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The Segregation State:
Administrative Constitutionalism and Federal Agencies' Resistance to *Brown*

By

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Abstract

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For years after the Supreme Court ruled segregation unconstitutional in *Brown v. Board of Education*, federal agencies continued to approve and fund the construction and maintenance of segregated schools and housing. They did not halt this practice—or squarely acknowledge the constitutional problems it raised—until Congress specifically prohibited it in the Civil Rights Act of 1964.

In this dissertation, I ask why some federal officials resisted *Brown*. Using a comparative case study approach, I examine several agencies' interpretation of equal protection principles in the decades immediately before and after *Brown*, from the New Deal through 1964. The agencies that I study are the Office of Education (and its parent organization, the Department of Health, Education, and Welfare); the Public Works Administration's Housing Division; the Public Housing Administration; the Federal Housing Administration; and the latter two agencies' parent organization, the Housing and Home Finance Agency. In focusing on federal education, public works, and housing programs, I probe the areas in which federal administrators faced the most acute constitutional controversies of the era, as civil rights leaders persistently petitioned them to stop approving and funding racial segregation and discrimination in local public schools, jobs, and housing.

Against the backdrop of a growing literature on administrative constitutionalism that often emphasizes agencies' role in expanding constitutional rights, this dissertation points to another perspective—highlighting the ways in which agencies can resist the judicial Constitution, prioritize particular constitutional goals at the cost of others, and serve as forces of entrenchment against reform.

I argue that the federal education and housing agencies' institutional design predisposed them to resist *Brown*'s revolution in constitutional meaning. Their cases illuminate the broader, recurring possibility that Congress and the president will design agencies in ways that empower politically powerful groups and stave off legal change, to the detriment of constitutional values. The education and housing agencies' mandates and structures, forged during constitutional

conflicts over the reach of the federal welfare state and federal authority to address racial discrimination, led them to defer to state and local authority over schools and housing. Congress deliberately attempted to insulate them from direct White House control, while the controversial nature of their programs (which limited their agencies' funding and mandates) made administrators extremely sensitive to the preferences of Congress, particular those of the Southern Democrats that served on their agencies' oversight and appropriations committees. The agencies' core clienteles, the state and local officials whose programs they funded, forced their attention to federalism values, and diminished the care they could give to racial equality principles. Simultaneously, and in sharp contrast to their agencies' political vulnerability, these federal officials were insulated from constitutional challenges in the courts by procedural legal doctrines of standing and sovereign immunity.

As a result, federal education and housing officials operated with substantial formal legal autonomy, but high levels of political constraint, as they shaped their programs' policies on racial segregation and discrimination. The choices that they made in that context tended to preserve progressive social programs while sacrificing the racial justice goals of the Reconstruction Amendments. Thus, these federal administrators' constitutional decisions helped create the landscape of enduring federal support for education and housing, alongside racially segregated schools and communities, that still exists today.

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PART I: INTRODUCTION

Chapter 1 The Segregation State

How has the administrative state affected racial equality in America? Two very different answers are possible.

For many people, the growth of the national government—and particularly the executive branch agencies—is nearly synonymous with the expansion of civil rights and economic opportunity. That narrative fits neatly with a broader embrace of administrative power by liberals and progressives. In the United States, social reforms are traditionally achieved by expanding the scope of public authority, often by creating new agencies and programs at the national level. That has been the case with civil rights since the 1960s.[1] Expanding federal administrative power sometimes served civil rights in earlier periods as well, as with Reconstruction-era civil rights statutes and federal programs.[2]

In accord with this vision, leading legal thinkers have extolled the virtues of administrative power in achieving progressive ends, and even in bringing about "constitutional"-level shifts in basic norms and institutions.[3] On that view, agencies' deliberative, flexible, and pragmatic approach to legal change permits a closer dialogue with social movements, greater legitimacy, and more successful, enduring policies.[4] Racial equality serves as a case in point: since the 1960s, federal administrators often have worked hand-in-hand with social justice advocates to develop cutting-edge, expansive understandings of civil rights.[5]

But one might easily argue for the opposite view: that the expansion of the national administrative state came at the cost of minority rights, and that administrators may be as likely to resist constitutional change as they are to further it. The New Deal's "alphabet soup" of agencies and their far-reaching social programs directly contributed to the deepening of racial inequality in the United States. As social scientists have documented, "the wide array of significant and far-

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[1] See Alfred W. Blumrosen, Black Employment and the Law (1971) (discussing the Equal Employment Opportunity Commission's early years); Gary Orfield, The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act 76-85, 104-06, 123, 131-35, 147-50 (1969) (describing the genesis of the Office for Civil Rights within the Department of Health, Education and Welfare in 1965).

[2] See Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (1988); Robert J. Kaczorowski, Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction, 61 N.Y.U. L. Rev. 863, 895-99, 920-22, 939-40 (1986); Robert C. Lieberman, The Freedmen's Bureau and the Politics of Institutional Structure, 18 Social Science History 405, 406, 412-24 (1994).

[3] William N. Eskridge & John A. Ferejohn, A Republic of Statutes: The New American Constitution 18, 23-24, 26-27 (2010); Gillian E. Metzger, Administrative Constitutionalism, 91 Tex. L. Rev. 1897, 1901-02, 1922-29 (2013).

[4] Eskridge & Ferejohn, supra note 3, at 12-22; Metzger, supra note 3, at 1922-29.

[5] See Eskridge & Ferejohn, supra note 3, at 29-74; Nancy MacLean, Freedom Is Not Enough: The Opening of the American Workplace 107-110, 135-36 (2008); Orfield, supra note 1, at 135-50; Susan D. Carle, A Social Movement History Of Title VII Disparate Impact Analysis, 63 Fla. L. Rev. 251 (2011); Nicholas Pedriana & Robin Stryker, The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971, 110 Am. J. Soc. 709, 724-40 (2004). For a contrasting view of these administrative expansions of civil rights from more conservative authors, see Hugh Davis Graham, The Civil Rights Era: Origins and Development of National Policy, 1960-1972 (1990); Paul D. Moreno, From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933-1972, at 231-82 (1999).

reaching public policies that were shaped and administered during the New Deal and Fair Deal era … were crafted and administered in a deeply discriminatory manner."[6]

From their origins, many federal agencies oversaw overtly racially discriminatory policies; in other cases federal officials looked away as state and local officials constructed general laws and policies in racially exclusionary manners, even as they received substantial streams of federal funding.[7] In effect, those officials' choices helped to preserve the "separate but equal" understanding of the Fourteenth Amendment, embodied in *Plessy v. Ferguson*,[8] and did so even after the Supreme Court cast that interpretation aside in *Brown v. Board of Education*.[9]

Legal scholars have devoted less attention to this alternative view of administrative power's impact on civil rights. But the latter account, and the earlier administrative role that it emphasizes, is critical to accurately understanding the sources of modern-day racial inequality, the reasons for the success or failure of the rights-based reforms of the 1960s, and the capacity of federal agencies to advance civil rights or other forms of constitutional innovation in the future. Administrative power, rather than dovetailing neatly with progressive goals, may have a more complex and equivocal relationship to racial equality, minority rights, and constitutional change.

This study asks: How did federal agencies grapple with constitutional equality principles before the statutory civil rights revolution of the 1960s? To what extent did they embrace or resist the expanding equal protection jurisprudence of the Supreme Court—as reflected in cases like *Shelley v. Kraemer*[10] and *Brown*—and its implications for the social programs they funded? Should their actions change how we understand the potential of administrative agencies to spearhead social reforms, and their capacity to implement the Constitution's rights guarantees?

I approach these questions by examining how administrators understood and applied equality principles as they implemented several federal social programs during the mid-twentieth century, in the years between the New Deal and the Civil Rights Act of 1964.[11] My case studies involve federal social programs in education, public works and housing.

I use archival research to examine the behind-the-scenes records of administrative decision-making within the Office of Education, Public Works Administration's Housing Division, and later housing agencies (the Public Housing Administration and the Federal Housing

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[6] See Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America 17 (2005); see also Desmond King, Separate and Unequal: African Americans and the US Federal Government (Revised ed. 2007); Robert C. Lieberman, Shifting the Color Line: Race and the American Welfare State (2001); Jill Quadagno, The Color of Welfare: How Racism Undermined the War on Poverty (1996); Harvard Sitkoff, A New Deal for Blacks: The Emergence of Civil Rights as a National Issue: The Depression Decade (2008); Sean Farhang & Ira Katznelson, The Southern Imposition: Congress and Labor in the New Deal and Fair Deal, 19 St. Am. Pol. Dev. 1 (2005).

[7] See infra Chapters 5, 8 (discussing federal education and housing programs); see also Joy Milligan Protecting Disfavored Minorities: Toward Institutional Realism, 63 UCLA L. Rev. 894, 927-43 (2016) (discussing history of discrimination in federal farm programs).

[8] 163 U.S. 537 (1896).

[9] 347 U.S. 483 (1954); see also Bolling v. Sharpe, 347 U.S. 497 (1954) (federal companion case).

[10] 334 U.S. 1 (1948); see also Hurd v. Hodge, 334 U.S. 24 (1954) (federal companion case).

[11] Pub. L. 88-352, 78 Stat. 241.

Administration). These agencies offer a rich, historically important context for examining how administrators resolved the constitutional dilemmas involved in extending federal social programs as widely as possible, while simultaneously addressing racial segregation and discrimination. Their situations highlight key features of administrative constitutionalism: the ways in which statutory frameworks and design shape agencies' priorities and internal norms, and the tremendous political pressures that can be brought to bear on administrative agencies as a result. The cases force difficult questions about what legal theorists and policymakers can expect from politically exposed agencies faced with stark constitutional choices.

From the late New Deal onward, civil rights organizations argued that federal administrators had the power and responsibility under the Fifth and Fourteenth Amendments to refuse to support segregated schools or housing.[12] But powerful political actors, particularly Southern members of Congress, stood ready to punish agencies that opposed segregation. As administrators of politically vulnerable agencies seeking Congress's approval and continuing funding, federal officials saw choices around equal protection issues as acute ones, that put their agencies' survival at stake. Their decisions in the face of these conflicts helped set up enduring racial patterns of life in the United States: They paid Southern towns to operate segregated schools and underwrote the construction of Northern and Southern metropolitan areas characterized by white suburbs and increasingly-minority public housing in the urban core.[13]

I ask why and how administrators decided to implement particular constitutional understandings of racial equality and federal power. In general, I argue that the agencies I studied had formal legal discretion in how they chose to address civil rights—but that officials were effectively constrained by the institutional frameworks and political setting in which they operated.

The constitutional norms administrators constructed within this formal legal space were deeply political, more constrained by legislative pressures, constituent interests, and agency goals than by judicial checks. There was a considerable gap between the judicially constructed constitution—as evidenced in Supreme Court and other federal court rulings—and the "administrative constitution" that federal officials implemented in the social welfare state.[14] The Office of Education continued to pay Southern localities to build and operate segregated schools well after the Court made it clear in *Brown* that such schools violated the Fourteenth Amendment. The Public Housing Administration rejected arguments that *Buchanan v. Warley*, *Shelley*, and

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[12] See infra Chapters 5 and 8.

[13] See infra Parts II and III; see also King, supra note 6, at 207 ("[M]ajor areas of American public policy have a fundamental racial dimension which springs directly from the way in which Federal government programmes were formulated. Residential housing is massively segregated in the United States...."); Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1993).

[14] While recognizing that the United States developed only a limited or "liberal"-type welfare state, I use the term to refer to the set of national-level programs developed to fund social services and supports. See Gøsta Esping-Andersen, The Three Worlds of Welfare Capitalism (1990) (setting forth a widely-used typology of welfare states). I also do not study federal programs involving cash assistance or related forms of social insurance, which represent archetypal welfare state programs for many people. Instead I examine those that supported education and housing. Unlike in programs involving direct payments to individuals, questions of racial discrimination in schools and housing centered on segregation and spatial inequality from the 1940s through the 1960s. Because constitutional law concerning segregation changed dramatically in these years, these agencies offer the best window into how administrative officials react to constitutional change.

Brown all required the agency to stop approving and funding segregated housing. Moreover, these agencies continued to approve segregation in their programs even when it put them at odds with the Justice Department or White House itself.

The breadth of administrators' formal legal authority—and their ability to deviate from the judicial Constitution—derived from Congressional silence, constitutional ambiguity, and insulation from judicial review. In these decades, Congress gave administrative officials significant power over racial justice questions. Most often, the relevant statutes did not address segregation or discrimination.[15] The legislative history sometimes revealed that legislators rejected non-discrimination provisions when forced to vote upon them. Still, statutory silence left bureaucratic officials with interpretive choices and substantial discretion as they carried out their programs.

Constitutional uncertainty and insulation from judicial oversight further reinforced agencies' effective discretion, and principles limiting federal administrative power provided them with the rhetorical tools to avoid constitutional responsibility if they wished.[16] This was true even after the core equal protection principles became clear, because of debates over how to apply those principles in the context of federal administrative supervision of social programs. Ongoing political and constitutional struggles over the legitimacy of the national administrative state provided officials with compelling federalism and separation of powers justifications for limiting administrative enforcement of minority rights, even when the equal protection principles at stake appeared clear-cut.

Legal discretion did not mean that agencies could act autonomously, though. In the absence of formal statutory guidance or constitutional constraints, agencies operated within a structural political environment that often incentivized them to undermine or ignore racial equality. Officials were exposed to potential sanctions from powerful Southerners in Congress. Moreover, these agencies' operational structure and closest constituents usually predisposed their officials to favor extending social programs while downplaying racial justice, in order to preserve their programs and maintain good relationships with their programmatic clienteles.

The key trade-off, as administrators understood it, was between the national social programs they oversaw and the enforcement of civil rights. Federal social programs were highly controversial during much of the twentieth century, drawing accusations of creeping socialism and federal overreach from conservatives in both parties. Against the backdrop of conservatives' sustained opposition, assembling and sustaining legislative majorities in favor of social programs was a demanding and precarious exercise. Given the pivotal role of Southerners in the Democratic coalition, federal officials and other advocates of the welfare state believed that they had to choose between providing social assistance and adhering to racial equality principles. If they were to

[15] See, e.g., Act of September 23, 1950, Pub. L. No. 81-815, 64 Stat. 967 (1950); Act of September 30, 1950, Pub. L. No. 81-874, 64 Stat. 1100 (1950); United States Housing Act, Pub. L. 75–412, 50 Stat. 888 (1937).

[16] Not all agencies sought to use legal uncertainty as a basis to avoid implementing constitutional norms, of course. See, e.g., Karen M. Tani, States of Dependency: Welfare, Rights, and American Governance, 1935–1972 (2016) [hereinafter, Tani, States]; Karen M. Tani, Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor, 100 Cornell L. Rev. 825–900 (2015) [hereinafter, Tani, Administrative]. As this study points out, public housing officials themselves actively implemented constitutional norms in the agency's early days, relying on a "separate but equal" vision rooted in Plessy v. Ferguson. See infra Chapter 7.

choose the latter, Southern Democrats would abandon the coalition, effectively killing or freezing their programs. Most of the time, officials chose to maintain and extend their programs. Liberal allies outside the agencies often encouraged and affirmed their choice to prioritize social welfare goals over racial integration ones.

In choosing to downplay minority rights, administrators drew on alternative legal principles to justify their stance—particularly federalism norms and limits on administrative discretion. In the legal regime they posited, statutes and Congressional intent controlled their behavior, while constitutional decision-making belonged to the courts. Hence even if equal protection precedents indicated that they were participating in unconstitutional actions, federal officials argued that they lacked the statutory authority and interpretive power to shift how they administered federal statutory mandates.

At a more pragmatic level, officials argued that sustaining social programs benefited everyone, and sometimes disproportionately aided non-whites, to the extent they were over-represented among the neediest families. To those administrators, the urgency of addressing the needs of the poor and working class outweighed any integration imperative, whether or not rooted in the Constitution.

Plan of the dissertation

The remainder of the dissertation probes these historical conflicts over the implementation of equal protection principles in the federal education, public works, and housing programs, from the New Deal period through the Civil Rights Act of 1964. Part I focuses on theoretical and legal frameworks, while Parts II and III present the substantive case studies. Part IV examines the case studies' implications for normative theories of executive branch constitutionalism.

Chapter Two sets the stage for the case studies and analysis in Parts II and III. The chapter presents the project's methodological approach and situates it within several overlapping literatures on agencies and civil rights. The chapter also develops the project's theoretical framework. I suggest that agencies' institutional designs are likely to shape their officials' substantive approach to constitutional interpretation, by determining the forms that political and legal oversight will take, as well as the substantive goals that staff are likely to prioritize. Such designs are politically determined, sometimes in response to underlying constitutional controversies, and quite variable. Given the politicized nature of earlier approaches to agency design, administrative constitutionalism has the potential to entrench earlier constitutional settlements, or particular political groups over others.

Chapter Three provides important legal context for the case studies, describing how administrators came to have substantial freedom in interpreting equal protection principles—at least as a matter of formal law. Because federal social programs were deeply controversial, and the relevant equal protection mandates were ambiguous, federal officials had the ability and incentives to downplay their own constitutional responsibility for policing state and local discrimination. Further, technical legal barriers to challenging the federal agencies' support for segregation meant the officials would rarely have to defend their actions in the courts. Thus, the question became one of administrators' interpretive authority: whether administrators should read

the Court's evolving equal protection principles into the statutes they administered, absent a court mandate or statutory change. Because administrators' duty to independently assess their constitutional mandates has never been fully settled in U.S. law, that too gave officials leeway to come to their own decisions. Together, that backdrop of federalism objections, insulation from legal review, and ambiguity regarding officials' equal protection obligations provided a context in which mid-twentieth century administrators could exercise substantial legal autonomy.

Part II introduces the federal Office of Education. Chapter Four describes the agency's formation and design. Chapter Five examines how the Office interpreted racial equality principles in the years beginning immediately before *Brown* and extending through the enactment of the Civil Rights Act of 1964, detailing the ways in which agency officials resisted the idea of implementing *Brown*'s equal protection norms in the programs they funded. It argues that the education agency's design shaped its officials' resistance to implementing the equal protection mandate. That design incentivized education officials to respond to fears of "federal control" of schools by deferring to local authorities and to Congressional preferences, rather than heeding the claims of civil rights advocates or even the positions of the Justice Department and White House.

Part III examines federal public works and public housing, as they originated in the Public Works Administration in the New Deal. Chapter Six discusses the creation and design of the federal housing agencies, focusing particularly on the Public Housing Administration (PHA), which originated in the Public Works Administration (PWA)'s Housing Division. It emphasizes the radicalism of the concept of government-owned and subsidized housing at its origin in the 1930s; the public housing agency found itself in increasingly precarious circumstances due to the strong and enduring political opposition to its work. Further, the agency's design, like that of the Office of Education, left it politically dependent on Congress and local officials, while Congress deliberately attempted to insulate it from more forceful White House control. And, as with education, procedural legal barriers meant that its officials rarely answered to equal protection claims on the merits in the courts.

In Chapter Seven, I show that early liberal leaders in the public works agency engaged in "creative constitutionalism" in service of equal protection goals, by fashioning "racial equity" requirements for public works jobs and public housing units. They saw those as a means to, at a minimum, secure the "equality" aspect of *Plessy v. Ferguson*'s "separate but equal" framework. I argue that the PHA's initial origins within the PWA provided a favorable political environment for incremental racial liberalism, and that the federal government's initial direct operation of public housing allowed these experimental ideas of racial equity to be adopted.

Chapter Eight asks how the federal housing agencies addressed the Supreme Court's evolving jurisprudence as the Court struck down segregation in cases like *Shelley* and *Brown*. Civil rights leaders had argued against allowing segregation in federal housing programs from the beginning; their claims strengthened as the Court's rulings coalesced toward an absolute prohibition on government-sponsored segregation. However, the agencies' leaders and lawyers refused to change course until in the early 1960s first the President, then Congress acted, to formally change federal housing policies. Even then, as I show, administrators did little to actively implement prohibitions on segregation, leaving the *Plessy* framework relatively intact. The concluding section argues that the public housing agency faced a direct trade-off between updating

its legal frameworks to match the Court's interpretations, and the future survival and expansion of its housing programs. Because the agency's appropriations were under constant threat in Congress, while the federal government had contracted to subsidize existing public housing for decades, its officials viewed themselves as politically and legally bound to continue funding segregated housing projects, just as it had done since the 1930s.

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Part IV concludes. In Chapter Nine, I examine the case studies' implications for modern theories of executive branch constitutionalism. I argue that they illustrate gaps and normative blinds spots in arguments praising independent interpretation by executive branch officials. In particular, proponents of departmentalism seem to envision a unified, high-level, and coherent interpretative process, directed by the president and justified by his legitimacy, as well as his need for efficient administration as chief executive. But, as these cases show, agencies may interpret the constitution without presidential sanction, and in divergent ways within the executive branch; they are likely to be influenced as much or more by Congress as by the White House. Advocates of administrative constitutionalism depict a more variegated, many-headed process, recognizing the role of multiple actors in influencing executive branch officials. But they give far less recognition to the risk that agencies will be designed in ways that entrench outdated constitutional norms, and ones that serve the interests of powerful minorities, rather than the public at large or subordinated groups. As the education and housing agencies' resistance to *Brown* illustrates, these are real and significant risks. Though administrative constitutionalism may be inevitable—and often work in normatively appealing ways—it is important to acknowledge its drawbacks, in order to imagine ways to ameliorate them.

It is also crucial to recognize the historical role that federal agencies' constitutional decision-making played in authorizing, perpetuating, and extending segregation in the South and North—and how intimately interwoven the expanding administrative state was with that Jim Crow regime. Many accounts of the era leading up to and following *Brown* focus on the role of the White House and the Justice Department in offering support to the NAACP's campaign to shift the meaning of the Equal Protection Clause. But the executive branch was not monolithic in its relationship to the civil rights movement. Even as the White House and Justice Department offered support and legal backing for the principles of *Shelley* and *Brown*, other parts of the executive branch turned a deaf ear to civil rights leaders' petitions.

Administrative officials in those agencies faced real and profound constitutional dilemmas, ones often lost in accounts that focus on Congress or other institutions. To discount administrators' choices oversimplifies the situations they faced, and obscures how agency officials and their allies traded off racial equality principles against welfarist goals. Believing that they were forced to decide between, on the one hand, funding better education and decent housing for poor families, and on the other hand, implementing the emerging judicial reading of the Constitution as prohibiting segregation, they chose to prioritize schools and homes. In a real sense, these aspects of the New Deal state were directly purchased at the cost of the Reconstruction Constitution. Narratives that blame Southern Democrats for entrenching segregation in national social programs thus overlook key actors: the liberals that chose to accept the bargain, fully apprised of the constitutional evils it entailed.

Chapter 2 Methods, Existing Literature, and Theoretical Framework

This chapter provides context for the historical and institutional analysis that follows. I begin by outlining my methods and reasons for selecting these historical case studies. Second, I discuss how this dissertation responds to and challenges the existing literature on federal agencies and civil rights, by honing in on how early administrators addressed (and often resisted), equal protection mandates in their programs. I then contextualize the legal struggle over racial equality in national social programs in light of Congressional statutory choices, structural political arrangements, and the constitutional arguments of civil rights leaders. Next, I present a theoretical approach to understanding why agency officials in these cases made particular choices, an approach that emphasizes the role of political contests over institutional design, and design's subsequent, ongoing impact on administrators' susceptibility to political and legal pressures, as well as their substantive priorities. Finally, I briefly preview the specific findings of my case study of each agency.

Methodological approach

The dissertation offers a detailed look at constitutional decision-making inside several agencies: the Office of Education, Public Works Administration's Housing Division, Public Housing Administration, and the Federal Housing Administration. I focus on officials' deliberations over questions of racial equality and their legal obligations under the Fifth and Fourteenth Amendments in the period between the late New Deal and the Civil Rights Act of 1964. I rely primarily on historical research into the agencies' archives, as well as presidential and legislative records, civil rights groups' archives, oral histories, memoirs, and contemporaneous news accounts, as well as scholarship from the period. Most prominently, I focus on internal memos regarding legal principles where possible, to reconstruct the specific arguments and rationales that officials relied upon in their decision-making. I apply legal doctrinal analysis to analyze the historical choices that these officials faced, and to interrogate the decisions they made.

In asking why the agencies chose particular approaches to racial equality, I leverage comparisons across agencies and over time where possible. However, the design and cases were selected less for their utility in allowing causal inference than for the respective agencies' historical importance in shaping patterns of racial inequality and segregation in the twentieth century United States. Further, due to the qualitative nature of my approach, the resulting analyses do not include the controlled comparisons that might be available in a randomized or natural experiment, or even from large-scale observational data. To the extent I make causal claims, then, they are probabilistic ones, assessed in light of the available alternative theories and the weight of the evidence favoring each possibility.

Both before and after the civil rights statutes, federal education, public works, and housing decisions played critical roles in determining the operational meaning of equality principles in American life. Thus these case studies are best seen as (1) historical accounts of specific agencies' decision-making around racial equality, and (2) evidence from which theories regarding agencies' constitutional interpretive approaches can be generated, though not definitively tested. In particular, the case studies help generate better understandings of one overarching question: how did mid-twentieth century federal administrators come to play such a prominent role in

undermining constitutional equality principles, as reflected in the Court's evolving jurisprudence (and the Reconstruction Amendments themselves)?

I chose the federal education, public works, and public housing agencies for study because of their close connection to the most pressing issues of equal protection jurisprudence of that period: non-discrimination in schools, jobs, and housing. Federal education and housing programs in particular involved spatial segregation, and were thus more dramatically affected by the *Brown* Court's rejection of the "separate but equal" framework than other programs that did not center on physically segregated institutions. I also chose contexts that directly involved public resources and institutions, so that the constitutional questions were clearly posed, without the additional complications raised by private actors' involvement.

Events that occurred after the period of interest also influenced my case selection: The agencies I study became key players in integration struggles following the enactment of the Civil Rights Act of 1964. One of the project's goals is to explicate what came *before* that watershed year, as way to better understand the agencies' trajectories after 1964. Although I do not have the space to address the latter question within this dissertation, the research presented here lays the foundation for future work drawing connections between the two periods.

Studies of agencies and civil rights

In examining how federal education, public works, and housing officials understood and applied equality principles, I engage with an interdisciplinary literature on agencies and civil rights.[17] This project builds on existing scholarship from political science, sociology, history, and law, but breaks new ground by focusing in on education and housing administrators' *constitutional* understandings in the decades *before* the modern civil rights statutes were enacted. In doing so, I draw on social science knowledge and methods to answer questions of special interest to lawyers and legal scholars—most importantly, why administrative officials interpret the Constitution in particular ways, a key question raised by the growing legal literature on administrative constitutionalism. I also illuminate the historical role that federal administrators played in supporting and extending racial segregation via federal social programs.

Understanding why administrators chose to acquiesce in segregation—even as it became increasingly at odds with accepted constitutional principles—is useful in addressing a question of special interest for legal scholars: why and how did a highly law-bound set of actors[18] come to

[17] See, e.g., Christopher Bonastia, Knocking on the Door: The Federal Government's Attempt to Desegregate the Suburbs (2008); Eskridge & Ferejohn, supra note 3; Graham, supra note 5; Stephen C Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act (1995); Charles M. Lamb, Housing Segregation in Suburban America since 1960: Presidential and Judicial Politics (2005); Orfield, supra note 1; John David Skrentny, The Ironies of Affirmative Action: Politics, Culture, and Justice in America (1996); Tani, supra note 16, States; Christopher Bonastia, The Historical Trajectory of Civil Rights Enforcement in Health Care, 18 J. Policy Hist. 362 (2006); Olatunde C. A. Johnson, Stimulus and Civil Rights, 111 Colum. L. Rev. 154 (2011); Sophia Z. Lee, Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present, 96 Va. L. Rev. 799 (2010); Margaret H Lemos, The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII, 63 Vand. L. Rev. 363 (2010); Tani, supra note 16, Administrative.

[18] See Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940 (2014).

operate in ways that undermined the supremacy of Constitutional principles? Faced with explicit constitutional challenges, how did administrators understand and justify their actions?

Though a substantial literature documents the ways in which early federal programs incorporated and extended racial discrimination, those works have not addressed that puzzle. Social scientists analyzing the New Deal and post-World War II period have examined Congress' role in designing new federal social programs in ways that intentionally allowed for racial discrimination, and have documented deep-rooted inequalities in particular agencies' programs, such as the Department of Agriculture, the Federal Housing Administration, and the Tennessee Valley Authority.[19] Most notably, political scientist Desmond King has offered a particularly comprehensive, cross-agency examination of discrimination within the federal executive branch.[20] However, King's analysis does not seriously engage questions of constitutional constraint and legal interpretation within agencies.[21]

Other scholars have focused on a later period and a distinct aspect of agencies' involvement in racial justice: their affirmative role in combatting discrimination after the statutory civil rights revolution of the 1960s, or what some have termed the "civil rights upholding state."[22] The Equal Employment Opportunity Commission and the Justice Department's Civil Rights Division have inspired a particularly large number of works.[23]

Within that body of work on post-1964 developments, several have focused on agencies' approach to legal interpretation. Authors have considered federal officials' willingness to push the boundaries of anti-discrimination principles, and have even evaluated the legitimacy of administrators doing so. Legal historian Sophia Lee has compared several federal agencies' willingness to adopt aggressive readings of equal protection principles, in order to regulate their licensees' fair employment practices.[24] Noted historian Hugh Davis Graham argued that the EEOC and other agencies took aggressive approaches to civil rights in part because they were "captured" by a new type of clientele—civil rights organizations like the NAACP.[25]

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[19] As to the Department of Agriculture, see Kimberley S. Johnson, Racial Orders, Congress, and the Agricultural Welfare State, 1865–1940, 25 St. Am. Pol. Dev. 143 (2011); Debra A. Reid, African Americans and Land Loss in Texas: Government Duplicity and Discrimination Based on Race and Class, 77 Agric. Hist. 258 (2003). As to the Federal Housing Administration, see Charles Abrams, Forbidden Neighbors: A Study of Prejudice in Housing (1955); Robert Clifton Weaver, The Negro Ghetto (1948); see also Douglas S. Massey & Nancy A. Denton, American Apartheid: Segregation and the Making of the Underclass (1993); Richard Rothstein, The Color of Law: A Forgotten History of how Our Government Segregated America (2017). On the TVA, see Melissa Walker, African Americans and TVA Reservoir Property Removal: Race in a New Deal Program, 72 Agricultural History 417 (1998).

[20] King, supra note 6, at 209 (concluding, "[F]or over half a century the Federal government played a significant role in shaping and reinforcing the system of race relations which disadvantaged Black American citizens.")

[21] As King commented in a later postscript, the work also "conceive[d] of the State as a unitary actor," rather than recognizing the differences and friction between different parts of the executive branch. Id. at 212.

[22] Desmond King and Robert Lieberman, The Civil Rights State: How the American State Develops Itself, at 178, 185 in The Many Hands of the State: Theorizing Political Authority and Social Control (K. J. Morgan & A. S. Orloff ed., 2017).

[23] Some scholars also have provided studies examining why other agencies did not address discrimination more effectively in the post-1964 years. See, e.g., Bonastia, supra note 17; Halpern, supra note 17; Lamb, supra note 17.

[24] See Lee, supra note 17.

[25] See Graham, supra note 5, at 469; Hugh Davis Graham, The Politics of Clientele Capture: Civil Rights Policy and the Reagan Administration, in Redefining Equality 113-15 (Neal E. Devins & Davison M. Douglas eds. 1998).

But very few scholars have drilled down into the earlier agencies to ask how administrators addressed the legal questions raised by discrimination within federal programs in that period. Legal historian Karen Tani stands out for her work showing that early federal welfare officials relied on constitutional principles to construct an equality mandate for federal benefits, barring arbitrary or unreasonable classifications by state welfare administrators (including ones that explicitly or implicitly discriminated on the basis of race).[26] However, those officials did not face the necessity of taking on racial segregation directly, since they were enforcing an equal treatment mandate in welfare benefits that could coexist as comfortably with a "separate but equal" understanding of equal protection as with an integrationist one. Housing scholar Arnold Hirsch has examined debates within federal housing agencies between "racial relations" officials and other administrators over implementing civil rights principles, including *Brown v. Board of Education*'s bar on segregation, but without specifically focusing on approaches to legal interpretation as distinct from policymaking more generally.[27]

This dissertation begins to address the under-explored question of how federal officials grappled with the evolving constitutional principles regarding racial discrimination—particularly the anti-segregation principle of *Brown v. Board of Education*—in the decades leading up to the "statutory civil rights revolution" of 1964 and beyond. It also considers the early initiative by public works and public housing officials to apply earlier constitutional principles—essentially a "separate but equal" mandate rooted in *Plessy v. Ferguson*, which they implemented by mandating proportionate benefits and participation for racial minorities, even while countenancing segregation in the programs they funded.

The outcomes in these historical cases raise a key theoretical question: Why do agencies choose to interpret and apply the Constitution in particular ways? As I discuss in more detail below, an increasing number of scholars working in the field of administrative constitutionalism have engaged with that question, but a systemic framework is still lacking.

Drawing on work by institutionalist scholars of the administrative state,[28] I argue that it is necessary to understand agencies' constitutional decisions as emerging from the iterative

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[26] See Tani, States, supra note 16, at at 103-109, 143, 174-76,235-36, 238-39; Tani, Administrative, supra note 16, at 855-59, 867-73, 878-81.

[27] See Arnold R. Hirsch, Containment on the Home Front Race and Federal Housing Policy from the New Deal to the Cold War, 26 J. Urb. Hist. 158 (2000); Arnold Hirsch, Searching for a "Sound Negro Policy," 11 Housing Pol'y Debate 393 (2000);

[28] This broad label comprises multiple strands from within political science, sociology, and law, including scholarship rooted in American Political Development (APD), public choice theory, historical institutionalism, public administration, and legal theory. See, e.g., Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928 (2001); Kenneth Finegold & Theda Skocpol, State and Party in America's New Deal (1995); Herbert Kaufman, The Forest Ranger: A Study in Administrative Behavior (2006); Karen Orren & Stephen Skowronek, The Search for American Political Development (2004); James Wilson, Bureaucracy: What Government Agencies Do And Why They Do It (1991); Paul Frymer, Law and American Political Development, 33 Law & Social Inquiry 779 (2008); Mathew D McCubbins, Roger G Noll & Barry R Weingast, Administrative Procedures as Instruments of Political Control, 3 J. L. Econ. & Org. 243 (1987); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431 (1989); Terry M Moe, Political Institutions:

relationship between politics and institutional design—and to root our understandings in the particulars of a given agency's history and attributes. On that view, administrative constitutionalism is not a general phenomenon but one that arises out of specific, politically motivated conflicts over how to design and oversee executive branch agencies. The "effective" constitution that emerges from agencies may, as Sophia Lee has pointed out, diverge or converge with judicial interpretations; whatever the outcome, it is inevitably constrained by specific agencies' historical design and current political realities.[29]

Agency origins matter in particular ways for later political outcomes. Early political actors' decisions about agencies' mission, structure, powers, personnel, and oversight give rise to sticky institutional attributes that tend to endure. The agencies' subsequent exposure to political pressures is shaped by those early decisions. The ease with which the White House or Congress can prod the agency to act, as well as the agencies' ties (and degree of dependence on) external constituencies emerges from such decisions. Administrators' constitutional decision-making occurs against the backdrop of these institutional legacies, but with the ongoing pressure of contemporaneous politics, as channeled through their particular agencies' structural relationships with Congress, the White House, and other constituencies.

In the specific context of mid-twentieth century social programs, the key was that Southerners exercised critical influence at multiple stages, and could thus enforce commitments to white supremacy both in initial decisions about an agency's mandate and structure, and through ongoing oversight and pressure on the agency. And both stages were interrelated: by designing an agency to remain susceptible to the influence of Southern members of Congress, and to specific constituencies, those legislators could attempt to assure that later oversight would be effective. In contrast, by designing agencies to be shielded from the influence of other constituencies—for example, by making effective White House control difficult—legislators could prevent later political oversight by their opponents.

At the point when federal social programs were designed and when later innovations (like new mandates or structures) were considered, Southern Democrats in Congress could insist on provisions that would steer agencies away from enforcing equality. They could also ensure that agencies would not stray too far from Congressional influence and objectives in the future through early decisions about their set-up, through mechanisms like distancing them from direct White House control, tying them to local constituencies, and maintaining control over their funding streams. Because constitutional oversight by the courts was loose, the effective Constitution for federal programs became whatever administrators constructed under these pressures.

The "administrative constitution" implemented in these decades was thus both highly politicized and often markedly different from the judicial constitution. Importantly, that administrative constitution shaped the practical reality of how social programs were implemented on the ground, to a far greater degree than the principles announced in Supreme Court decisions of the period. For those who ask why *Brown* and its progeny were poorly implemented—leaving segregation to flourish in many spheres of American life—part of the answer lies in the extensive

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The Neglected Side of the Story, 6 J.L. Econ & Org. 213 (1990); Rogers M. Smith, Political Jurisprudence, The "New Institutionalism," and the Future of Public Law, 82 Am. Pol. Sci. Rev. 89 (1988).

[29] See Lee, supra note 17.

role that administrators played in implementing federal programs, the very thin judicial oversight of that administrative role (at least as to equal protection principles) played by courts, and the outsize political influence of Southern Congress members over federal social programs' survival in these decades.

The legal conflict over race and civil rights in federal social programs

Well before the Civil Rights Act of 1964 and other leading civil rights laws of the 1960s were enacted, federal agencies oversaw the development of welfare state programs in the absence of clear statutory civil rights principles. During the early to mid-twentieth century, the growing administrative state, with all of its distributive and regulatory implications, had the clear potential to either deepen or combat racial inequality.[30] Thus federal agencies served as key battlegrounds for civil rights.

The NAACP and other groups fought to ensure that federal investment in employment, farming, schools, job training, housing, social insurance, welfare, and other areas would not leave out racial minorities. Civil rights advocates consistently lobbied Congress to include explicit non-discrimination requirements in the statutory programs they enacted, beginning in the New Deal.

Congress, however, generally refused to explicitly address questions of racial equality, even as it took the leading role in enacting new federal programs. Instead, as political scientists have shown, Congress designed many New Deal social programs to be racially unequal, through facially neutral mechanisms that redounded to the benefit of whites. Legislators accomplished this both by formally excluding categories of workers that were predominantly minority, and by ensuring local control over administration so that ground-level officials could discriminate against non-whites.[31] For example, the Social Security Act expressly excluded farm workers and domestics from old-age insurance.[32] What came to be known as "welfare," or Aid to Dependent Children, was governed largely through localized, discretionary administration. Congress also implicitly authorized discrimination in other settings by rejecting proposals for anti-discrimination provisions in legislation like the National Labor Relations Act.[33]

Past scholars have emphasized the importance of Congress's institutional design choice of "local control" in entrenching racial discrimination in welfare state programs.[34] For example, Robert Lieberman has argued that the choice between nationally uniform administration by a relatively autonomous federal agency and "parochial" governance by local, politically vulnerable actors made the key difference in determining whether a given social program would deepen racial

[30] See, e.g., Ralph J. Bunche, A Critique of New Deal Social Planning as it Affects Negroes, 5 J. Negro Educ. 59 (1936); John P. Davis, A Survey of the Problems of the Negro Under the New Deal, 5 J. Negro Educ. 3 (1936); W. E. B. Du Bois, Social Planning for the Negro, Past and Present, 5 J. Negro Educ. 110 (1936).
[31] Ira Katznelson, Kim Geiger & Daniel Kryder, Limiting Liberalism: The Southern Veto in Congress, 1933-1950, 108 Pol. Sci. Q. 283, 297 (1993); Lieberman, supra note 6, at 7-8.
[32] Katznelson et al., supra note 31, at 297; see also Farhang & Katznelson, supra note 6, at 12-15 (discussing exclusion of agricultural and domestic workers in early national labor laws).
[33] Quadagno, supra note 6, at 23.
[34] Katznelson et al., supra note 6; Lieberman, supra note 6.

inequality or overcome it.[35] That design choice—national versus local control—arguably outweighed the impact of race-based, substantive exclusions.[36]

As this dissertation highlights, another design choice also helped shield local structures of racial subordination: delegation to politically vulnerable federal administrators, against the backdrop of legislative silence. In delegating the power to supervise federal social policy to federal administrative officials, while refusing to explicitly prohibit discrimination, legislators left those officials with apparent discretion to shape racial policy. In the face of Congressional silence, those officials theoretically could have chosen to adopt a number of different approaches to racial equity. They could have adopted their own interpretations of constitutional principles, relied on judicial precedent, or taken no action at all. Given this legal power to shape racial policy, administrators arguably could have taken bold steps toward racial equality. In rare instances, they did. But mostly they approved inequality and segregation within federal social policy.

Why? Federal administrators overseeing education, public works, and public housing operated within a set of structural political arrangements that predisposed them to sanction segregation and overlook discrimination.[37] At the same time, lingering doubts about the constitutional legitimacy of federal social policy, alongside unanswered questions about racial equality guarantees, gave officials rationales for inaction. Whether or not individual actors genuinely held those concerns or used them as pretexts for racism, those foundational doubts about federal power and administrative legitimacy still resonated strongly in the immediate wake of the New Deal constitutional revolution.

As a result, legislators did not need to take the constitutionally problematic step of enshrining racial discrimination in formal statutory text. Instead, by remaining silent and delegating administrators discretion over racial policy, even as agencies operated within a structural political context that threatened officials with repercussions for taking progressive stances, Congressional actors could generally ensure that those officials would not strike out in new directions to advance minority rights.

The unanswered constitutional questions

To civil rights leaders, even in the face of legislative refusals to bar discrimination, a fundamental question remained: Did constitutional rights guaranteeing equal treatment flow along with the expanding federal welfare state? Many federal programs operated through the mechanism of federal grants-in-aid to state or local agencies. Those authorities directly operated the programs according to federal statutory and regulatory requirements, in what is generally known as "cooperative federalism." Insofar as federal officials did not directly design and operate the programs, the key legal question was whether they still had the supervisory power or responsibility to ensure that states and localities respected constitutional equality principles.

Did providing federal money to social programs operated by others mean that federal constitutional guarantees were automatically invoked on behalf of those who might benefit from

[35] Lieberman, supra note 6, at 20-21.
[36] Id.
[37] For more extended discussion of those arrangements, see infra Chapters 3, 4, and 6.

the funds? This issue arose not only with respect to state and local governments receiving federal funds, but also with regards to private actors receiving federal supports. Civil rights lawyers argued, "[W]hen one dips one's hand into the Federal Treasury, a little democracy clings to whatever is withdrawn."[38] By this they meant that federal funds could not lawfully be used to subsidize racial discrimination by state and local officials, or even private parties. In fact, they claimed that the Constitution barred such subsidies, based on the Fifth Amendment's prohibition of *federal* racial discrimination. But whether and how to police equal protection principles in federal social programs remained hugely controversial.

In the case of federal social programs touching upon education and housing, a number of potential constitutional principles were at stake. Advocates of a national role overcame federalism and separation of powers concerns in forging new agencies and authorities, though often at the cost of forgoing direct federal control and permitting states and localities to take the leading role in designing and operating programs.[39] While such structural constitutional concerns subsided as the courts blessed new arrangements for national administrative power,[40] another primary constitutional conflict arose around equal protection and race.

White southerners in particular feared that creating new forms of federal power would give rise to intervention on behalf of racial minorities.[41] Southern Democrats might well favor extending national programs that would aid the poor, but they did not want to do so if it meant accepting racial equality mandates.[42] In effect, creating the New Deal constitution—one that entrenched minimum social welfare rights and a federal administrative apparatus to carry it out—ran up against the unfinished business of the Reconstruction amendments.

The settlement that emerged was simple. Politically, expansion of the welfare state rested on giving up on constitutional compliance with equality principles. Leading white liberals threw in their lot with Southerners in order to assure social programs' survival, and agency officials followed suit.[43]

Legally, the administrative state got a pass, as courts looked the other way. Even as courts settled the questions of national power that threatened to undermine New Deal programs, they also insulated federal grants-in-aid from constitutional and other legal challenges. Standing doctrine, sovereign immunity, and other barriers meant that the NAACP and other litigants struggled to bring racial justice claims against federally funded programs in education, public works, and housing.[44]

In effect, the New Deal constitution, with its safeguards for social legislation and administrative power, triumphed over the Reconstruction constitution's racial equality principles.

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[38] Ming v. Horgan, 3 Race Rel. L. Rep. 693, 697 (Cal. Super. Ct. 1958) (describing the plaintiffs' theory in a case challenging housing discrimination by FHA-insured private developers).
[39] See infra Chapters 3, 4, and 6.
[40] See Helvering v. Davis, 301 U.S. 619 (1937); Chas. C. Steward Machine Co. v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936).
[41] See, e.g., infra notes 143-144 and accompanying text.
[42] See, e.g., infra notes 743-746 and accompanying text.
[43] See, e.g., infra notes 300-307; 651-659 and accompanying text.
[44] See infra Chapter 2.

That settlement characterized the expansion of the federal administrative state through the 1960s. In a context of statutory silence, constitutional ambiguity, and legal insulation, federal officials extended national social programs in ways that entrenched segregation and racial inequality.

Institutional design and administrative constitutionalism

What might these administrators' constitutional choices teach about the relationship between administrative power and racial equality, or progressive constitutional change more generally?

These historical case studies indicate that administrative power has no inherent valence vis-à-vis individual rights, equality, or other liberal goals. Instead, agencies are generally creatures of the political context that creates their mandates and structures, as well as the ongoing political imperatives and legal oversight mechanisms that operate upon them within those frameworks. That insight is a useful one for the growing literature on constitutional interpretation within agencies, or "administrative constitutionalism."

The implication is that one must focus in on the institutional specifics of particular agencies, in order to understand the forces driving particular interpretative stances—particularly the ways in which such agencies are initially structured and how those design choices structure subsequent administrators' political and legal incentives. That point resonates with a rich theoretical and empirical literature in political science and sociology on the path-dependent development of the American state, which emphasizes the constraining effect of early institutional configurations and their role in shaping later political contests, as well as substantive outcomes.[45]

In law, a more recent literature on administrative constitutionalism has foregrounded the progressive promise of agencies. From this perspective, expert administrators can respond to broad democratic movements by crafting rights-protecting policies, thus updating the practical constitutional regime in more flexible, pragmatic ways than legislative or judicial adaptation offers. First created in experimental form, such administrative policies often expand and become entrenched, giving them a life that may even outlast the political regimes that first fostered them. William Eskridge and John Ferejohn are the leading proponents of this view.[46] They show, for example, that EEOC officials responded to the women's rights movement of the 1970s by creatively extending fair employment law to the realm of pregnancy discrimination.[47] That interpretive move influenced both Congress and the judiciary's subsequent interpretations of the underlying equal protection norm, helping to bring about a more expansive view of sex discrimination in statutes and judicial decisions.[48]

But progressive administrative action is by no means an automatic outcome. Legal historians and other scholars have also highlighted instances in which administrators construed rights narrowly or retrenched on earlier policies. For example, Karen Tani has shown that federal

[45] See, e.g., Orren & Skowronek, supra note 28; see also supra note 28 and other sources cited therein.
[46] Eskridge & Ferejohn, supra note 3.
[47] Id. at 29-74.
[48] Id. at 33, 47, 57-58; see also Reva B. Siegel, You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs, 58 Stan. L. Rev. 1871 (2006).

welfare officials initially claimed a broad power to implement equal protection principles, but later retreated, in part to insulate their favored legal approach from the raging controversies surrounding school desegregation. Sophia Lee has contrasted the Federal Communications Commission (FCC) and the Federal Power Commission (FPC)'s divergent readings of the equal protection norm in equal employment regulations from the 1960s onward. The FCC embraced a theory that the Constitution required agencies to impose nondiscrimination requirements on those they regulated, while the FPC took the opposite view.

As such works suggest, administrative officials can also play a key rearguard role in rejecting change, insulating prior regimes, and diminishing rights. There is no necessary connection between agencies and progressive, equality-expanding reforms.

What then leads particular administrators to interpret constitutional principles in particular ways? One way of approaching that question is through the framework of institutional design. That perspective emphasizes that individual agencies are constructed along many different lines, to serve different goals and masters, and that these heterogeneous legacies shape the ways in which administrators experience political and legal pressures and the decisions that they subsequently produce. That basic fact holds true across many settings—even when officials are interpreting the most fundamental constitutional norms. While the relationship between administrative constitutionalism and agency design is under-explored at present, design offers the potential to illuminate why particular agencies may pursue rights protections even as others do not.

Scholars of administrative behavior have long noted the ways in which Congress and the president can constrain agencies' future decision-making through choices about initial mission and structure. How might such decisions help shape administrators' subsequent approaches to constitutional interpretation?

Two broad categories of institutional attributes seem especially likely to shape administrators' interpretations: the agency's independence from political and legal oversight, and its substantive mission. An agency's effective degree of independence will affect administrators' incentives to defer to other actors' constitutional interpretations. For example, an agency might be relatively insulated from the courts, but quite exposed to Congressional control, or it might be susceptible to one interest group's pressures, but not others'.[49]

That relative degree of exposure flows from a number of attributes, including an agency's economic and political resources, breadth of delegated authority, legal powers, procedures, location within the executive branch, leadership structure and tenure, personnel requirements, scope of jurisdiction, funding sources, and external relationships.[50] Official's interpretative

[49] See David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997, at 16 (2003) ("It is …necessary in a theory of agency design to specify the form of insulation and who is harmed" given that some forms of insulation will empower the President, others Congress, others neither entity); Rachel E. Barkow, Insulating Agencies: Avoiding Capture through Institutional Design, 89 Tex. L. Rev. 42-64 (2010) (discussing design features that may insulate agencies against excessive influence by organized interests).

[50] Jennifer Nou argues that agencies can go beyond hard-wired design features and construct more independence from presidential control through "self-help" measures. See Jennifer Nou, Agency Self-Insulation under Presidential

autonomy also depends on an agency's practical strength or weakness, as embodied in the agency's powers, scope of discretion, financial resources, and procedural flexibility, among other qualities.[51] In addition, agencies experience differing levels of judicial review, depending on the nature of their activities and how Congress crafts their organic statute.

Along with varying levels of independence, agencies bring differing substantive values to constitutional interpretation. To the extent an agency's mission and role lead it to develop corresponding constituencies, staffing needs, areas of expertise, professional associations, prestige, and external relationships, those factors may lead its staff to embrace particular norms or priorities over others.[52] Other aspects of an agency's organization and procedures may also lead it to be particularly sensitive to certain values or interests. For example, incorporating states in a cooperative federalism scheme may lead officials to favor interests traditionally well represented at the state level.[53] Enfranchising particular interest groups and limiting an agency's other sources of information can force the agency to rely on data provided by those groups, with whatever biases that may entail.[54]

Review, 126 Harv. L. Rev. 1755, 1835-37 (2013) (concluding that "executive branch agencies … can engage in autonomous and selective self-insulation from [presidential] influence").

[51] Those who create agencies can design them to be powerful or dependent on other actors, depending on their mandate, legal tools, and resources. "A powerful, well-designed agency can turn policy goals into reality, while a weak, poorly designed one can get nowhere. Because everyone in the policy process knows this, much of the struggle over policy is really a struggle over bureaucratic structure—the design, location, staffing, and empowerment of administrative agencies…." Terry M. Moe & Scott A. Wilson, Presidents and the Politics of Structure, 57 Law & Contemp. Probs. 1, 4 (1994). Among the powers an agency may exercise are "the power to make rules, develop informal practices, investigate, adjudicate, impose sanctions, grant licenses, and provide goods, services, advice," and other resources (such as federal grants). Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 521 (2010) (Breyer, J., dissenting). Broad statutory mandates endow agencies with considerable discretion, while detailed delegations limit their range of action. David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Politics Approach to Policy Making under Separate Powers (1999). But if the enacting coalition includes some less-than-fervent supporters, they may exact conditions that weaken the agency—for example, by constraining its resources or loading it down with procedural requirements. Terry M. Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. Econ & Org. 213, 229-30 (1990) ("Because American politics is unavoidably a process of compromise, then, public agencies will tend to be structured in part by their enemies—who want them to fail."). Attempts to insulate the agencies and/or prevent bureaucratic arbitrariness may also dilute their effectiveness. Id. at 229, 235; see also Kathleen Bawn, Political Control versus Expertise: Congressional Choices About Administrative Procedures, 89 Am. Pol. Sc. Rev. 89:62-73 (1995). On various burdensome procedures that opponents may seek to dilute agency effectiveness, see Terry M. Moe, The Politics of Bureaucratic Structure, in Can the Government Govern? 267, 276 (John E. Chubb & Paul Peterson, eds. 1989).

[52] For example, by structuring an agency to regulate only one industry, Congress makes it more likely that the agency will take into account only that narrow interest; in contrast, an agency that oversees multiple industries is more likely to reflect the varied, competing interests of its multiple constituents. See Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies, 8 J.L. Econ & Org. 93, 93-94 (1992).

[53] See Moe, supra note 51, at 302 (noting that state involvement in the federal occupational safety regime favored business interests that were well-represented in state-level politics).

[54] The theory is that providing avenues for direct involvement by agency constituents in the agency's decision-making will allow those constituencies to direct, monitor, and sanction the agency. Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 Va. L. Rev. 431 (1989).

Institutional attributes like these are likely to endure, once put into place.[55] Though Congress and the president can attempt to reshape agencies over time, initial design choices constitute "an institutional base that is protected by all the impediments to legislation inherent in separation of powers, as well as by the political clout of the agency's supporters."[56] To the extent that agency design is politically negotiated and persists, then it offers a means by which past constitutional settlements may be entrenched. Traits chosen by legislative drafters can embed specific constitutional principles—such as a structural orientation toward federalism or a substantive emphasis on individual rights—in an agency's mission, practice, incentives, and norms. The battle to change agency structures thus may be a proxy fight over changing the constitution.

The Office of Education

The Office of Education illustrates the interwoven effects of design and ongoing political influence. Founded during Reconstruction at the urging of professional education associations, the federal office remained small and limited in its mandate until the post-WWII period. Although education reformers pushed for federal legislation providing general financial support to local schools, to be overseen by the Office, that vision of "general federal aid" repeatedly failed in Congress. Opponents argued that such legislation risked federal control, might involve federal officials in dictating racial practices, and would implicate the state in funding (or excluding) private religious education, particularly by Catholic dioceses. Race proved a primary stumbling block, and in fact opponents at times even supported equality mandates in general federal aid legislation as a strategic tactic to defeat the bills. Such anti-discrimination provisions, even when they merely required "separate but equal" schools, meant the loss of crucial Southern support for the legislation.

By refusing to enact a broader mandate for the Office, Congress thus prevented the agency from straying into questions of racial equality. That implicit directive was further reinforced by the professional education associations who were the Office's main constituents. The largest of those groups, the National Education Association, itself remained segregated in the South until the 1960s and generally opposed any equality mandates in federal legislation.

Throughout the 1950s and into the early 1960s, the Office of Education refused to apply anti-segregation principles to the schools and universities it funded, arguing that it lacked statutory authority to do so. But officials also opposed attempts in Congress to explicitly give them that authority. The Health, Education, and Welfare (HEW) Secretary, who oversaw the Office, consistently opposed legislative provisions barring segregation in federally funded education programs. Several times the Office explicitly weighed the implications of the Supreme Court's mandate in *Brown v. Board of Education* for its programs, and decided that it should not weigh whether schools were violating the Constitution as a factor in its funding decisions.

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[55] "Soft" attributes like culture may be especially long-lasting. As Jonathan Macey argues "Over time the agency will develop a set of norms and a culture that is built on this set of norms." Jonathan Macey, Organizational Design and the Political Control of Administrative Agencies, 8 J. L., Econ. & Org. 93, 104 (1992); see also James Wilson, Bureaucracy: What Government Agencies Do And Why They Do It 91 (1991).

[56] Moe, supra note 51, at 285.

Under great pressure by the early 1960s, the Office and its parent department, HEW, gave slight ground by reinterpreting broad statutory language in several laws to limit segregation—for example, they determined that "suitable education" did not include segregated education, and they determined that the definition of a "public library" did not allow for segregated services. Even those decisions were limited in their impact though. Not until the Civil Rights Act of 1964 was passed, with Congress insisting on including a mandate barring federal funding for racial discrimination, did the Office acknowledge its power to halt funding to segregated schools.

The public works and public housing agencies

The case of public works and public housing is more complex than that of education, because the Public Works Administration (PWA) and its successors were designed by liberal reformers and actually attempted to enforce equality mandates at their origins. Public housing began as a Depression era public works program, administered directly by the Housing Division of the PWA in the early 1930s. Overseen by a liberal Secretary of Interior, Harold Ickes, who had recently appointed the department's first Advisor on Negro Affairs, and designed by federal officials, the early federal public housing program became known for its relatively liberal racial policies.

The key figure in crafting "racial equity" policies for public works and public housing was Robert Weaver, a Harvard-trained economist and member of FDR's "black cabinet" who became the department's second Advisor. Weaver worked directly with the PWA's Housing Division to set up "racial equity" policies for the program, policies which assured racial minorities a fair share of public jobs and housing. Both the staff of the Housing Division and these policies became the foundation for a new public housing agency, when Congress enacted a formal public housing program in the United States Housing Act of 1937. As a result, "racial liberalism" was woven into the public housing program's early policies and procedures. That liberalism contrasted starkly with the approach of the Federal Housing Administration (FHA), which was created in 1934 to provide mortgage insurance chiefly benefitting the middle class, and was attacked from its early years for its open racial discrimination.

However, public housing's racial liberalism was framed around *Plessy v. Ferguson*'s "separate but equal" theory of equal protection, in a time when even the NAACP and other civil rights groups accepted segregation within social programs as the price of enactment, and fought merely for equal distribution of benefits to minority programs. Public housing was racially segregated from its origins, even in many instances in the North. The goal of the agency's "racial equity" policies was simply to ensure an equal share of public resources for non-whites, without addressing segregation itself.

Moreover, federal officials soon ceded direct control over implementation of public housing to local officials. When Congress enacted the 1937 United States Housing Act, it did so with a new mandate of local control. Rather than federal agencies themselves constructing and overseeing public housing, as the PWA initially did, the new federal program created in the 1937 Act provided funds to local housing authorities, with instructions on how to carry out the program. Governmental bodies in the form of local housing authorities generally did not exist at the start of

the 1930s, but the Public Works Administration had lobbied states to enact legislation providing for such authorities.

At federal instigation, then, a new structure of local governance was created for the public housing program, which ensured that local officials would take the initiative in applying for, designing, and managing public housing. Local housing officials subsequently formed a principal constituent for the agency, forming the National Association of Housing and Redevelopment Officials.

The oversight and funding process also subjected the agency to ongoing Congressional controls, including an especially heavy Southern role. Southerners chaired the oversight and appropriations committees for the housing agencies throughout most of the post-war to 1964 period. They also acted as key members of the legislative coalition supporting housing programs aimed at the poor and working class.

The new public housing agency thus embodied a conflicting mix: a set of longstanding internal procedures and institutional actors devoted to "racial equity," along with profound dependence on local authorities and Southern support in Congress. It also faced ongoing, staunch opposition from conservatives and the real estate industry. By the late 1940s, public housing was perceived to be so radical and was so embattled that its liberals forswore civil rights commitments. In the postwar period, public housing's survival was an open question. Hostility from business interests and conservatives was extreme. Once Republicans assumed control of the executive branch in 1953, its precarity grew. Public housing survived in the 1950s only as an adjunct to urban renewal. The urban poor who were displaced as central cities were razed for redevelopment were given priority placement into public housing. Because those displaced residents were disproportionately minorities, public housing itself became increasingly occupied by racial minorities.

Ironically, one of the most socially progressive programs in U.S. history became increasingly regressive on questions of race. Starting from a point of relative liberalism on questions of race in the 1930s, federal housing officials resisted updating their racial policies even as constitutional norms evolved dramatically. A status quo that was once liberal became entrenched and served as a key building block of metropolitan segregation.

From the public housing program's inception, the NAACP simultaneously served as supporter and sharp critic. Even as the civil rights organization lauded the agency's attempt to treat racial minorities in a fair manner, its leaders attacked the agency's acquiescence and support for segregated housing. Later, the NAACP toughened its approach to segregation, deciding to stop supporting social programs that endorsed segregation, even if they arguably benefited racial minorities in the short run by providing greater resources to non-whites on a segregated basis. From that point onward, the NAACP and its allies lobbied for tough non-discrimination requirements in public housing and similar programs, and argued that the federal Constitution itself barred federal financial support for segregation.

In housing, the NAACP found strong legal support for its arguments even before the Court's decision in *Brown*. In 1948, the Court ruled in *Shelley v. Kraemer* and *Hurd v. Hodge* that

neither state nor federal judges could enforce residential segregation, reinforcing a decades-old bar on legislation requiring segregation. From *Shelley* and Hurd onward, the civil rights movement had legally compelling grounds for opposing federal support for residential segregation. If neither legislative nor judicial actors could enforce housing segregation requirements, then the same rule must necessarily apply to executive actors as well, the argument ran. Further, the Court's rulings indicated that similar rules applied to federal as well as state actors. On this view then, the Constitution barred federal executive branch actors from enforcing or otherwise supporting residential segregation, just as it did for legislative and judicial actors.

The most vulnerable point in the argument lay in the question of "otherwise supporting"—assumedly federal executive actors could not mandate residential segregation, but at what point did their participation and approval become so extensive as to itself violate the Constitution or public policy? Civil rights leaders argued that knowing, overt support and approval for state and local authorities' enforcement of segregation in federally funded programs was sufficient to invoke federal constitutional protections. As noted above, their view was that "when one dips one's hand into the Federal Treasury, a little democracy clings to whatever is withdrawn."[57] Federal funding brought federal rights protections.

However, civil rights advocates' constitutional arguments failed to move housing officials. Agency leaders declined to implement non-segregation requirements in federal housing programs up until President John F. Kennedy's executive order requiring non-discrimination in such programs in 1962. Even then, the order was only applicable to housing contracts signed after its issuance, leaving most public housing unaffected. Officials continued to formally allow segregated public housing arrangements until the Civil Rights Act of 1964 was enacted, with its bar on discrimination in federally funded programs. Even then, agency lawyers' interpretation of the restrictions on segregation left ample room for overt housing segregation to persist.

Why did a once-liberal agency refuse to bar segregation for so long? In part because the very liberalism of the agency's program left it highly politically exposed. Like education, public housing's controversial status as an extension of the federal welfare state meant that the agency was subject to constant attack from conservatives and required Southern Democrats' support to persist. Further, like education, the public housing agency constantly sought maintenance and expansion of the funding that served as its program's lifeblood. At the same time, its role in overseeing federal grants, rather than directly implementing social programs, left it relatively insulated from judicial oversight just as the Office of Education was.

Unlike education, however, certain aspects of the housing agency's design made the internal fight over segregation more acute. Civil rights supporters had staunch allies within the public housing agency, in the form of the Racial Relations Service officials who oversaw its "racial equity" requirements, whereas no such institutional ally existed within the Office of Education. But though that meant that the constitutional arguments against segregation were mounted from inside as well as outside the agency, the practical result was only that "separate but equal" was enforced more strictly in housing than in education. That is, the "equality" aspect of the earlier *Plessy* framework got more than lip service in public works and public housing, whereas the

[57] Ming v. Horgan, 3 Race Rel. L. Rep. 693, 697 (Cal. Super. Ct. 1958) (describing the plaintiffs' theory in a case challenging housing discrimination by FHA-insured private developers).

education agency never bothered to enforce even explicit "separate but equal" statutory mandates in its programs. None of the agencies adopted the updated *Brown* framework to govern their programs until Congress mandated that they do so in 1964.

Chapter 3 The Legal Context for Administrative Constitutionalism

From the early twentieth century forward, civil rights leaders fought to subject the expanding federal welfare state to equal protection norms.[58] The NAACP's long-running campaign toward this objective is an underappreciated—yet critical—part of its history. Even as Thurgood Marshall and his legal team fought to enshrine a new constitutional norm of racial equality via litigation, other NAACP officials aggressively lobbied for the federal government itself to enshrine those norms in its increasingly far-reaching programs. Attacking federal agencies' funding of segregation was a crucial component in their drive to end Jim Crow.[59]

Federal agencies overseeing national social programs at mid-twentieth century had considerable legal autonomy in how they chose to apply equal protection requirements to the programs and institutions they funded. That autonomy resulted from a legal context that problematized federal authority over state and local actors, while leaving federal officials' specific equal protection obligations ambiguous. Moreover, procedural doctrine tended to insulate federal administrators' decisions regarding segregation from challenges in the courts. In the absence of a direct judicial order, administrators faced conflicting legal arguments regarding their duty to independent assess the Constitution's mandates. This chapter lays out the legal debates and doctrine in each area, as essential background for understanding how the federal education, public works, and housing agencies came to possess substantial interpretive discretion.

As mid-twentieth century administrators considered civil rights advocates' claims that constitutional equality principles governed national social programs, the background law was often ambiguous. Judicial decisions resolved some questions, while leaving others murky. Further, technical legal barriers meant that sometimes courts would not address certain questions at all, leaving these open for administrators themselves to resolve in practical (and often-enduring) ways.

From the origin of the Constitution, the most pressing legal question regarding federal social programs involved their very existence. Did the national government have the authority to intervene in areas that did not appear among the enumerated list of Congressional powers? For proponents of a national welfare state, Article I's spending clause, which empowers Congress to act for the "general welfare" indicated a resounding yes. But other legal commentators disagreed, and getting Congress and the courts to adopt an affirmative answer proved arduous. Only in the 1930s did Congress enact and the Supreme Court approve comprehensive national programs of social assistance. Formalizing the breadth of the national spending power took even longer. Still,

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[58] On the term "welfare state," see supra note 14. On the NAACP's long lobbying campaign to change federal executive branch policy toward racial discrimination, particularly in its social welfare programs, see generally Dona Cooper Hamilton & Charles V. Hamilton, The Dual Agenda: Race and Social Welfare Policies of Civil Rights Organizations (1997); 3 The Papers of Clarence Mitchell, 1946–1950 (Denton L. Watson ed., 2010); Denton L. Watson, Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws (1st ed. 1990). Specific evidence of the NAACP's lobbying campaign in the education and housing contexts appears throughout Parts II and III, infra.

[59] For example, in 1951, the NAACP's national organization wrote to its branches that federal funding was the crucial factor in preserving Jim Crow: "The South cannot possibly continue to finance segregation in public schools, housing, recreation, and other services unless it has outside help." 4 The Papers of Clarence Mitchell, 1951–1954, at 276 (Denton L. Watson ed., 2010).

over the course of the New Deal constitutional "revolution," the broad legality of federal spending programs came to be accepted, at least as a litigable matter in the courts.

An even more persistent and troubling question was whether federal programs grounded in the spending power were governed by constitutional rights guarantees, particularly the Fourteenth Amendment's equal protection mandate. That question remained unresolved, long after the New Deal state emerged. The ambiguity resulted in part from technical obstacles to challenging spending clause programs. As courts considered constitutional challenges to federal social programs in the early twentieth century, they erected barriers to litigating claims against federal grants-in-aid. Even before the Supreme Court suggested that the judiciary might withdraw from closely reviewing national social legislation in footnote four of *United States v. Carolene Products*, legal doctrines made it difficult to challenge federal spending clause programs as a practical matter.

As a result, after the New Deal, there was a vacuum of judicial oversight over the federal welfare state. Constitutional constraints on federal social programs were politically enforced, if at all. That left ample room for the expansion of federal programs. But it meant that racial equality concerns were administratively addressed, rather than being resolved through litigation in the federal courts.

Constitutional principles concerning race discrimination also were unsettled in this period, further augmenting administrators' practical authority. Most basically, the meaning of "discrimination" itself was unclear until the mid-1950s, insofar as courts did not resolve whether segregation itself inevitably constituted a form of race discrimination until *Brown v. Board of Education* in 1954. Whether the Constitution barred federal officials from discriminating on the basis of race also remained unclear up to *Brown*. Even then, the federal companion case to *Brown*, *Bolling v. Sharpe*, left open a number of questions about how the Fifth Amendment's due process clause would be applied to racial discrimination. As a result, in the years immediately following *Brown* and *Bolling*, how equal protection principles might affect racial discrimination in programs relying upon the federal spending power loomed unanswered.

Effectively, then, as a result of insulation from judicial review and constitutional ambiguity, racial equality in federal social spending became a matter of administrative discretion. At the same time, constitutional doubts about the validity of federal intervention in areas of primary state concern persisted, though it became clear during the New Deal years that the federal courts were unlikely to strike down such programs.[60] Despite judicial acquiescence, agencies still had reason to believe that there were political—and perhaps constitutional—limits on federal intervention in areas like schools and housing. Those doubts created a context in which administrators could cite constitutional concerns about federal overreach as reasons for inaction in areas they viewed as subject to state control.

[60] See Thomas A. Gilliam, The Impact of Federal Subsidies on State Functions, 39 Neb. L. Rev. 528, 528 (1960) (noting longstanding complaint that "federal subsidies are invasions upon the traditional power of the states in the American federal system").

Federal power to create a welfare state

From the beginning of federal spending on education and similar areas, some had debated whether Congress had any power to act in these traditional areas of state power, given that the Constitution did not specifically delegate any authority over such social issues to the national government.[61] It has generally been understood that the federal government lacks general "police powers" to legislate on any matter affecting the public welfare, unlike the states. But since the founding, debate has raged over the meaning of Article III's text empowering Congress to "provide for the … general Welfare."[62] How did it expand the scope of Congressional power, if in fact it did?

Interpreters have offered three possibilities.[63] The most sweeping is that the spending clause creates an independent power in Congress to further the nation's general welfare by any appropriate means (including legislation).[64] In stark contrast, the most narrow interpretation of the text has been that the clause does not create any independent powers in Congress whatsoever, and that the taxing and spending powers can be used only to further the other enumerated powers of Congress that are listed in Article I, Section 8's subsequent clauses, such as the war and commerce powers.[65]

An intermediate possibility is that the clause creates an independent fiscal power—the power to tax and spend for the general welfare (but not a broader power to regulate primary behavior and take other actions unconnected to taxation and expenditures). Alexander Hamilton and Justice Joseph Story (in his renowned *Commentaries on the Constitution*) argued for this interpretation; in the twentieth century, Edward Corwin, another famed constitutional commentator, also adopted it.[66] The strongest evidence for this position consists of the text itself

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[61] For example, President James Buchanan vetoed Congress' first attempt to create land grant colleges in 1859, writing "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes on the people of the United States, for the purpose of educating the people of the respective States." James Buchanan, Veto Message, Feb. 24, 1859, http://www.presidency.ucsb.edu/ws/?pid=68368. However, similar legislation was successfully enacted and signed by President Abraham Lincoln three years later. Morrill Act of 1862, Pub. L. No. 37-130, 12 Stat. 503.

[62] See Edward S. Corwin, Spending Power of Congress Apropos the Maternity Act, 36 Harv. L. Rev. 548 (1922). Article I, section 8, clause 1 empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. Art. I, § 8, cl. 1.

[63] Thos. F. Green, Jr., The Constitutionality of the A. A. A. Processing Tax, 14 N.C. L. Rev. 28, 40 (1935); Leon Keyserling, Legal Aspects of Public Housing, in 1 Horace Russell & Leon H. Keyserling, Legal Problems in the Housing Field 34(1939).

[64] Most commentators discount that interpretation because it would vitiate the concept of a limited federal government, apparently providing Congress with unrestricted police powers. United States v. Butler, 297 U.S. 1, 64 (1936); Green, Jr., supra note 63, at 30.

[65] James Madison advocated this interpretation. Proponents of this view have emphasized that the framers could not have intended otherwise, given how carefully they limited federal powers in other parts of the Constitution. E.g., Russell L. Post, The Constitutionality of Government Spending for the General Welfare, 22 Va. L. Rev. 1, 37-38 (1935); Note on Madison's Views, 9 Mass. L.Q. 76 (1923).

[66] Corwin, supra note 62. A modern scholar has described Corwin's "reputation as a propagandist (in the best sense) of progressive constitutionalism" and "an active public spokesperson" for the constitutional theories that underlay the New Deal. Howard Gillman, Disaster Relief, 'Do Anything' Spending Powers, and the New Deal, 23 Law & Hist. Rev. 443, 448 n. 15 (2005).

(leading Corwin to dub this interpretation the "literal reading" of the general welfare clause), along with the longstanding historical practice of presidents and Congress to advocate and approve spending for "non-federal" purposes (i.e., for goals not otherwise within Congress' enumerated powers), long before the New Deal.[67]

At the start of the twentieth century, the Supreme Court had not yet resolved this longstanding dispute over the meaning of the general welfare clause, even as it recognized that "it would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching."[68] Despite the Court's silence, the propriety of Congressional spending in "non-federal" areas like agricultural research, disaster relief, and education had gradually been accepted as a practical matter. Entire federal agencies had been created to administer such programs without serious challenge, including the Department of Agriculture in 1862 and the federal Office of Education in 1867.[69]

As a result of such practical precedents, by the 1930s, the major controversy was not over federal power to simply provide subsidies, but rather over federal power to create comprehensive regulatory schemes or social programs via its taxing and spending power. Could Congress use funds as a carrot to induce the states to adopt regulatory programs—or taxes as a stick? In several earlier cases, the Court had indicated that Congress could not use its enumerated powers to reach into areas traditionally reserved to the states under the Tenth Amendment.[70] For example, neither the commerce power nor the taxing power allowed Congress to indirectly regulate child labor within the states, even if the legislation otherwise appeared valid under those clauses as a formal matter.[71] Such restrictive precedents loomed over President Franklin Delano Roosevelt's New Deal, and the Court in fact invalidated major portions of his early legislation as exceeding federal power.[72]

However, in 1936 in *United States v. Butler*, the Court adopted the broader reading of the "general welfare power," laying out the possibilities and ruling in favor of Hamilton, Story, and Corwin's view—that Congress did indeed have an independent power to tax and spend in furtherance of the nation's welfare, without needing to root its actions in other enumerated powers.[73] The Court also ruled that the Tenth Amendment constrained the spending power,

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[67] Corwin, supra note 62, at 575; Green, Jr., supra note 62, at 40-43.

[68] Massachusetts v. Mellon, 262 U.S. 447 (1923); United States v. Realty Co., 163 U.S. 427, 434 (1896) (finding it unnecessary to resolve whether Congress had the constitutional power to award subsidies to sugar producers); Field v. Clark, 143 U.S. 649, 695 (1892) (same). Lower courts split over the issue. See Russell L. Post, The Constitutionality of Government Spending for the General Welfare, 22 Va. L. Rev. 1, 28-32 (1935) (discussing rulings from courts within the Fourth, Eighth, Tenth, and D.C. Circuits).

[69] See Edward S. Corwin, Constitutional Aspects of Federal Housing, 84 U. Pa. L. Rev. 131 (1935); Corwin, supra note 62, at 579-80.

[70] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[71] The Child Labor Tax Case (Bailey v. Drexel Furniture Co.), 259 U.S. 20, 36-39 (1922) (invalidating a ten percent excise tax on the net profits of manufacturers using child labor); Hammer v. Dagenhart, 247 U.S. 251, 271-75 (1918) (invalidating a federal prohibition on the interstate shipment of products made with child labor).

[72] See David P. Currie, The Constitution in the Supreme Court: The New Deal, 1931-1940, 54 U. Chi. L. Rev. 504, 524-36 (1987).

[73] 297 U.S. at 65-66.

though, apparently preventing the federal government from using taxes and subsidies to indirectly regulate at least some areas of traditional state authority.[74] Justice Roberts' majority opinion distinguished conditional grants to the states from the contractual payments at issue in the case, suggesting the federal government might be able to impose conditions in federal spending statutes that it could not via contract.[75]

Commentators derided *Butler* as unclear and predicted that it would not serve to restrain the federal government's power under the general welfare clause.[76] Soon, new decisions addressing the scope of the general welfare clause and Tenth Amendment restraints—which followed the Court's famous "switch in time"—proved them right.[77] In 1937, the Court upheld the Social Security Act's old age benefits as a valid exercise of the spending power.[78] It also rejected a Tenth Amendment challenge to the Act's unemployment benefits scheme (which used tax credits to incentivize states to adopt unemployment legislation), distinguishing *Butler* and emphasizing states' voluntary, cooperative role in the scheme.[79]

Subsequent rulings emphasized that states, as sovereigns, had the power to consent to federal regulatory schemes in exchange for benefits.[80] In the ensuing years, the Tenth Amendment dissipated as an independent check on federal power. By 1941, the Court termed the amendment a "truism," that did not "depriv[e] the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[81] Thus, it appeared clear that Congress could give money to the states—with substantive strings attached.[82] In later decades, the Court continually affirmed the power of the federal government to place reasonable conditions on federal funds.[83]

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[74] In Butler, the Court ruled that the Agricultural Adjustment Act's scheme (combining processing taxes with contractual payments to farmers to voluntarily reduce acreage) amounted to "a statutory plan to regulate and control agricultural production" that "invade[d] the reserved rights of the states." 297 U.S. at 68-69 ("Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not [e]ntrusted to the federal government." (quoting Linder v. United States, 268 U.S. 5, 17 (1925)).

[75] 297 U.S. at 73-74.

[76] E.g., Walter F. Dodd, The Powers of the National Government, 185 Annals Amer. Acad. Pol. & Soc. Sci. 65, 70 (1936) (stating that Butler left "the scope of the authorized spending power of the National Government . . . as indefinite as ever" and that the ruling was "not likely to stand as the basis for a permanent restriction upon the Federal spending power.").

[77] On the Court's doctrinal shift, see Currie, supra note 72, at 541-53. A massive debate has raged among students of the New Deal Court over the extent, timing, and causes of the doctrinal shift. See, e.g., AHR Symposium: The Debate over the Constitutional Revolution of 1937, 110 Am. Hist. Rev. 1046 (2005).

[78] Helvering v. Davis, 301 U.S. 619, 641-45 (1937).

[79] Chas. C. Steward Machine Co. v. Davis, 301 U.S. 548, 585-93 (1937).

[80] E.g., Oklahoma v. U.S. Civil Service Comm'n, 330 U.S. 127, 143-44 (1947); United States v. Bekins, 304 U.S. 27, 51-54 (1938).

[81] United States v. Darby Lumber Co., 312 U.S. 100, 124 (1941); see also id. at 116-17 (overruling Hammer v. Dagenhart).

[82] Michele Landis Dauber has termed Butler "the most significant Supreme Court case in the formation of the American welfare state." Michele L. Landis, Let Me Next Time Be Tried By Fire: Disaster Relief and the Origins of the American Welfare State 1789--1874, 92 Nw. U. L. Rev. 967, 1031 (1998)

[83] E.g., King v. Smith, 392 U.S. 309, 333 n.34 (1968); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. U.S. Civil Service Comm'n, 330 U.S. 127, 143 (1947).

As a legal matter, then, by the late New Deal federal grants in areas of traditional state power were sanctioned, and there was no bar to conditioning those grants on regulatory requirements that Congress lacked the power to impose otherwise. Essentially, the Court had blessed the use of the conditional federal grant to create large-scale regulatory schemes in areas of traditional state power.[84]

The Tenth Amendment lost force as an actual legal barrier. However, federalism objections continued to be politically enforced by Congress and the executive branch, insofar as Congress structured programs to provide state and local authorities with operational control, and the President and other executive branch officials deferred to such authorities. Thus, administrators who cited federalism concerns were not inventing a chimera. But they were alluding not so much to real litigation threats as to a politically enforced constitution.

The federal government's non-discrimination obligations

Even as federal power to act in areas like schools and housing suffered from substantial doubts, those concerns were far less relevant with regards to one specific issue: racial equality. Had the federal government wished to require states and localities to provide equal treatment in schools, jobs, and housing, it had ample constitutional authority to do so. The Fourteenth Amendment explicitly empowers Congress to exercise its power to enforce the equal protection guarantee against the states.[85] If Congress had wished to legislate against race-based discrimination in public schools and housing, or government jobs, it could have.[86] In providing federal funds to the states, Congress likely did not even need its Fourteenth Amendment powers, and could have relied on its spending power alone to impose non-discrimination conditions. Certainly, the combination of Congressional spending powers and the Fourteenth Amendment enforcement authority would have validated any such restrictions.

Yet federal administrators elided the backdrop principle of federal power to enforce the Equal Protection Clause. Instead, they emphasized the tenuous nature of federal authority in areas of traditional state power, as though that also undermined the government's express powers to enforce equal protection guarantees against state actors. And Congress itself repeatedly rejected non-discrimination provisions in federal funding statutes.

The question, then, for civil rights advocates—and for the administrators they engaged—became one of executive authority or obligation. Absent a legislative mandate, was there a constitutional basis for federal administrators to bar discrimination in federally funded programs?

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[84] See Gilliam, supra note 60, at 535 ("Thus, the American subsidy system historically established the right of the federal government to participate in welfare matters….").

[85] U.S. Const. amend. XIV, § 5.

[86] See, e.g., Constance Baker Motley to Walter White (Dec. 7, 1948), Education-General 1948-55, II:B67, Records of the National Association for the Advancement of Colored People, Manuscript Division, Library of Congress, Washington, D.C. (ProQuest digitized version) [hereinafter NAACP Papers] ("Congress could, under the Fourteenth Amendment and its constitutionally granted powers to implement this Amendment, pass legislation forbidding states to segregate students once it has set up education facilities for them. This prohibition ... may be predicated on a finding by the legislative body that segregation is discrimination.").

Surprisingly, there was no clear answer to this question. Civil rights' advocates argument that the Equal Protection Clause should govern federal programs rested on an interconnected series of legal claims. NAACP lawyers elaborated their arguments in support of those claims in legal memos addressed directly to the president and other executive branch leaders, as well as in litigation. At the outset, in the 1940s, none of the claims were well-accepted. Increasingly, though, each claim drew support, from members of Congress to other reform groups and even the courts. By the 1960s, several had become black-letter constitutional law, but others remained questionable, accepted only in piecemeal lower court rulings or largely untested in litigation.

The claims ran as follows: First, that the federal government was bound by equal protection principles. The initial problem was that the Fourteenth Amendment's Equal Protection Clause did not apply to the federal government. Advocates had to rely upon the Fifth Amendment's due process mandate, with its prohibition of arbitrary government action. The argument was that the Fifth Amendment's bar on arbitrariness encompassed an equality mandate—what some called "reverse incorporation."

Through the 1930s, the Court continued to point out that the federal government was not subject to equal protection requirements, though it was willing to assume in challenges to federal tax schemes that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."[87] In the 1940s cases challenging the military's seizure and internment of Japanese Americans on the West Coast, the Court indicated that the Fifth Amendment "restrains only such discriminatory legislation by Congress as amounts to a denial of due process"—but also suggested that "racial discriminations are in most circumstances irrelevant and therefore prohibited"—even as it upheld the military's creation of race-based internment camps as a supposed matter of wartime necessity.[88] Thus, the Court's rhetoric suggested that the Fifth Amendment barred race discrimination, but its statements were arguably dicta (and in tension with the Court's actual deferential analysis).

In 1948, the Court had a chance to expressly apply the Fifth Amendment to invalidate federally enforced race discrimination, but declined to do so. Civil rights advocates relied on the Fifth Amendment in the federal companion case to *Shelley v. Kraemer*, which challenged judicial enforcement of restrictive covenants in the District of Columbia. In parallel to the argument in *Shelley* that state courts violated the Fourteenth Amendment in enforcing race-based exclusions from housing, the plaintiffs argued in *Hurd v. Hodge* that federal courts violated the Fifth Amendment in doing so. But though the Court accepted the Fourteenth Amendment-based argument in *Shelley* and barred state courts from enforcing covenants on constitutional grounds, it did not adopt the parallel argument in *Hurd*. Instead, the Court held that a Reconstruction era civil rights statute guaranteeing property rights, along with federal public policy, barred federal courts from enforcing racial covenants. The Court reserved the question of the Fifth Amendment's meaning.

Finally, in 1954, the Court explicitly applied the Fifth Amendment to discrimination by federal actors. In *Bolling v. Sharpe*, *Brown v. Board of Education*'s companion case, the Court applied the Fifth Amendment's due process guarantee to strike down de jure school segregation in

[87] Steward Machine Co., 301 U.S. at 584-85.
[88] Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

the District of Columbia: "Segregation in public education is not reasonably related to any proper governmental objective, and thus it … constitutes an arbitrary deprivation of [African American children's] liberty in violation of the Due Process Clause."[89] Citing its ruling in *Brown*, the Court further elaborated that "it would be unthinkable that the same Constitution would impose a lesser duty on the federal government" than it did upon the states.[90]

The NAACP's second claim was that equal protection barred both adverse treatment and segregation itself. In the early twentieth century, the term "discrimination" was not understood to encompass segregation.[91] Even after the Court's 1954 ruling in *Brown* that segregation violated equal protection, many continued to refer separately to "discrimination and segregation" as if they were distinct concepts.[92] The underlying idea was that there could be forms of segregation that did not entail differential treatment in terms of who got what, but simply spatial separation—i.e., "separate but equal." Some states and localities claimed that their social programs were equal in distributive terms, but simply segregated. It was necessary to broaden the understanding of unconstitutional discrimination to include segregation, in order to argue that these segregated programs violated the Constitution. Theoretically, doing so should have been easiest in the context of housing programs, because the Court had uncharacteristically ruled that local governments could not enforce residential segregation laws in 1917, in *Buchanan v. Warley*—long before the justices showed any interest in overruling state-enforced segregation in other settings.

Third, the NAACP had to assert that federal support, approval, and acquiescence in segregation were themselves unlawful—as unlawful as the Southern laws that explicitly and directly required segregation. Because federal officials generally did not operate social programs like schools and housing themselves but instead provided subsidies and other resources to others, they were not the ones who imposed segregation. Many argued that such "indirect" federal support for discrimination did not itself violate the Constitution—after all, could the federal government be expected to police all subsequent uses of its resources? The countervailing argument was that pervasive federal regulation and extensive financial support for social programs made the federal government responsible for what went on in those programs. As the Court's state action doctrine around government support for segregation strengthened, that case law provided support by analogy for equal protection scrutiny of the federal government's role in financing state and local government's constitutional violations. If Virginia could not provide textbooks to private segregation academies, presumably the federal government could not pay states and localities to construct and maintain segregated institutions.

Fourth, the NAACP argued that executive branch officials were directly bound by the Constitution, with those constitutional obligations trumping any countervailing statute, expression of Congressional will, agency regulation, or longstanding practice. The idea that administrative power might be directly regulated by the Constitution—even if not implemented in legislation or enforced by a court—was far from accepted. Federal officials could argue that even if they were

[89] 347 U.S. 497, 500 (1954).
[90] Id.
[91] See Preface, 3 The Papers of Clarence Mitchell, supra note 58, at pxx (describing internal debate in 1933-1934 over whether to challenge segregation, including W.E.B. DuBois' 1934 assertion that "there should never be an opposition to segregation pure and simple, unless that segregation does involve discrimination").
[92] See, e.g., infra notes 693, 760-761, and 875-877 and accompanying text.

engaged in what might be constitutional violations, that they as administrators lacked any power to weigh the Constitution against statutory mandates. Unless and until a court ruled otherwise, they would simply follow the Congressional directive (or even the agency's longstanding practice, as implicitly sanctioned by Congressional knowledge and acquiescence).

NAACP lawyers' legal arguments thus required a series of doctrinal moves—that while largely commonplace now, required reaching beyond existing Supreme Court precedent. The logic they articulated was elegant, compelling, and cohesive. But it did not prevail for many years.[93]

Technical hurdles to challenging federal grants

Apart from substantive doctrine, the difficulty of challenging federal grant-in-aid programs in court helped entrench broad uses of the federal spending power. Even advocates of a broad "general welfare power" believed there might be some limit on the conditions that the federal government could place upon its grants. But it was unclear how any constitutional limits on federal grant conditions might be enforced.[94] The Constitution requires that a plaintiff must have a specific, concrete injury before bringing a lawsuit in the federal courts—a jurisdictional requirement that is referred to as "standing." If no interested party has standing to challenge a particular policy or practice, then the courts may never have an opportunity to address it, no matter how illegal it may be.

In 1923, the Supreme Court indicated that it would be rare for any individual or entity to have standing to challenge federal grant conditions. In joint cases that involved both a state and an individual taxpayer's challenge to a federal maternal health grant program, as beyond the federal government's spending clause powers and invasive of the states' Tenth Amendment reserved rights, the Court refused to address the merits and dismissed the cases for lack of jurisdiction.[95] In the state's challenge, the Court characterized the question as an abstract one of political power, writing that a state faced with the choice of accepting or rejecting a conditional federal grant could simply reject it—hence bore no burden nor any cognizable legal injury.[96] Individual taxpayers' alleged interest in avoiding paying taxes for unconstitutional programs was too minute and remote to give them standing either.[97] To observers, *Massachusetts v. Mellon* "indicated that the tenth amendment . . . would not be a hindrance where a state consented to Congressional sharing of taxes in a traditional area of local determination."[98]

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[93] Subsequent judicial decisions that incorporated this reasoning include Gautreax v. Romney, 448 F. 2d 731 (7th Cir. 1971); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (en banc).

[94] See, e.g., William Ebenstein, The Law of Public Housing, 23 Minn. L. Rev. 879, 895 (1939) (asking "But who could contest the constitutionality?" of the federal public housing program, given the limits on standing announced in Massachusetts v. Mellon).

[95] Massachusetts v. Mellon, 262 U.S. 447 (1923).

[96] "In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial in character…." 262 U.S. at 483.

[97] 262 U.S. at 487-89.

[98] Gilliam, supra note 60, at 529.

Sovereign immunity also blocked challenges to federal spending programs. If the federal government had not consented to be sued, then litigants seeking to challenge racial discrimination in federal programs might see their claims against federal defendants summarily dismissed. That happened repeatedly in challenges to segregation in federally assisted public housing, for example.[99]

Administrative power (and responsibility) to apply the Constitution

Given the murkiness of the law and the difficulty of obtaining judicial determinations, the question became one of executive authority to implement equal protection requirements, even without an express statutory mandate to do so.

Leading political appointees and career lawyers often argued that the executive branch did not have the authority to independently apply the Constitution, especially if the statute was silent or could be read to impliedly reject federal oversight of racial discrimination. For example, President Kennedy's Assistant Attorney General for Civil Rights, Burke Marshall, told a Congressional subcommittee in 1962, "it is not the responsibility of the Executive to pass upon the constitutionality of statutes enacted by the Congress, once they have been finally approved by the President."[100] Similarly, materials prepared for HEW Secretary Anthony Celebrezze's 1963 testimony on the Civil Rights Act included an attachment to a memo from his general counsel, which cited various sources for the proposition that executive officials "cannot question the constitutionality of a statute under which they operate."[101]

In contrast, civil rights advocates argued that the Constitution necessarily constrained grants of statutory authority to agency, and that executive officials were bound by their oaths of office to uphold the Constitution—even without explicit judicial directives or statutory instructions to that effect.[102]

Even in the present, the legitimacy of independent executive branch interpretation is a matter of active debate.[103] As to agencies in particular, commentators worry that this may lead officials to exceed their statutory delegations of power and appropriate role vis-a-vis Congress.[104]

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[99] See Marshall W. Amis, General Counsel, to Warren R. Cochrane, Director of Racial Relations (Nov. 29, 1951), Racial Discrimination (1) (1938-1961), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

[100] RG 12, 100.2, at 3

[101] RG 235, 133, 151/161 (quoting Panitz v. District of Columbia, 112 F.2d 39, 42 (D.C. Cir. 1940), along with former Attorney General Homer Cummings and the constitutional scholar Edwin Corwin). But see infra notes 237-243 and accompanying text (discussing legal memo in which HEW lawyers discounted this principle in considering the impact of Brown on the agency).

[102] See, e.g., Roy Wilkins & Arnold Aronson, Proposals for Executive Action to End Federally Supported Segregation and Other Forms of Racial Discrimination 13 (Aug. 29, 1961), Box 133, Secretary's Correspondence, RG 235, NARA II [hereinafter Wilkins & Aronson, Proposals] ("[I]t must be presumed that in providing for the grant-in-aid programs, Congress intended that they be administered in accordance with the Constitution."); id. (arguing that Article II's presidential oath and "take care" clause "gives to the President the power to regulate the expenditure of Federal funds in such a way as will be consistent with the Fifth Amendment").

[103] See infra chapter 9 (discussing theories of "departmentalism" and arguments for executive power to independently apply the Constitution, even if that results in contravening judicial precedent or federal statutes).

[104] See Metzger, supra note 3, at 1916-17 (citing these concerns by other scholars).

Unsurprisingly, matters were no less clear at mid-twentieth century, and administrators did not perceive themselves as clearly bound to apply the Constitution to the state, local, and private programs they oversaw and funded.

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Federal administrators thus could draw upon non-frivolous arguments that their authority to police state and local segregation was constrained, and that the nature of the federal equal protection obligation was unclear in any case. Since they rarely had to defend those arguments in the federal courts, the question of whether to fund segregated schools and housing was left to their discretion to address.

But as I show in the case studies that follow, that legal discretion did not mean federal administrators could act free of constraint. Instead, the agencies' statutory mandates and designs gave them strong political incentives to avoid implementing the Supreme Court's equal protection jurisprudence. Attempting to prohibit segregation as a condition of federal funding would have subjected them to serious political risks and backlash, thereby threatening what they perceived as their agencies' core missions of extending federal funding and national social programs as broadly as possible.

PART II: EDUCATION

This Part probes how the federal Office of Education grappled with civil rights leaders' challenges from the years immediately preceding *Brown v. Board of Education* through the passage of the 1964 Civil Rights Act. In Chapter Four, I first examine the federal education bureaucracy's historic design and role. Chapter Five draws on agency archival materials to reconstruct the Office of Education's legal interpretations and its stance toward school segregation in the period before the Civil Rights Act. The concluding section argues that the education agency's design shaped its officials' resistance to implementing the equal protection mandate.

Chapter 4 An Office for Educators

In 1962, the incoming Commissioner of Education knew the Office of Education by reputation as "a pretty sleepy old place" staffed by "a group of rather older professional educators." It was "a report-writing agency . . . a statistics-gathering agency."[105] His immediate predecessor as Commissioner had decried the hold that professional educators' groups like the National Education Association had on the agency, believing that his top deputy was "in their pocket."[106] He said later, "My function as the U.S. Commissioner was simply to be a representative of the schools in dealing with the government, mainly to raise money. Beyond that, I was to keep my damn mouth shut."[107] Another staffer described the agency in the 1950s as "almost . . . an office for the profession, an office for educators rather than an office of education."[108] Career staff fiercely protected their programs: High-level education officials would say, "'we have to hang on to such-and-such. It's our bread and butter.'"[109] Education officials also shunned controversy, characterizing the Office as "non-political," and focused solely on technical matters.[110] Being non-political meant staunchly avoiding issues of racial discrimination—as the new Commissioner who arrived in 1962 put it, "The Office had ... the reputation for a good many years of being, shall we say, aloof from the Civil Rights problem. It had not been an activist agency."[111]

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[105] Interview by John Singerhoff with Francis Keppel, former Comm'r of Educ., in N.Y.C. 15–16 (July 18, 1968) (on file with LBJ Library; Papers of Lyndon Baines Johnson, President, 1963–1969; Administrative History; Volume I; Box 3A [hereinafter OE Administrative History]).

[106] Sterling M. McMurrin & L. Jackson Newell, Matters of Conscience: Conversations with Sterling M. McMurrin on Philosophy, Education, and Religion 267 (1996), http://signaturebookslibrary.org/sterling-m-mcmurrin/.

[107] Id. at 271 (specifically describing a meeting with a committee of the American Association of School Administrators).

[108] Interview #2 by William W. Moss with Kathryn G. Heath, Assistant for Special Studies, Office of Educ., Dep't of Health, Educ., and Welfare, in Washington, D.C. 53 (July 27, 1971) (on file with John F. Kennedy Presidential Library and Museum; John F. Kennedy Library Oral History Program).

[109] McMurrin & Newell, supra note 106, at 293–94; see also Eloise Pasachoff, Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off, 124 Yale L.J. 248, 262 (2014) (noting that "[f]or some [C]abinet departments, giving such grants" to state and local authorities "is their bread and butter," and this is true of the current Department of Education).

[110] Interview by William A. Geoghegan with Anthony J. Celebrezze, former Sec'y, Dep't of Health, Educ., and Welfare 16 (ca. 1968) (on file with John F. Kennedy Presidential Library and Museum; John F. Kennedy Library Oral History Program) ("The Department is not a political department. These are all highly trained technical people here."); Interview #2 by William W. Moss with Kathryn G. Heath, supra note 108, at 55 (stating that up to the 1950s, "there was a general view that education was not political," and the Commissioner from 1934 to 1948, John Studebaker, "held strongly that it was not").

[111] Keppel interview, supra note 105, at 6.

How did the Office come to be a conservative, "sleepy" office for educators, rather than a more vibrant and autonomous agency, even an "activist" one? This chapter argues that political actors' decisions about the federal Office of Education's mission and structure shaped the agency in ways that led its personnel to defer to Congress and local school authorities, while prioritizing federalism norms over equal protection principles.

From its origins during the Reconstruction era, the Office existed amidst constitutional controversies concerning federal power over schools and racial segregation in the South.[112] As a result, Congress delegated only very limited powers to the agency. The Office also developed its closest political and professional ties to education interest groups, allies that opposed federal intervention in segregation. Though the agency's leaders and allies constantly sought to expand its programs, concerns about federal overreach and potential intervention in Southern racial practices helped derail these efforts. In reaction, the Office developed a strong tradition of "non-interference" in local schools, especially in racial justice issues, which won it praise from Congress and educators.

The Office's narrow mandates and structural incentives for expansion thus left it "locked into dependency relations with both Congress and professional educators."[113] At the same time, the Office was subject to relatively weak controls within the executive branch and was insulated from constitutional review. In this setting, the agency developed internal practices and norms that emphasized education over equal protection, state and local power over federal authority, and strict adherence to statutes over independent constitutional interpretation.

Programs, powers, and clientele

The Office of Education began its existence as a small, meagerly funded executive branch agency with a narrow set of powers. In 1867, Congress set up a federal education department at the formal behest of the National Association of State and City School Superintendents, which had joined other education groups in calling for a federal agency to support schools.[114] The agency was charged simply with "collecting . . . statistics and facts" and "diffusing . . . information."[115] Despite its limited mandate, the agency quickly proved politically vulnerable. Opponents questioned whether the Constitution's limited grant of federal powers allowed the national government to play any role in education—and whether the government would use the agency to

[112] Donald R. Warren, To Enforce Education: A History of the Founding Years of the United States Office of Education 82–86, 129, 135–36 (1974).
[113] Donald R. Warren, The U.S. Department of Education: A Reconstruction Promise to Black Americans, 43 J. Negro Educ. 437, 448 (1974).
[114] An Act to Establish a Department of Education, Pub. L. No. 39-73, 14 Stat. 434 (1867); Gordon Canfield Lee, The Struggle for Federal Aid, First Phase: A History of the Attempts to Obtain Federal Aid for the Common Schools, 1870–1890, at 22–26 (1949). Southerners were not present to vote on the bill, but a large proportion of Democrats opposed it. Id. Public educators had begun calling for a national office to collect educational statistics in the mid-nineteenth century, while calls for broad federal aid to local schools dated back even further. Id. at 8, 22–24; Warren, supra note 113, at 438.
[115] §§ 2–3, 14 Stat. at 434. The Commissioner of Education was to report annually to Congress, and was allowed a staff of three clerks. Id.

promote equal education for African Americans in the South.[116] Under these attacks, the agency lasted only a year as a stand-alone department, with Congress folding it into the Department of Interior and slashing its budget.[117] It would take the Office's leaders and allies over a century to reestablish a freestanding Department of Education.[118]

From the beginning, the Office was a classic single-purpose agency—and its purpose was to serve a specific clientele, professional educators. The agency was created at educators' behest, and its programs directed information and resources to education. As a result, "a close collaboration between the Office of Education and the organized educational groups in the country" developed over many decades.[119] Education groups repaid the Office's deference to their prerogatives with staunch loyalty, resisting efforts to lodge education programs in any other agency.[120] These lobbies also sought to insulate the Office from political control, so that its officials would be committed to professional education groups rather than to political superiors in the executive branch.[121] New organizations of education interests formed around the agency's grant programs; in lobbying Congress to protect that funding, these client groups also served as key political allies for the agency.[122]

Even with education groups' staunch backing, though, the Office of Education only gradually expanded its programs and powers. Initially, the Office's small staff drafted reports, as

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[116] Warren, supra note 113, at 443–44. Lack of constitutional authority was a general objection to any federal role in education at the time. See, e.g., Lee, supra note 114, at 9–10 (discussing President James Buchanan's veto of the first legislation establishing a system of land grant colleges on the ground that it exceeded federal powers); see also id. at 14–16, 25–26 (quoting Representative George Hoar, who wrote, "The office was exceedingly unpopular, not only with the Old Democrats and the Strict Constructionists, who insisted on leaving such things to the States, but with a large class of Republicans" (internal citation omitted)).

[117] An Act Making Appropriations for the Legislative, Executive, and Judicial Expenses of the Government, for the Year Ending the Thirtieth of June, Eighteen Hundred And Sixty-Nine, 15 Stat. 92, 106 (1868) (reducing the commissioner's pay from four thousand to three thousand dollars, and deleting the appropriation for all three clerks); Lee, supra note 114, at 26; Richard Wayne Lykes, Higher Education and the United States Office of Education (1867–1953) 165 (1975) (the Office's appropriation fell from $24,676 in 1867–68 to $9,150 in 1870); Warren, supra note 112, at 118, 128–136, 142–43.

[118] An act creating a federal Department of Education was enacted in 1979. Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat 668 (1979).

[119] Frank J. Munger & Richard F. Fenno, Jr., National Politics and Federal Aid to Education 79 (1962).

[120] Id. at 52, 80; see also id. at 53 (The National Education Association [NEA]'s "greatest worry may be that control over federal education policy will be exercised not by the professional educators of the Office of Education, but by legislators or by other administrators."). The agency forged a close relationship with the National Education Association, soon after the organization's creation in 1870—helping to organize its meetings and distribute its publications. In return, the NEA passed resolutions supporting the agency, requesting higher funding levels from Congress, and arguing for its elevation to Cabinet status; it even intervened with various presidents to retain the Commissioner of Education himself. See Stephen J. Sniegoski, John Eaton, U.S. Commissioner of Education, 1870-1886, at 4-5 (1995).

[121] Educators wanted to restructure the Office as an independent agency or board. Id. at 79–80.

[122] See V.O. Key, Jr., The Administration of Federal Grants to States 178–82 (1937). Both the land grant colleges and vocational education officials formed organizations to promote their interests, the American Vocational Association (AVA) and the Association of Land Grant Colleges and Universities. Id. (describing the two organizations' political strength); see also Rufus E. Miles, Jr., The Department of Health, Education, and Welfare 150 (1974) (the AVA "developed an extremely effective lobby on behalf of vocational programs" after its founding in 1929). Commissioner Samuel Brownell described the "vocational education bureaucracy" within his office as nearly autonomous, due to their strong support by the vocational education lobby and in Congress. Brownell interview, at 64.}

the 1867 statute creating the Office mandated, but they lacked the resources to do independent research, instead relying on data voluntarily supplied by the states.[123] In 1890, the Office was delegated the responsibility of overseeing federal funding of the state land grant colleges under the Second Morrill Act, which allowed it to acquire another clerk.[124] During the New Deal years, the Office began to acquire greater responsibilities, taking over federal vocational education programs in 1933.[125] In 1941, the Office began overseeing the Lanham Act's wartime grants to assist areas burdened by educating defense workers' children.[126] Yet the Office remained small and meagerly funded in the post-war era.[127] "Understaffing, lack of funds, and fragmentation of programming" limited the Office's ambitions.[128]

Since the nineteenth century, the Office of Education's leaders and allies had sought to expand its limited mandate, by proposing broad federal funding for all U.S. elementary and secondary schools, unrestricted by purpose—an elusive, longed-for goal that was often referred to as "general federal aid."[129] But these attempts failed, often due to concerns over whether the federal government might unconstitutionally displace state and local control over education.

In the Reconstruction era, a few advocates of aid had proposed that a federal agency enforce minimum standards for education, and even operate federal schools where states failed to provide adequate education.[130] Opponents grounded their opposition in the Tenth Amendment, arguing that education was reserved to the states; though the proposal was defeated, from then on the threat of federal control loomed over all debates over aid.[131] That history led the Office's personnel to constantly disavow any desire to override state or local authority. Commissioners had to assuage fears of federal take-over, assuring Congress, their educator clients, and the public that they had

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[123] Warren, supra note 112, at 146 ("The most glaring weakness in the agency's operation was its dependence upon statistics and information voluntarily submitted by teachers, school officials, and other friends of education.").
[124] Lykes, supra note 117, at 20–21.
[125] See Secretary of the Interior, Annual Report of the Secretary of the Interior for the Fiscal Year Ended June 30 1933, at 264 (1933); Munger & Fenno, supra note 119, at 79 (noting that 40% of the Office's staff was dedicated to vocational education afterward).
[126] Lanham Act, Pub. L. No. 76-849, 54 Stat. 1125 (1940); Pub. L. No. 77-137, 55 Stat. 361 (1941).
[127] The Office "remained a small bureau of less than a hundred people located in the Department of the Interior throughout the Depression years." Miles, supra note 122, at 16. In 1945, the Office had less than 500 employees and an appropriation of less than one million dollars. Lykes, supra note 117, at 165 tbls. 8 & 9.
[128] Lykes, supra note 117, at 166–67. The Office also did not even oversee all educational funding programs; federal aid to education was scattered throughout many other agencies, including the Departments of State, Treasury, War, Justice, Agriculture, and Commerce. Id. at 147–48, 164.
[129] The Commissioner of Education often served as a chief proponent of these bills. See, e.g., Munger & Fenno, supra note 119, at 78 (noting that the second Commissioner of Education, John Eaton, was "[o]ne of the most forceful spokesmen" for general federal aid). The legislative fight did not succeed until 1965—though technically, the Elementary and Secondary Education Act of 1965 provided categorical, not general, aid, an important strategic switch by aid proponents. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965); James Sundquist, Politics and Policy: The Eisenhower, Kennedy, and Johnson Years 212 (1968) (noting perception of the 1965 legislation as "the old idea of general aid to education in a new form—a form carefully designed to circumvent previous constitutional barriers to benefits for parochial and other private school children").
[130] Ward M. McAfee, Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s, at 105 (1998); Warren, supra note 112, at 65–66, 78–79.
[131] See also Warren, supra note 113, at 443 (noting opposition to creation of the Office of Education on the grounds that it was unconstitutional for the federal government to enforce educational standards).

no desire to exert power over local schools.[132] The Office affirmed this commitment to "federal aid without federal control" as one of its guiding principles.[133]

Over many decades, the Office of Education successfully lived up to its leaders' pledges of "non-interference." In 1948, after meeting with education lobbyists, conservative Republican leader Robert Taft made a dramatic conversion from opposing to supporting general federal aid.[134] He cited the Office's long practice of deference to state officials: "The record of the federal Office of Education has been very good. It has relied almost entirely on state boards of education. It has a history of not interfering in any way with their administration and of conducting a very simple operation."[135] Even with the agencies' cautious history, Congress periodically reinforced the "no federal control" principles by incorporating specific prohibitions on federal intervention in federal aid legislation, both proposed and enacted.[136]

The Office finally saw results from its cautious policies in 1950, when the agency's budget and powers grew significantly with the enactment of "impact aid."[137] That year, following the failure of broader school aid legislation, Congress instead expanded the wartime Lanham Act's program of federal funding for school districts burdened by large numbers of defense workers.[138] To do so, Congress enacted two measures providing grants to school districts that educated large numbers of federal children, Public Laws 815 and 874.[139]

Southern schools disproportionately benefited from the Office's major new aid program: Most school districts receiving impact aid funds were near military bases, and those bases were concentrated in Southern states.[140] In 1960, more than $63 million in those funds went to schools

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[132] In 1950, Commissioner Earl McGrath did it in this way: "I have repeatedly testified . . . that . . . [neither] the Commissioner of Education, nor any of his staff, has any desire or intention to interfere with the internal operation of education in the 48 states . . . ." Munger & Fenno, supra note 119, at 47.

[133] See, e.g., Annual Report of the U.S. Department of Health, Education, and Welfare 172 (1954) ("[T]he Office of Education . . . accepts the role of the Federal Government as that of assisting and strengthening the 48 State systems and their local school units with a view to helping them to carry on their responsibilities without Federal domination, control, or interference.").

[134] Diane Ravitch, The Troubled Crusade: American Education, 1945–1980, at 26 (1983).

[135] Munger & Fenno, supra note 119, at 84 (internal quotations and citation omitted). V.O. Key, Jr. similarly commented on the "cautious policies" of the agency's vocational education division in overseeing grants to the states, attributing that caution to the agency's fear of substantiating "the unfounded but recurrent charges of 'federal dictation' over a function historically locally controlled." Key, supra note 122, at 177.

[136] E.g., Gordon C. Lee, Policies for Federal Aid to Education: An Historical Interpretation, 1 Hist. Educ. J. 46, 52 (1949) (noting that contemporaneous federal aid bills "go to great lengths to prohibit the federal government from any interference whatsoever in the conduct of education" (emphasis omitted)). For example, the impact aid statutes contained provisions barring federal officials from exercising "any direction, supervision, or control over the personnel, curriculum, or program of instruction of any school or school system of any local or State educational agency." Act of September 23, 1950, Pub. L. No. 81-815, § 208(a), 64 Stat. 967, 975 (1950); Act of September 30, 1950, Pub. L. No. 81-874, § 7(a), 64 Stat. 1100, 1107 (1950).

[137] In 1945, the Office's budget was under a million dollars; by 1953, it was nearly $3 million. Lykes, supra note 117, at 165 tbl.8.

[138] Lanham Act, Pub. L. No.76–862, 54 Stat. 1125 (1940); see also Pub. L. No. 137, 55 Stat. 361 (1941).

[139] Act of September 23, 1950, Pub. L. No. 81–815, 64 Stat. 967 (1950); Act of September 30, 1950, Pub. L. No. 81–874, 64 Stat. 1100 (1950).

[140] See U.S. Comm. on Civil Rights, Civil Rights 198–99 nn. 115–116 (1963) (noting that 46% of military personnel were stationed in Southern and border states, and more than a third of impact aid payments went to those states between

in 11 Southern states—over $500 million in current dollars.[141] And impact aid quickly became so popular that even staunch Congressional opponents of federal involvement in schools supported it, while subsequent presidents failed in numerous attempts to cut or eliminate the program. [142]

Race, local schools, and "non-interference"

A key aspect of the federal education agency's "non-interference" was that its officials avoided intervening in Southern racial practices. Race dogged the fight for general federal aid from the start. Southerners feared federal involvement in schools would bring both centralized control and integration, arguing that aid was simply a "Trojan Horse" which "concealed the lurking foe—mixed schools."[143] An 1872 aid proposal backed by the Commissioner of Education had to be amended to specifically permit aid to segregated schools, but still failed.[144]

Early Commissioners of Education, reading the political winds, soon set a conservative precedent for the Office's approach to racial questions. Though the agency produced two early reports on black education, and the first two Commissioners called for improving resources for black schools, they went no further.[145] For example, the second Commissioner of Education, John Eaton, had been involved in the predecessor to the Freedmen's Bureau in the South, and voiced support for the idea of non-segregated schools in the abstract, but expressly opposed using federal

1951 and 1962). The grants were based on a formula that counted the number of children of federal personnel that the local schools educated, and their usage was largely unrestricted. See Integration in Public Education Programs: Hearings Before the Subcomm. on Integration in Federally Assisted Public Educ. Programs of the H. Comm. on Educ. & Labor, 87th Cong. 431–33 (1962) [hereinafter Integration] (Commissioner McMurrin) ("The funds that go to federally impacted districts for operational purposes are not audited from the Office of Education."). The rationale was that the funds replaced the property taxes that were not paid on federal land in the district.

[141] Wilkins & Aronson, supra note 102, at 28. Present day value calculated using Bureau of Labor Statistics "CPI-Inflation Calculator," https://www.bls.gov/data/inflation_calculator.htm, and calculating change between September 1960 and February 2018.

[142] Impact aid was made permanent in 1958. Act of Aug. 12, 1958, Pub. L. No. 85-620, 72 Stat. 548; see Miles, supra note 122, at 158 (Eisenhower once could not find a single member of Congress to sponsor an amendment reducing the program's funding); Heath, supra note 108, at 56–57 (calling the program a "boondoggle" that was impossible to kill).

[143] McAfee, supra note 130, at 115 (quoting 45 Cong. Globe, 42nd Cong., 2nd Sess. 8569 (1872) (Rep. McIntyre)); see also id. at 112 ("from [1871] on, mixed schools and federal involvement in public education were inextricably linked"); id. at 156 (describing propaganda that called Representative George Hoar's federal aid proposals "the Civil Rights Bill in disguise"—thus linking it to the controversial, and later-excised, provision in the pending civil rights legislation that mandated integrated schools).

[144] See 45 Cong. Globe, 42nd Cong., 2nd Sess. 882 (1872); McAfee, supra note 130, at 121. The bill's language requiring public schools to be free to all children triggered fears of federally mandated integration. H.R. 1043, 42nd Cong., §§ 7, 9 (1872) (as reported); 45 Cong. Globe, 42nd Cong., 2nd Sess. 855 (1872) (Rep. Harris); see also McAfee, supra note 130, at 115-18; Lee, supra note 136, at 52.

[145] McAfee, supra note 130, at 21; Warren, supra note 112, at 119–20, 163.

law to prohibit school segregation.[146] Eaton and others feared that Southern whites would abolish those states' nascent public school systems rather than see them integrated.[147]

The statute governing the Office's earliest grant program specifically directed officials to fund segregated schools, so long as states divided the federal funds equitably. In the 1890 Morrill Act, Congress barred racial discrimination but in an explicit "separate but equal" clause, specified that segregation was acceptable, so long as states equitably divided the funds between the white and black land grant colleges.[148] The Act empowered the Office to refuse to certify the states' eligibility for funds if the statutory conditions were not met—the first express withholding provision in a federal grant in aid.[149][150] When, however, the agency attempted to exercise this power by refusing to certify South Carolina's grant in 1892, Congress immediately overrode the decision.[151] In fact, the statute had expressly provided for states' appeal of such decisions to Congress, reminding agency officials where true power resided.[152]

Until at least the 1920s, it was thought "politically obvious" that no general federal aid to education legislation could be enacted without a provision expressly permitting aid to segregated schools.[153] In the 1920s and 1930s, federal aid proposals that barred aid to segregated schools failed.[154] Later statutory programs did not explicitly address the issue, and the Office steadily funded segregated schools, first, in the vocational education context, and then via impact aid. In the impact aid program, legislators included a provision barring local authorities from discriminating against federal children, but made it clear that they meant only discrimination vis-à-vis local children of their own race; a specific reference to providing such education in accordance "with the laws of the State" was intended to authorize state-imposed segregation.[155]

Civil rights leaders did not let federal funding of segregation go unnoticed. From early on, the NAACP fought for federal aid, but with safeguards against discrimination in the distribution

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[146] McAfee, supra note 130, at 129. After a federal integration mandate was defeated in Congress, Eaton described the legislation as "the expression of a theory of equality, right in itself, but which it would have been fatal at that moment to enforce." Walter J. Frazer, John Eaton, Jr., Radical Republican: Champion of the Negro and Federal Aid to Southern Education, 1869-1882, 25 Tenn. Hist. Q. 239, 253 (1966).

[147] Frazer, supra note 146, at 252-53; Alfred H. Kelly, The Congressional Controversy over School Segregation, 1867-1875, 64 Am. Hist. Rev. 537, 553-55, 558 & n.114, 561 (1959). During the Civil War, Eaton had played a key role in developing what was to become the Freedmen's Bureau, serving as General Superintendent of Freedmen in the Tennessee and Arkansas region. See Report of the General Superintendent of Freedmen, Department of the Tennessee and State of Arkansas for 1864, at 98 (1865).

[148] Second Morrill Act, ch. 841, 26 Stat. 417, § 1 (1890).

[149] Key, supra note 122, at 156. The Secretary of Interior was charged with certifying each state's entitlement to funds, or withholding the certification if the conditions were not met, and reporting to Congress; he delegated that responsibility to the Commissioner of Education. Lykes, supra note 117, at 21.

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[151] Key, supra note 122, at 161–62.

[152] Second Morrill Act, ch. 841, 26 Stat. 417, § 4 (1890).

[153] Lee, supra note 136, at 52; see also Daniel W. Crofts, The Black Response to the Blair Education Bill, 37 J. S. Hist. 41, 42–43 (1971) (discussing "separate but equal" requirements in Blair federal aid proposals of 1880s).

[154] Lee, supra note 136, at 52.

[155] Act of September 23, 1950, Pub. L. No. 81–815, 64 Stat. 967, 973 § 205(b)(1)(F) (1950). The House committee report explained: "This provision . . . is not intended to disturb . . . patterns of racial segregation established in accordance with the laws of the State in which the school district is situated." H.R. Rep. No. 81–2810, at 15 (1950).

of the funds, requiring equitable allocation of benefits to whites and blacks.[156] That position sometimes contributed to the defeat of federal aid, because Southern Democrats that would otherwise support aid for their cash-strapped schools would revolt. In fact, opponents of federal aid frequently supported anti-discrimination provisions as a strategic means to defeat such legislation.[157]

Beginning in 1949, the NAACP took a more aggressive posture toward federal aid legislation, fighting not just for equal distribution of funds but also against segregation itself. President Truman's Civil Rights Committee had urged in 1947 that federal funds should not go to segregated institutions.[158] But Truman did not throw his weight behind the recommendation. Instead, the NAACP took up the cause, lobbying for a statutory anti-discrimination mandate that would bar segregation in all federally funded institutions, even as it fought for a constitutional prohibition on segregation in the courts.[159] In 1949, the NAACP's convention resolved to fight to condition all federal aid on the absence of segregation, and Senator Henry Cabot Lodge offered an anti-segregation amendment to proposed aid legislation on the organization's behalf.[160]

After three important Supreme Court victories against segregation in 1950, the NAACP's leaders saw even less reason to support the flow of federal funds to segregated schools.[161] They concluded that such funding would simply strengthen the dual system and prolong the fight against segregation.[162] Clarence Mitchell, the NAACP's primary legislative representative, became the major force behind the organization's battle to condition federal funding on non-segregation. Mitchell told a national education conference in 1950 that the organization would challenge any federal aid legislation that lacked safeguards against funding segregation.[163]

Even as Mitchell worked unrelentingly toward this goal, a more provocative leader, Representative Adam Clayton Powell, became the public face of the crusade.[164] Powell, the

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[156] See Charles V. Hamilton, Adam Clayton Powell, Jr.: The Political Biography of an American Dilemma 223–27 (1991); Denton L. Watson, Lion in the Lobby: Clarence Mitchell, Jr.'s Struggle for the Passage of Civil Rights Laws 296–97 (1st ed. 1990).

[157] In an extreme example, in 1943, Senator William Langer attached an amendment to the federal aid bill requiring "separate but equal" expenditures across segregated schools, including equitable division of federal and state funds. The amendment was seen as ensuring the bill's defeat and the NAACP opposed it. Sure enough, the legislation failed. See Munger & Fenno, supra note 119, at 67–68; see also Federal Aid to Education, NASSP Bulletin, Nov. 1943, at 2, 88 (calling it "the nefarious Langer Amendment" and recording individual Senators' votes in the National Association of Secondary School Principals' bulletin).

[158] The Committee recommended that Congress formally condition "all federal grants-in-aid and other forms of federal assistance to public or private agencies for any purpose on the absence of discrimination and segregation based on race, color, creed, or national origin." To Secure These Rights: The Report of the President's Committee on Civil Rights 166 (1947).

[159] Federal Aid to Education, in 3 The Papers of Clarence Mitchell, 1946–1950, at clxvii (Denton L. Watson ed., 2010).

[160] Hamilton, supra note 156, at 225; Munger & Fenno, supra note 119, at 68–69.

[161] See Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Henderson v. United States, 339 U.S. 816 (1950).

[162] Federal Aid to Education, supra note 159, at clxvii.

[163] Id. at clxix–clxx.

[164] Hamilton, supra note 156, at 227 (stating that the Powell Amendment that ultimately emerged "was really the brainchild of the President's Civil Rights Committee in conjunction with the subsequent tedious political work for over a decade by the NAACP").

minister of a historic Harlem congregation, was the first black representative to be elected to Congress from New York.[165] As a Democrat, Powell was often at odds with the Southern wing of his party due to his civil rights advocacy—in 1956, the *New York Times* termed him the "country's most vocal crusader for Negro rights."[166] After 1950, Powell consistently worked with the NAACP to propose amendments barring segregation in programs receiving federal funds.[167] In 1955, with *Brown v. Board of Education* providing constitutional grounding for his position, Powell announced that he would attach his amendment to all new education legislation.[168] A legislative stalemate over federal aid and the "Powell Amendment" resulted.

In the face of the Congressional impasse, civil rights advocates pressured the executive branch for action instead, focusing on the federal education officials who supervised the flow of federal funds to Southern schools.[169] Gradually, they developed an argument that the Constitution barred any form of federal support for segregation, including federal funds, and that this constitutional mandate directly bound federal executive officials, regardless of whether Congress acted.[170]

However, the Office of Education itself had little reason to endorse this position. Nothing in the Office's mandates, structure, or past practices suggested that it would seek to enforce desegregation, and the agency's incentives for expansion militated against angering powerful Southerners in Congress. In 1960, the agency and its parent department, HEW, still did not have a single employee dedicated to civil rights.[171]

Structure, oversight, and staff

Although the Office of Education was an executive branch agency, Congress intentionally structured it in ways that made difficult for the White House to control. Within its parent department, HEW, the Office was perceived as "both incompetent and separatist."[172] That was no aberration: HEW itself was essentially a "holding company of agencies," each with its own history, politics, and norms, which made the department notoriously hard to govern for its Secretary.[173]

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[165] Adam Clayton Powell, Jr., Adam By Adam: The Autobiography of Adam Clayton Powell, Jr. 46–54, 62–68 (1971).
[166] Id. at 128.
[167] Hamilton, supra note 156, at 227–35.
[168] Powell, Jr., supra note 165, at 120.
[169] For a detailed discussion of their campaign for executive branch action, see infra Chapter 5.
[170] E.g., Wilkins & Aronson, supra note 102, at 4, 11–15.
[171] Miles, supra note 122, at 2. This is not to say that HEW was wholly inattentive to discrimination. As Karen Tani has shown, the department's welfare officials opposed states' attempts to exclude racial minorities from benefits in this period (though they did not attempt to regulate local segregation practices). Tani, Administrative, supra note 16, at 855–59, 867–73, 878–81; see also Willcox Memo, RG 235, Box 133, 138/161 (stating that, in contrast to segregation in federally funded programs, "[a] different question is presented if persons are wholly excluded from a program on grounds of race, as Arizona sought to exclude reservation Indians from public assistance").
[172] Keppel, supra note 105, at 33.
[173] Interview by Helen Hall with Ralph K. Huitt, former Asst. Sec. for Legislation and Cong. Relations, Health, Educ., & Welfare, Washington, D.C. at 4 (Sep. 17, 1969). A journalist covering HEW wrote in 1965: "The Secretary—and therefore the White House—has never been able to achieve any real control over the agencies. They have gone their own merry way for years, even in the old Federal Security Agency." Memorandum from Mike O'Neill to Doug Cater (Mar. 31, 1965) (on file with LBJ Library; Papers of Lyndon Baines Johnson, President, 1963–1969; Files of S.

HEW had been cobbled together through two different executive reorganizations, and Congress resisted creating more centralized political control in a department that conservatives viewed suspiciously, dating back to its origins as the Federal Security Agency under President Roosevelt.[174]

Since its establishment, HEW had faced "the antagonism of conservatives in Congress who had long fought against a Cabinet position that they associated with the welfare state and even socialism."[175] For legislators who wanted to rein in the department's social activism, keeping the many constituent agencies autonomous helped make it "easy for Congressional leaders to play on the interests of the separate bureaucracies in preventing the Cabinet officer at the top from becoming a figure of real influence."[176] In fact, Congress refused to vest legal powers over education in the HEW Secretary well after it transferred other constituent agencies' powers upward, "reflecting partly the influence of the education lobbies, partly the possessiveness of congressional committees, and partly the continuing hope of both that an organization handling education will some day be elevated to a Cabinet department."[177] The Secretary of the new Department also had to operate with a tiny, inadequate staff—another relic of the department's creation by executive reorganization authority.[178]

HEW's legal staff did provide one cohesive element stretching across the department's varied programs, including the Office of Education. The Office of General Counsel provided legal advice to all the program agencies, with its staff attorneys specializing in particular areas and often staying for decades.[179] Agency leaders intentionally created a centralized legal staff in the original Federal Security Agency structure in 1940 to secure "consistent legal advice . . . to avoid situations in which there would be conflict between the legal opinions of the various parts of the [organization]."[180] But because the lawyers were organized into divisions serving different program agencies, they also tended to acquire the perspective of those agencies after years collaborating with them.[181]

Douglass Cater; Box 13B). Secretary Abraham Ribicoff called the department unmanageable at his final press conference upon resigning in 1962. Miles, supra note 122, at 43.

[174] HEW was created when President Eisenhower used reorganization powers to elevate the old Federal Security Agency (FSA) to Cabinet status in 1953; President Roosevelt had created the FSA in 1939, using executive reorganization powers to bring together the various government bodies focused on health, education, and welfare. Miles, supra note 122, at 19. Roosevelt lacked the power to create a Cabinet Department under the reorganization statute of the time, so the FSA "became in everything but words a major department of the government" Id. at 18–19 (quoting Louis Brownlow, who had directed the committee that proposed the new agency).

[175] Fred Hechinger, Emphasis on Education: Gardner's Appointment to Cabinet Puts School Problems into Agency's Limelight, N.Y. Times, July 28, 1965, at 18.

[176] Id.

[177] Miles, supra note 122, at 65. However, Rufus Miles, a long-time department administrator, did not think that this formal allocation of authority was as important as it seemed, since Commissioners of Education could be fired at will by the president (and two had been since World War II). Id. at 65–67.

[178] Id. at 28.

[179] By the end of the Johnson administration, the ten highest-ranking attorneys in the Office of General Counsel, including General Counsel Willcox, had all served for at least twenty years in the office. Forward, General Counsel Alanson W. Willcox, Gen. Counsel, Forward, in Office of the General Counsel 2 (undated) (on file with LBJ Library; Papers of Lyndon Baines Johnson, President, 1963–1969; Administrative History; Volume I, Part III; Box 2).

[180] Miles, supra note 122, at 68.

[181] Id. at 69.

Even as education officials had the benefit of these seasoned lawyers, their activities were insulated from judicial scrutiny. Because the Office wrote reports and distributed grants, its activities were less vulnerable to judicial review than an agency engaged in regulation and enforcement might have been.[182] Under traditional standing doctrines, individual taxpayers could not challenge federal spending on the ground that it was unconstitutional.[183] Moreover, the Administrative Procedure Act of 1946 specifically exempted grant-making from notice and comment rule-making.[184]

While the Office of Education had significant autonomy from presidential and judicial oversight, Congress kept tight control over the agency. The agency's long fight to enact general federal aid for schools oriented it toward a difficult set of Congressional overseers, where Southerners wielded disproportionate power—most prominently, on a House committee on education that seemed determined to defeat that goal.[185] Given the legislative barriers to enacting the agency's favored legislation, education officials had strong external incentives to cater to Congressional conservatives, in order to protect the agency's existing programs and extend its mission by enacting general federal aid programs.[186]

In addition, federal education officials had significant reasons to align with the education lobbies. Most of the agency's personnel, including the Commissioner's top deputy, were career employees, often with strong relationships with the educational associations built over decades of joint work.[187] As a result, Commissioners could not always exercise control over the various

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[182] In 1964, Office of Legal Counsel (OLC) attorneys in the Justice Department pointed out: "There are very few judicial decisions involving a review of administrative action under grant programs. . . . no case has been found compelling a federal officer to make a grant, or invalidating any condition or requirement of a grant." Authority to Prohibit Discrimination in Employment on Federally Assisted School and Hospital Construction, at 7, 9 (unsigned OLC memo) (July 15, 1963) (on file with the Lyndon B. Johnson Library; Department of Justice 1961–1968 microfilm records; Department of Justice Legal Counsel; Roll 8 [hereinafter DOJ Roll 8]).

[183] See Massachusetts v. Mellon, 262 U.S. 447, 486–88 (1923) (ruling that individual taxpayer lacked standing to attack federal appropriation statute as unconstitutional). However, had the Office withheld funds from Southern school districts, they could have obtained review under specific statutory provisions. The impact aid statute funding school construction, for instance, explicitly authorized judicial review in such cases. Pub. L. No. 81–815, 64 Stat. 967, § 207(b).

[184] Pub. L. 79–404, 60 Stat. 237, § 4 (1946) (exempting "any matter relating to . . . public property, loans, grants, benefits, or contracts" from notice and comment requirements); see also Pasachoff, supra note 109, at 334.

[185] In the post-WWII period, the agency had dramatically different relationships with the two chambers of Congress and its respective Congressional oversight committees. The Senate generally favored aid to education, but the House presented major obstacles. Southerners chaired both committees. See Munger & Fenno, supra note 119, at 122; Wayne J. Urban, More Than Science and Sputnik: The National Defense Education Act of 1958, at 17–33 (2010); Stewart E. McClure: Chief Clerk, Senate Committee on Labor, Education, and Public Welfare (1949–1973) 106, 108, 186–87 (January 28, 1983) (on file with the Senate Historical Office, Washington, D.C.)

[186] The Office's incentives to curry favor with Congress were not motivated simply by officials' desire to see new programs created; many of the Office's grants programs required regular reauthorization, so it was important to keep Congress happy simply to maintain the office's existing funding. Cf. Pasachoff, supra note 109, at 334 (pointing out that "a large subset of grant statutes, unlike most other statutes, are subject to regularly scheduled reauthorizations and modification").

[187] See Beryl A. Radin, Implementation, Change, and the Federal Bureaucracy: School Desegregation Policy in H.E.W. (Department of Health, Education and Welfare) 1964-1968, at 41, 150 (1977). For example, Wayne Reed, Deputy Commissioner from 1957 to 1965, was a former state superintendent of education, principal, and teacher and

program divisions within the Office. "[B]usiness as usual" meant "the activities of the Office of Education [were] determined by autonomous bureaus within the Office (bureaus with intimate relationships with the education interest groups)."[188]

Even if the Commissioner could have exerted sharper control, it seems unlikely that many Commissioners would have deviated very far from the career staff or organized education groups' preferences. The Commissioners, the agency's career personnel, and members of the groups shared similar backgrounds and experiences. Education officials tended to come from public school teaching, school administration, or university-level schools of education and usually returned to similar positions when leaving the agency.[189] Further, many worked with the education groups, either after serving in the Office or even as consultants outside of office hours.[190] The Office's career employees' connections with the agency's organized education clientele were so dense that a former HEW official described the Office as a "daisy chain that resulted in an interchangeability between people using OE services and the people on the OE staff."[191]

Unsurprisingly, the Office tended to follow the leading education organizations' positions on race discrimination. Those groups explicitly opposed including anti-discrimination provisions in education grant programs. The National Education Association (NEA) was the largest and most influential of these groups.[192] Its long-time executive director, William Carr, advocated "gradualism and voluntarism" in school desegregation until he stepped down in 1966, viewing

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served as a liaison with the "Big Six" education associations from the late 1950s to the early 1960s. Id. at 149–150; Jean R. Hailey, W.O. Reed, Aerospace Education Pioneer, Dies, Wash. Post, Oct. 30, 1974, at B10. Rall Grigsby, who served as Deputy Commissioner between 1949 and 1952, then as head of the impact aid program during the 1950s and early 1960s, was a former assistant superintendent and teacher. Lykes, supra note 117, at 191–92; Rall Grigsby, Education Office Chief, Wash. Post, Sep. 1, 1975, at B11.

[188] Radin, supra note 187, at 186.

[189] Commissioners of Education, from the New Deal through the 1960s, were usually public educators, professors of education, or both. Afterward, they returned to education, working for educational publishers, education schools, university administration, public school systems, and the NEA itself. See McMurrin & Newell, supra note 106, at 309; L. G. Derthick Sr., 85, A U.S. Education Chief, N.Y. Times, Dec. 5, 1992, at 27; Glenn Fowler, Francis Keppel Dies at Age of 73; Was Commissioner of Education, N.Y. Times, Feb. 21, 1990, at A22; Marvine Howe, Earl J. McGrath, Education Chief Under 2 Presidents, Dies at 90, N.Y. Times, Feb. 5, 1993, at A18; Robert D. McFadden, Samuel Brownell, 90, Ex-Education Official, Dies, N.Y. Times, Oct. 14, 1990, at 34; Alfonso A. Narvaez, John W. Studebaker Dies at 102; Developed Educational Programs, N.Y. Times, July 28, 1989, at A10. One Commissioner during the 1930s resigned after only a year to direct the American Council on Education, a lobbying group for higher education. The Office's career employees were also from education backgrounds—as one uncharitable description put it, they tended to be "aging educators who wanted a quiet place to spend their last working years." Radin, supra note 187, at 31–32. The Office staff was also disproportionately from the South, Southwest, and Midwest. Id.

[190] Staff even made additional income as consultants for federal education grant recipients, outside of their normal working hours. In the words of a contemporaneous observer: "The agency was so inbred that one could not differentiate between the interests of state and local educators (and their organizational representatives) and those of individuals who were paid by the government." Radin, supra note 187, at 32.

[191] Id. at 31 (quoting a former Office of Education official).

[192] The NEA was a giant, well-funded professional education organization, representing more than 750,000 dues-paying members by the early 1960s, with members spread throughout every Congressional district. Beryl A. Radin & Willis D. Hawley, The Politics of Federal Reorganization: Creating the U.S. Department of Education 2, 7–8 (2013). The organization traced its origins to 1857; by 1957 it was the largest professional organization in the United States. Michael John Schultz, The National Education Association and the Black Teacher: The Integration of a Professional Organization 81 (1970).

integration as a threat to his association.[193] While the NEA was technically open to black members, it had a federated structure with state-level affiliates, which remained segregated in most of the South until the mid-1960s.[194] Several attempts to pass a resolution endorsing *Brown v. Board of Education* failed in the 1950s, and a mild statement of support did not emerge until 1961.[195] Though the American Federation of Teachers (AFT) was far more liberal on race and suspended its segregated affiliates in 1956, the organization was tiny compared to the NEA.

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The Office of Education's narrow focus and conservative character did not come about by chance. The agency's historical design rendered the agency politically dependent on both Congress and professional educators. The problem of how to address racial segregation and discrimination loomed over the Office from its origins—and by structuring the Office to have limited powers, while continually refusing to expand its role, Congress predisposed the Office to avoid questions of racial justice. Further, because of the agency's single mission focused on education, its personnel tended to come from similar professional educator backgrounds, sharing associations, experiences, and allegiances with the state and local school officials they served. As a result, its officials prioritized distributing federal grants for education, while steering clear of any hint of federal control or social controversy.

[193] Marjorie Murphy, Blackboard Unions: the AFT and the NEA, 1900–1980, 205–06 (1992).
[194] Id. at 201, 205.
[195] Schultz, supra note 192, at 71–126 (describing the annual convention battles to pass a strong resolution supporting integration). In 1958, Southern members staged a walk-out over a resolution simply to form a study committee on problems of integration. Id. at 87–90.

Chapter 5 Subsidizing Segregation

How then did the Office of Education understand equal protection mandates in the era of *Brown v. Board of Education*?[196] How did the agency justify directing federal taxpayers' funds to segregated schools? In this chapter, I examine the Office's approach to equal-protection principles in the years leading up to the Civil Rights Act of 1964. I probe federal education officials' legal approach in interpreting federal grant-in-aid statutes, applying *Brown*, advocating new federal aid legislation, and construing the agency's constitutional authority. I argue that the Office consistently prioritized an older set of constitutional commitments to limited federal powers, rather than to the emerging understanding of equal protection as integration. Throughout, I contrast the Office's legal positions with those of other federal actors; the gap in their interpretations suggests that the agency's unique institutional attributes helped shape its officials' distinctive constitutional interpretations.

Interpreting segregated education as "suitable" education

In the years immediately before *Brown*, federal education officials refused to apply anti-discrimination principles to the statutes they administered—despite the national policy in favor of integration, embodied in everything from President Truman's 1948 order integrating the armed forces to the Justice Department's express position that segregation violated the Equal Protection Clause.[197] The sharpest controversy arose in the context of "impact aid," the statutory program providing grants to schools educating federal children. Under both the Truman and the Eisenhower administrations, education officials emphasized states' traditional sovereignty over education and their own longstanding policy of "non-interference" in segregation.

The controversy first flared up during the late Truman administration. In spring 1951, Baltimore's black newspaper, the *Afro American*, reported that overt racial segregation persisted on federal military bases.[198] For example, at Fort Bragg, North Carolina, black soldiers' families were confined to a small, remote section of the base commonly called "Fort Bragg's Harlem," while black children were excluded from the base's "lily wh[i]te" schools and bussed to off-base Jim Crow schools instead.[199] As the *Afro American* pointed out, the federal government not only permitted such segregation but funded it with impact aid grants, paying local school authorities to operate segregated schools on federal bases throughout the South.[200]

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[196] 347 U.S. 483 (1954).

[197] Exec. Order No. 9981, 13 Fed. Reg. 4,313 (July 26, 1948); Brief for the United States as Amicus Curiae at 17, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[198] James Hicks, Army Ignores Truman Order; Hicks Sees No Mixed Units at Ft. Bragg, Afro-Am., June 2, 1951, at 1; see also Exec. Order No. 9981, 13 Fed. Reg. 4,313 (July 26, 1948) (integrating the armed forces).

[199] Id.; see also Afro Story Brings End to Bragg's JC Schools, Afro-Am., Oct. 27, 1951, at 1 (describing subsequent steps toward integration at Ft. Bragg).

[200] Louis Lautier, Sitting on "Ace in the Hole": 187 Million Earmarked for Federal JC Schools, Afro-Am., June 30, 1951, at 6. The Fort Bragg school was integrated that fall, but the Truman administration did not take broader action. See Afro Story, supra note 199. Truman vetoed an educational funding bill in fall 1951 that would have required segregation in all military base schools in the South, terming it a "backward step," but did not demand complete integration of schools on military bases, saying "It is never our purpose to insist on integration without considering pertinent local factors." School Bill Killed as Peril to Rights, Text of Memorandum, N.Y. Times, Nov. 3, 1951, at 10.

Civil rights leaders pressured the administration to bar segregation in schools serving military children. By early 1953, the NAACP's Clarence Mitchell convinced outgoing Assistant Secretary of Defense Anna Rosenberg to take up the cause.[201] She wrote the Commissioner of Education, challenging the Office's policy of funding segregated schools on federal bases. Rosenberg even suggested that the Office could reinterpret the impact aid statutes' reference to "suitable free public education" to exclude segregated schools, and thus halt the funding.[202]

But Commissioner Earl McGrath rejected that idea, suggesting that it would reflect federal overreach. In a press statement, McGrath cited Congressional intent and "the States rights principle of the control of education in this country"—a principle the Office of Education had observed for 85 years and that McGrath "heartily endorse[d]."[203] In another statement, the Commissioner sounded an even firmer note: "This . . . policy of observing State and local control has always prevailed within the Office of Education and will continue to prevail."[204]

After President Eisenhower took office, McGrath maintained this position. In a memo preparing the new HEW Secretary for a meeting with Clarence Mitchell, McGrath advised Oveta Culp Hobby that the Office's policy was "one of noninterference [with segregation], in keeping with the accepted principle of State and local control of education."[205] In a letter shortly afterward, Secretary Hobby reiterated the Office's position, writing that "schools located physically on military bases but operated by State and local authorities, are subject to the Constitution and laws of the States in which they operate."[206] In other words, federal policy could not override state sovereignty over education, even when local policies imposed segregation on the children of federal soldiers living on federal land.

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[201] See Clarence Mitchell, Jr., Recent Highlights in the NAACP Campaign Against Segregation in Schools on Military Posts and Additional Steps in Integration of Schools on Military Posts (Feb. 17, 1954), in 4 The Papers of Clarence Mitchell, supra note 59, at 405.

[202] Letter from Anna M. Rosenberg, Asst. Sec'y Def., to Earl J. McGrath, Comm'r Educ., (Jan. 10, 1953) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870–1980; Office Files, 1939–1980; Box 79; LL 2-3 SAFA, segregation (Rosenberg).

[203] Statement of U.S. Commissioner of Education Earl J. McGrath in Reply to Inquiries from the Press (Jan. 15, 1953) (on file in Commissioner Office Files, supra note 202). Though he rejected the idea of reinterpreting the impact aid statutes, McGrath wrote to Rosenberg that he would cede to any formal Defense Department policy decision requiring schools on the bases to be integrated. Letter from Earl J. McGrath, Comm'r Educ., to Anna M. Rosenberg, Asst. Sec'y Def. (Jan. 15, 1953) (on file in Commissioner Office Files, supra note 202).

[204] Statement by U.S. Commissioner Earl J. McGrath in Reply to Query from Mr. McNeil, Scripps Howard Press (Jan. 14, 1953) (on file in Commissioner Office Files, supra note 202); see also United Press (Segregation) (Jan. 15, 1953) (on file in Commissioner Office Files, supra note 202).

[205] Letter from Earl J. McGrath to Oveta Culp Hobby, Administrator (Mar. 2, 1953) (on file in Commissioner Office Files, supra note 202). The memo also emphasized the impact-aid statutes' constraints, while noting that the Office's policies were not discriminatory on their face: "The Acts themselves have no nondiscriminatory clauses in them. And in the administration of the Acts, there is not anything of record which designates whether a project is designed for one race or another." Id.

[206] 4 The Papers of Clarence Mitchell, supra note 59, at 349 n.14 (quoting Letter from Hobby to Senator Hubert Humphrey (May 18, 1953), NAACP WB-171, Library of Congress).

Facing the agency's commitment to the principle of "non-interference" with local schools, civil rights leaders sought to involve President Eisenhower. The president and his staff took a firm stand against segregation on federal bases. In March 1953, when asked by a black reporter about segregated schools on military bases, Eisenhower affirmed his previously-stated position that federal funds should not support discrimination:

> I have said it again and again: wherever Federal funds are expended for anything, I do not see how any American can justify—legally, or logically, or morally—a discrimination in the expenditure of those funds as among our citizens. All are taxed to provide those funds. If there is any benefit to be derived from them, I think they must all share, regardless of such inconsequential factors as race and religion.[207]

A week later, Eisenhower followed up by ordering on-base schools operated by federal authorities to be integrated.[208] On-base schools operated by local authorities required further study due to "complicating factors."[209]

Education officials opposed further steps. Soon after Eisenhower's order, the HEW Secretary argued to the President that they should not proceed with integrating those on-base schools that were run by local school districts, because federalism concerns militated against it.[210] Instead, she argued that they should wait for the Court's ruling in *Brown*. Hobby believed two fundamental principles were in conflict: "the principle of non-segregation and the principle of State and local responsibility for education"—and that "which of these two principles is dominant is a question of high policy."[211]

After civil rights leaders got wind of Hobby's arguments, they again publicized the problem, eventually forcing the White House to adjudicate between the competing principles of federalism and non-discrimination.[212] Eisenhower sent a public letter to Representative Adam Clayton Powell, affirming his support for the non-discrimination principle: "We have not taken and we shall not take a single backward step. There must be no second-class citizens in this country."[213]

Behind the scenes, White House aides adjudicated the quasi-constitutional conflict that the Office of Education had raised between federalism principles and the national policy favoring

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[207] The American Presidency Project, Dwight D. Eisenhower, The President's News Conference (March 19, 1953), http://www.presidency.ucsb.edu/ws/?pid=9798.

[208] The American Presidency Project, Dwight D. Eisenhower, Memorandum Concerning Segregation in Schools on Army Posts (March 25, 1953), http://www.presidency.ucsb.edu/ws/?pid=9803.

[209] Id.

[210] Letter from Oveta Culp Hobby to the President (Apr. 13, 1953), in 12 Blacks in the United States Armed Forces: Basic Documents 350–52 (Morris J. MacGregor & Bernard C. Nalty eds., 1977).

[211] Id. at 351. Hobby cited additional considerations, including the Office's preexisting understandings with local authorities and the potential that Congress might slash the impact aid program in retaliation for an integration order. Id. at 351–52.

[212] Powell, Jr., supra note 165, at 98–99.

[213] Id. at 100–01. Powell replied enthusiastically, calling the president's letter "a second Emancipation Proclamation." Id.

integration. Eisenhower's aides instructed education officials: "The policy of abolishing segregation in schools located on Federal property outweighed and overcame the long-standing policy . . . that education should be a State and local matter."[214] At least as to schools located on federal property, supported by federal funds, and educating federal children, the president had determined that states' rights had to give way.

Despite the White House orders, officials in the Office of Education continued to countenance segregation in on-base schools, leading the NAACP's Mitchell to write grimly of "stubborn resistance by local officials and sabotage by some Federal officials."[215] In November 1953, two new whites-only schools opened on federal bases in Texas.[216] In a letter to Assistant Secretary of Defense John Hannah, Mitchell denounced "bungling or outright defiance by underlings" of Eisenhower's order to end segregation in on-base schools, calling out officials within both the Defense Department and the Office of Education.[217]

Long-serving officials in the Office of Education continued to assert the principle of local control of schools. Rall Grigsby, a fifteen-year veteran of the Office and head of the impact aid program, complained to the Commissioner that the "new Federal policy [of barring segregation in schools on federal bases] is causing complications," given the prior assumption that it was acceptable for local authorities to operate segregated schools on federal property.[218] Grigsby proposed that one way to implement the new policy would be to educate military children to the extent possible in existing schools on federal bases, but send the remaining children who could not be accommodated in already-existing facilities to off-base segregated schools.[219]

Several months later, Secretary of Defense Charles Wilson circulated an unequivocal directive ordering on-base schools integrated.[220] Grigsby again voiced concern: A new whites-only school was slated to open at Craig Air Force in Selma, Alabama, within days.[221] Noting that the Defense Department order was "in contradiction" with the impact aid statutes' principle of allowing local authorities to operate schools for military children whenever possible, Grigsby suggested as a first option delaying the integration order to "permit this school to be opened and

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[214] Letter from Rall I. Grigsby, Dir., Div. of Sch. Assistance in Federally Affected Areas, to Dr. S.M. Brownell, Comm'r of Educ. (Nov. 25, 1953) (on file in Commissioner Office Files, supra note 202) (quoting an unnamed "White House representative" in conferences held on June 17 and 18, 1953).

[215] Clarence Mitchell, Jr., A Report From Washington (June 15, 1953), in 4 The Papers of Clarence Mitchell, supra note 59, at 362.

[216] Military's Racial Integration Is Sabotaged, NAACP Says, Wash. Post, Nov. 16, 1953, at 11; Segregated School Hit, N.Y. Times, Nov. 24, 1953, at 30.

[217] Military's Racial Integration is Sabotaged, supra note 216. Hannah later became the first head of the Civil Rights Commission. John T. McQuiston, John Hannah, 88, Who Headed Michigan State and Rights Panel, N.Y. Times, Feb. 25, 1991, at B10.

[218] Grigsby, supra note 214, at 2.

[219] Id at 4-5.

[220] C.E. Wilson, Sec'y Def., Memorandum for the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force (Jan. 12, 1954) (on file in Commissioner Office Files, supra note 202).

[221] Letter from Rall I. Grigsby, Acting Comm'r Educ., to Under Secretary of Health, Educ., and Welfare (Jan. 22, 1954) (on file in Commissioner Office Files, supra note 202).

operated by local school authorities on a segregated basis."[222] The alternative of opening the school on a "non-segregated basis" would require the Air Force to take over operations and cause "considerable delay"; another option would be to let the school sit unused and continue busing military children to local segregated schools off the base.[223]

Meanwhile, HEW lawyers refused to interpret the impact aid statutes' reference to "suitable free public education" to exclude segregated schools.[224] Under the statutory framework, that interpretation meant that the executive branch could not directly fund and operate integrated schools for military children on federal bases, so long as local segregated schools were deemed "suitable."[225] Instead, military children would be bused to segregated off-base schools, so long as factors like "crowding, adequacy, availability of facilities, etc." did not render them unsuitable.[226] Local school authorities would continue to receive their federal funding for educating those military children, even if they did so in segregated schools.

At the end of 1954, Clarence Mitchell concluded:

> The past year reveals that President Eisenhower remains committed to a policy of attacking racial segregation by Executive action. In several instances, subordinates have defied the Chief Executive's policy of refusing to permit Federal dollars to be used to promote discrimination. Others seek to slow down progress in this field.[227]

In early 1955, only two on-base schools had been integrated, and two more closed; seventeen more schools remained segregated.[228] Though the Secretary of Defense had originally committed to integrating all base schools by fall 1955, the process was not completed until 1959.[229]

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[222] Id.

[223] Id. Eventually the integrated option won out; Mitchell reported in June 1954 that the new school at Craig Air Force Base was to open that fall, operated by federal authorities. Clarence Mitchell, Jr., Desegregation by Presidential Order and Legislative Record of 1954 Candidates (ca. June 29, 1954), in 4 The Papers of Clarence Mitchell, supra note 59, at 428.

[224] Letter from Parke M. Banta, Gen. Counsel, to the Secretary & Under Secretary (Jan. 29 1954) (on file with National Archives at College Park; Record Group 235: Records of the Department of Health, Education, and Welfare; Office of the General Counsel; Division and Regional Legal Precedent Opinion Files, 1944-1974; Box 3; LL 2-3 SAFA, segregation (Rosenberg) [hereinafter OGC Opinion Files]).

[225] Id. Banta contrasted his interpretation with the Secretary of Defense's order, which indicated that if local authorities refused to operate integrated schools on the bases, "appropriate proposals will be prepared . . . to have the Office of Education provide non-segregated free public education in post facilities." Id. Instead, Banta wrote, "the Office of Education will [first] be responsible for ascertaining whether or not there is any local educational agency able to provide suitable education for children living on the military post, in facilities off base, whether segregated or not." Id. (emphasis added).

[226] Id.

[227] Clarence Mitchell, Jr., Annual Report (Dec. 31, 1954), in 4 The Papers of Clarence Mitchell, supra note 59, at 462.

[228] United Press, Segregation (Jan. 3, 1955) (on file in Commissioner Office Files, supra note 202). The press reported the military's plans to proceed with integration "despite feeling among the lower echelons in the armed services and the Office of Education that the military should not press ahead of the Court." Id.

[229] A number of segregated schools with long-term leases of federal land were allowed to persist, among other exceptions. See, e.g., Letter from Hugh M. Milton II, Asst. Sec'y Army, to Asst. Sec. Def. (July 16, 1956) in 12 Blacks in the United States Armed Forces: Basic Documents 381 (Morris J. MacGregor & Bernard C. Nalty eds., 1977); R.B.

The federal Office of Education continued to direct substantial sums to segregated off-base schools, which served the large majority of federal children. As Grigsby pointed out, otherwise the Office would have to "assume the responsibility . . . of providing integrated public education for all children residing on Federal property" in segregated States—a responsibility that ran against the principle of local control, and that the Office did not appear to want.[230]

Thus, though the President and the Defense Department had issued orders directing the integration of the on-base schools, and had even created the expectation that children living on the base would attend integrated schools in the future, the Office of Education continued to interpret the impact-aid statutes to effectively require the education of military children in segregated schools, run by local authorities.[231] Because local schools received federal funds based on every federal child that attended, any other interpretation would have meant fewer federal children in the local schools—and fewer federal dollars for the Office to disburse to local authorities. It took eight years after *Brown* before the Office would finally conclude that segregated education was not, in fact, "suitable" education.[232]

Reading, and Rereading, Brown v. Board of Education

The Office of Education also construed the equal-protection mandate of *Brown v. Board of Education* extremely narrowly. When the Supreme Court finally held school segregation unconstitutional on May 17, 1954, the justices spoke clearly: "Separate educational facilities are inherently unequal."[233] In *Bolling v. Sharpe*, the Court confirmed that the Fifth Amendment applied the same principle to the federal government.[234]

Civil rights leaders argued that the Court's decisions meant executive officials should immediately halt federal funding for segregated schools and universities under the existing land grant, college, vocational education, and impact aid programs. But education officials came to different conclusions, initially resting on their lawyers' conclusion that they could maintain the status quo as an interim position. Later agency leaders changed tactics, no longer justifying the status quo as a holding pattern. Instead, they adopted extremely narrow interpretations of equal protection, federal responsibilities, and the executive role in constitutional interpretation.

Anderson, Memorandum to the Sec'y of Def. (June 7, 1955) in id. at 358.; see also Robert Fredrick Burk, The Eisenhower Administration and Black Civil Rights 32 (1984) (describing the same exceptions).

[230] Letter from Rall I. Grisby, Director, SAFA, to Dr. S. M. Brownell, Comm'r of Educ. (Feb. 2, 1955) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1939-1980; Box 100; LL 2-3 SAFA, Segregation (Rosenberg)).

[231] See Letter from Parke M. Banta, supra note 224.

[232] See infra notes 341-342 and accompanying text.

[233] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[234] 347 U.S. 497, 500 (1954) ("In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

To Clarence Mitchell, the NAACP's chief legislative liaison, the meaning of *Brown* seemed obvious. Several days after the ruling, he told a Senate Labor subcommittee that providing federal aid to build segregated schools "would, in effect, repudiate the Supreme Court decision."[235] HEW's leaders and attorneys disagreed. Though the agency's lawyers concluded that the agency would lose any legal challenge to its continued support of segregated institutions, they found legal justifications for maintaining the status quo; they also counseled against opening the question with the pro-civil-rights Justice Department.

In a staff meeting soon after *Brown*, Secretary Hobby told her aides that the department "should follow the course we have always taken" of funding segregated institutions, at least until the Court gave more specific directions.[236] She also asked General Counsel Banta to explore possible actions by the department, preparing a draft submission to the Attorney General. In response, OGC attorneys offered a memo, entitled "Problems Arising in the Administration of Education Laws Because of Supreme Court Decisions Declaring Segregated Education Unconstitutional."[237]

The memo made two things clear: First, the agency's lawyers thought it obvious that *Brown* and *Bolling* directly impacted programs providing federal funding for segregated education, and that they would lose any subsequent litigation challenging such funding—given "the probable legal responsibility of the Department to avoid the use of Federal monies for an unconstitutional purpose which it can do by construing the [acts in question] consistent with the Federal Constitution."[238] The authors acknowledged "some legal support" for the principle that "an executive official is not authorized to question the constitutionality of the statute he administers if the statute . . . clearly authorizes the particular act."[239] But they ultimately thought reliance on that argument was "unrealistic and would invite immediate litigation which the Department apparently would be in no position to win."[240] They also noted that the agency had recently argued to the federal courts that the HEW Secretary had an interest in avoiding unconstitutional uses of federal funds.[241]

Second, the lawyers argued that the Department could put off halting funding to segregated schools for now—even though "it would be arguable that the Department may immediately apply the principles of the *Brown* and *Bolling* cases without awaiting the final decrees of the Court in

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[235] United Press, Schools (May 20, 1954) (on file in Commissioner Office Files, supra note 202).

[236] Letter from Parke M. Banta, Gen. Counsel, to the Secretary (June 22, 1954) (on file in OGC Opinion Files, supra note 224) (quoting minutes of the June 7, 1954, staff meeting).

[237] Letter from A.D. Smith, Asst. Gen. Counsel, Welfare & Educ. Div., to Parke M. Banta, Gen. Counsel (June 9, 1954) (on file in OGC Opinion Files, supra note 224).

[238] Id. Though the OGC attorneys recommended maintaining the status quo, their memorandum actually represents a fairly liberal view of Brown and Bolling, insofar as Smith and the other OGC attorneys concluded that the department would likely lose litigation challenging its funding of segregated schools, and emphasized the agency's responsibility to read its statutes in light of the equal-protection mandate. Id.

[239] Id.

[240] Id.

[241] Id. (citing the government's brief in State of Arizona ex rel. v. Hobby, No. 11,839, D.C. Cir.).

those cases."[242] Instead, the memo suggested a "wait and see" attitude, deferring action until the Court issued its remedial opinion and timetable in *Brown*. This passive approach, the lawyers argued, would be "in accord with the intent of the Supreme Court to postpone for a time implementation of its decisions."[243]

General Counsel Banta not only agreed with his attorneys' counsel that the agency should not immediately enforce *Brown*, but strongly advised Secretary Hobby that they should avoid consulting with the Justice Department. Banta wrote to Hobby saying that her plan to stick to "the course we have always taken" appeared "legally supportable."[244] Banta argued that consulting with the Justice Department could have unfortunate consequences for the agency.[245] Banta seemed to fear that the Attorney General, who had been a staunch advocate for civil rights, would press the agency to enforce *Brown* against the agency's best interest, overriding its longstanding "precedents" of non-interference: "[I]t is quite conceivable that the Attorney General, unless fully briefed, may become involved in a discussion as to the scope of our responsibilities under the Constitution with respect to the enforcement of the basic guarantees of the Fourteenth Amendment, as well as the due process clause."[246] He worried that "[t]he Attorney General's analysis may prove quite inconsistent with our considered thinking and with the precedents that we have built up and followed in this matter up to this time . . . ."[247]

Banta went on to argue that even if the Attorney General wished to play a coordinating function in determining federal agencies' constitutional stances, it was the courts that necessarily had that responsibility, not executive branch officials. "[T]he Attorney General cannot resolve our course."[248] Banta evidently did not wish to open the question of the agency's constitutional responsibilities to further debate and scrutiny, much less override by a civil-rights-minded Justice Department.[249]

In interpreting *Brown*, just as with the earlier question of segregated schools on federal bases, officials in HEW and the Office of Education took a different constitutional approach than

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[242] Id.

[243] Id.

[244] Parke M. Banta, Gen. Counsel, to the Secretary 1 (June 22, 1954) (on file in OGC Opinion Files, supra note 224).

[245] Id. at 1–2. Banta wrote, "An Attorney General's opinion setting forth rules for our guidance may leave us in a very awkward situation in specific cases, the relief of which might require us to go back to him before we could take the action which the situation seemed to demand." Id.

[246] Id. at 2.

[247] Id.

[248] Id. Banta suggested an administrative solution in the case of segregated hospitals receiving funding under the Hill-Burton Act, though.

[249] Commissioner of Education Samuel Brownell later recalled that he too had questioned the legality of federal funding for the segregated land grant colleges after the Brown decision. He proposed putting the land grant colleges on notice that they would not be certified for funding in subsequent years unless they began the process of integration, but HEW Secretary Marion Folsom ultimately stymied the proposal. In Brownell's words, "the position taken by the Department was... we'll not take any position on that at this time." Interview by Ed Edwin of Dr. Samuel M. Brownell, New Haven, CT 75-78 (June 6, 1967), Eisenhower Administration Project, Columbia Center for Oral History Archives, Rare Book & Manuscript Library, Columbia University in the City of New York [hereinafter "Brownell interview"].

other federal actors. In this case, the conflict apparently did not materialize, given the general counsel's advice to avoid consulting with the Attorney General.[250] Still, the gulf that Banta anticipated between his department and the Justice Department suggests that HEW and its education officials were situated differently in assessing federal responsibilities to enforce desegregation.

Four years later, in fall 1958, the department returned to the question of *Brown*'s meaning—and interpreted the Court's ruling even more narrowly. Massive resistance to school desegregation was in full swing by then. A number of school systems had closed entirely rather than integrate, leaving federal children without schooling—and raising sharp questions about maintaining federal funding for such districts.[251] HEW also had a new leader, Arthur Flemming, who took an active interest in school desegregation.[252]

That fall, Assistant HEW Secretary Elliot Richardson sent the new Secretary a memo on *Brown*'s implications for the impact aid program.[253] Richardson, as Assistant Secretary for Legislation, occupied a key political post. Earlier that year he had successfully shepherded the National Defense Education Act (NDEA) through the many legislative pitfalls that threatened federal aid legislation, and he continued to represent the department in its ongoing attempts to preserve and extend its grant programs.[254] That the memo came from him rather than the General Counsel's office suggested that it was not simply a matter of legal analysis, though Richardson was a highly credentialed lawyer.[255] In the memo, Richardson considered whether education

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[250] The Attorney General, Herbert Brownell, was Commissioner of Education Samuel Brownell's brother, which raises the question of how Banta thought it possible to avoid raising the issue. Perhaps he intended only to avoid doing so through formal channels. See id. at 3. Commissioner Brownell later recalled that he had "never discussed the matter" of Brown v. Board of Education during the period leading up to the Court's decision, though the Office of Education had provided research relevant to the case. Id. at 60, 74.

[251] Office of Civil Rights, Assistant Sec'y for Cmty. & Field Servs., at 87 (on file with LBJ Library; Papers of Lyndon Baines Johnson, President, 1963–1969; Administrative History; Volume I, Part III; Box 2) [hereinafter OCR, HEW Administrative History]. In Norfolk, Virginia, school closings harmed over 16,000 children of federal military personnel and civilian employees. Id.; see also J. Harvie Wilkinson III, From Brown to Bakke: The Supreme Court and School Integration: 1954–1978, at 82–86 (1979) (describing massive resistance).

[252] OCR, HEW Administrative History, supra note 251, at 85–86, 92.

[253] Memorandum from Elliot L. Richardson, Assistant Sec'y, to the Secretary (Oct. 4, 1958), (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1939-1980; Box 101; LL 2-3 Desegregation, Prince Edward Co.; Cong. Daniel's Committee (statements & miscellaneous—1962)).

[254] Miles, supra note 122, at 35, 71; Sundquist, supra note 129, at 174, 177–80. The NDEA was the largest package of federal aid to education ever at that point—framed as a response to Sputnik, the Soviet's 1957 launch of the first satellite, in order to upgrade the United State's science education, it included funding to improve science, foreign language, and math education, among other elements. See Pub. L. No. 85-864, Title III, 72 Stat. 1580, 1588–90 (1958).

[255] Richardson was a Harvard Law graduate and former clerk to Judge Learned Hand and Supreme Court Justice Felix Frankfurter, later to become HEW Secretary, Secretary of Defense, and then Attorney General under President Richard Nixon. He achieved his greatest fame for resigning rather than following Nixon's orders to fire the special prosecutor investigating the Watergate affair, Archibald Cox. Neil A. Lewis, Elliot Richardson Dies at 79; Stood Up to Nixon and Resigned in 'Saturday Night Massacre,' N.Y. Times, Jan. 1, 2000. A HEW staffer later described the memorandum in the department's Administrative History as "a synthesis of staff views and an analysis of legal issues." OCR, HEW Administrative History, supra note 251, at 88.

officials should rely on the Constitution or statutory interpretation to halt funds for segregated schools.

Richardson read the substantive equal protection mandate narrowly.[256] He argued that the Court's remedial decree in *Brown II*[257] provided a "grace period," as he put it, for segregated schools to remain so.[258] Therefore, no reasonable basis existed for withholding the impact aid funds based on segregation alone. The question was closer if the schools in question were in direct defiance of a court order to integrate, but Richardson still did not think the federal government's own constitutional obligations were at stake. Instead, he characterized the question as one of discretionary federal enforcement against the states: "The withholding of grants is a sanction which Congress may or may not employ as a means of forcing States to live up to their obligations under the Constitution."[259]

Even if one thought Congress might violate the Fifth Amendment by authorizing funding "to support a nonconstitutional activity," Richardson asserted that educating white children in a segregated school was constitutional.[260] He argued that segregation involved only the rights of black children refused admission to the white school, and was skeptical that "the continued education by the same authorities of other children is unconstitutional merely because it is segregated."[261] Thus, he believed resolution came down to policy considerations, which required "extended analysis" of a depth not possible in the memo.[262]

Richardson also considered whether the statutory requirement that the schools provide a "suitable free public education" could be interpreted to bar segregation, as Assistant Secretary of Defense Rosenberg had long ago argued at the NAACP's behest.[263] The General Counsel's office had informally opined that the "suitability" determination could not rest on segregation, given past administrative practice, the impact aid statutes' legislative history, and the House's recent rejection of an amendment that would have achieved this result. "Legal analysis, however, does not appear to foreclose the opposite view," Richardson acknowledged. Again, the decision rested on policy considerations.[264]

Thus, Richardson disposed of all the relevant legal arguments for withholding funds from segregated schools—by reading the statute, the Court's decisions, the federal government's responsibility to implement equal protection norms, and the Equal Protection Clause itself extremely narrowly. As the top HEW official focused on Congress, Richardson was keenly aware

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[256] Richardson, supra note 253, at 3.

[257] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[258] Richardson, supra note 253, at 2.

[259] Id. at 3.

[260] Id.

[261] Id.

[262] Id. at 4.

[263] See Act of September 30, 1950, Pub. L. No. 81-874, §6, 64 Stat. 1100, 1107 (1950) (charging the Commissioner, in cases where "no local educational agency is able to provide suitable free public education" with making other arrangements for "free public education" for children living on federal property); Richardson, supra note 253, at 4.

[264] Richardson, supra note 253, at 4.

of the potential repercussions for the agency of reading the equal protection mandate more expansively. And in subsequent debates over the Office of Education's authority to withhold funds from segregated schools, those who opposed any intervention relied on the Richardson memo.[265]

Though the agency's lawyers had predicted in 1954 that they would lose any litigation challenging their funding of segregated schools and universities, that litigation was not forthcoming during the 1950s. [266] The doctrine barring taxpayer standing to challenge unconstitutional federal expenditures impeded such suits.[267] Liberals in Congress would later cite the doctrine as a key obstacle to obtaining a judicial ruling on the question, and propose enacting special judicial review provisions to permit litigants to challenge the constitutionality of federal grants.[268] For the time being, the agencies' grants to segregated schools remained insulated from judicial review. As a result, the Office's interpretations of *Brown* endured, having avoided Justice Department override and judicial oversight.

Advocating federal aid—without discrimination safeguards

Even as they refused to reinterpret existing statutes and construed *Brown* narrowly, federal education officials also declined to support new legislation that would explicitly authorize them to enforce equal protection principles. They believed that it would be impossible to obtain any future congressional authorization for a broader federal role in education, if they were to assume the role of implementing *Brown*.

Throughout the Eisenhower and the Kennedy administrations, the Office of Education and HEW sought general federal aid to education, with support from both presidents. Eisenhower did so more reluctantly due to his ideological opposition to federal expansion, while Kennedy made his federal aid program a major domestic priority.[269] As part of those campaigns, the White House and the education agency's leaders uniformly opposed any attempt to attach anti-segregation

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[265] See infra note 331 and accompanying text.

[266] See A.D. Smith, supra note 237, at 3.

[267] See Massachusetts v. Mellon, 262 U.S. 447, 486–88 (1923) (noting that in the Frothingham case, which involved a taxpayer's suit alleging that the federal Maternity Act violated the Tenth Amendment, the Court ruled that taxpayers lack standing to challenge federal appropriations acts on the ground that they require taxation for unconstitutional purposes); see also Harry Kranz, A 20th Century Emancipation Proclamation: Presidential Power Permits Withholding of Federal Funds From Segregated Institutions, 11 Am. U. L. Rev. 48, 76 n.192 (1962) (noting that this doctrine, along with the lack of provision for judicial review in federal spending legislation, "has prevented challenges in the courts of existing Federal aid to segregated institutions").

[268] In a 1953 memorandum sent to participants in a NAACP conference on strategies to attack housing discrimination, Constance Baker Motley discussed the obstacles to challenging the use of federal funds to support segregated public housing. Memorandum from Constance Baker Motley, Racial Discrimination in Housing (ca. early 1953), Housing-General 1953, II:A311, NAACP Papers. The NAACP had filed a case in the D.C. District Court seeking to enjoin federal agencies from doing so, and Motley commented: "The difficulty we anticipate is with the standing of plaintiffs to seek this kind of remedy." Even so, she wrote, "this suit should . . . be pressed if for no other reason than the fact that it puts pressure on the federal agency to exert greater influence on local agencies to adopt open occupancy policies. It also embarrasses the federal government . . . ." Id. at 17–18. Motley also warned against joining federal defendants in other suits, since it would delay the cases and it was sufficient to sue the local housing authority and its director. Id. at 16–17.

[269] Munger & Fenno, supra note 119, at 104–05, 149.

provisions to the bills, fearing that such "Powell Amendments" would doom the legislation by driving Southern legislators out of the coalition supporting aid. Leaders in both administrations described questions of racial discrimination as matters for law enforcement or regulatory agencies—and school segregation as "extraneous" or a "side issue[]" unrelated to their own mission of improving schools.[270] They argued that attempts to pass such legislation would backfire to hurt children of all races.

When President Eisenhower began supporting federal grants for school construction in 1955, civil rights advocates initially believed Eisenhower would have to support an anti-discrimination provision in any federal aid bill, given his previous statements condemning discriminatory uses of federal funds. However, the administration firmly rejected an anti-segregation amendment. Eisenhower himself publicly opposed such amendments several times.[271] His aides explained that the president "insisted upon swift, purposeful progress" [in integration] only when an "undertaking . . . is predominantly Federal" and that he favored solely "encouragement and example" in "essentially local activities and traditions"—apparently referring to education.[272] Agency leaders, for their part, emphasized that their mission was education, not law enforcement. That fall on *Meet the Press*, the new HEW secretary Marion Folsom, a native Georgian, affirmed the administration's hands-off position on school segregation: "That is a matter for the courts to decide, as well as Congress. Our plan is just to build schools."[273]

Education groups also opposed an anti-segregation provision, reflecting the strategic incentives that they shared with education officials to get general federal aid enacted, at whatever cost. The NEA went so far as to circulate a memo arguing that the Powell Amendment was unnecessary and inappropriate, because no other federal grants to education contained such provisions and it was not proper for the Commissioner of Education to implement a judicial decree like *Brown* in any case.[274] In congressional testimony, the executive secretary for the powerful Council of Chief State School Officers called the segregation issue a "red herring" and argued that "there should be no mention of [segregation]" because "numerous other aids now in operation . . . have no reference whatever to segregation."[275] Thurgood Marshall provided a legal memorandum rebutting the NEA's arguments, but even liberals attacked the Powell Amendment as endangering

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[270] Eisenhower called the anti-segregation provision "extraneous" while Kennedy's HEW Secretary dismissed it as a "side issue[]." School-Aid Plan Stirs Race Issue, N.Y. Times, Feb. 21, 1961, at 23; Dwight D. Eisenhower, The President's News Conference (June 8, 1955), http://www.presidency.ucsb.edu/ws/index.php?pid=10253.

[271] See Ethel Payne, Ike's Anti-Bias Record All Talk, No Action, Chi. Defender, Aug. 20, 1955, at 4.

[272] See Proposed Legislation for Federal Assistance to States for School-Construction Purposes, Hearings Before the H. Comm. on Educ. & Labor, Part 3, 84th Cong. 824 (1955) [hereinafter 1955 House School Construction Hearings] (reproducing letter to Rep. Herbert Zelenko from Bryce N. Harlow, aide to President Eisenhower).

[273] Teachers' Pay Issue Local, Folsom Says, N.Y. Times, Sept. 5, 1955, at 26. Secretary Folsom did not appear inclined to support civil rights as a general matter; for example, he opposed including anything in the Eisenhower administration's civil rights bill of 1956 beyond the creation of a civil rights commission. Sherman Adams, Firsthand Report: The Story of the Eisenhower Administration 337 (1961).

[274] See 1955 House School Construction Hearings, supra note 272, at 1062–64 (statement of Clarence Mitchell and legal memorandum by Thurgood Marshall).

[275] Emergency Federal Aid for School Construction, Hearings Before the S. Comm. on Labor & Pub. Welfare, 84th Cong. 232–34 (1955) (testimony of Dr. Edgar Fuller); Ike's School Aid Bill Stirs Jim Crow Furore, Chi. Defender, Feb. 19, 1955, at 3.

the legislation, and it was rejected in committee.[276] That fall, at the White House Conference on Education, only a small minority of participants favored conditioning federal school aid on compliance with *Brown*.[277]

In subsequent years, fights over federal aid for segregated schools continued to pit education groups, the administration, and Southern aid proponents against civil rights advocates, while dividing Northern liberals.[278] In 1956, the forces favoring federal aid nearly triumphed. The House Committee on Education and Labor reported out an aid bill for the first time since 1934, but the coalition split apart on the House floor, as conservative opponents helped enact Powell's anti-segregation amendment as part of their strategy to defeat the bill.[279] The biggest story in the *NEA Journal* that year was the defeat of federal aid. The anti-segregation amendment drew the organization's special ire, with the article terming it (in bold print) "more than anything else [] the major contributing factor to the defeat" of the bill.[280] In fall 1956, the NEA again opposed anti-segregation provisions, arguing that attempts to enforce such conditions would "contradict[] the principle of federal aid without federal control."[281]

When President Kennedy began his own quest for general federal aid for education in Congress in early 1961, his administration also opposed an anti-segregation amendment.[282] White House officials and HEW leaders saw such actions as directly conflicting with their top priority in education: passing the administration's aid legislation. In February 1961, the new HEW Secretary Abraham Ribicoff expressly denied any intention to require desegregation as a condition for federal funding, stating that he lacked the authority to do so; he opposed a Powell Amendment for fear it would doom the legislation.[283] Both the HEW Secretary and the president emphasized that the federal government should not intervene in local authority over schools. Ribicoff called the administration's bill a "states rights" proposal, while Kennedy affirmed that "education must remain a matter of state and local control."[284]

In opposing anti-segregation safeguards, both the Eisenhower and the Kennedy administrations thus rejected the NAACP and its allies' argument that Congress had "a clear duty"

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[276] 1955 House School Construction Hearings, supra note 272, at 1062–64; School Aid, in CQ Almanac 1955, at 265–70 (11th ed. 1956), http://library.cqpress.com/cqalmanac/cqal55-1353260.

[277] Pearl A. Wanamaker & Edgar Fuller, How Can We Finance Our Schools—Build and Operate Them? in Texts of Reports of the White House Conference on Education, N.Y. Times, Dec. 2, 1955, at 22.

[278] See Sundquist, supra note 129, at 165–66 (noting that in 1956 leading Republican and Democrat advocates of federal aid all opposed an anti-segregation amendment, and that the subsequent House vote on the amendment sharply divided Northern liberals).

[279] Munger & Fenno, supra note 119, at 14. However, the voting records suggest that race was not actually the causal factor in the bill's defeat. Id. at 150–51.

[280] Schultz, supra note 192, at 80 (quoting the NEA Journal).

[281] Urban, supra note 185, at 113 (quoting the NEA Journal).

[282] John D. Morris, President Warns Loans Could Kill School-Aid Plans, N.Y. Times, Mar. 9, 1961, at 1.

[283] School-Aid Plan, supra note 270.

[284] Erwin Knoll, Kennedy Submits Plan for $5.6 Billion in Aid to Schools, Teachers, Wash. Post, Feb. 21, 1961, at A1; Powell Is Left No Alternative, Afro-Am., Mar. 4, 1961, at 4.

to ensure that states receiving federal funds complied with the Constitution.[285] Instead, they indicated that no constitutional conditions need accompany federal funding—and certainly not ones that could override states' traditional powers over education. In this case, the White House, HEW, and Office of Education were in lockstep, united by the goal of enacting general federal aid and maintaining Southern Democrats as crucial members of their legislative coalitions.

Resisting executive authority over the constitution

By the late 1950s, civil rights advocates increasingly argued that executive branch officials had the inherent constitutional power under Article II—if not the responsibility under the Fifth Amendment—to use their administrative powers to enforce the equal protection mandate. In plain terms, that meant shutting off federal funds to segregated schools.

Toward the end of the decade, a new federal agency joined these voices, exerting pressure on the Office of Education and HEW. The Civil Rights Act of 1957 had created the U.S. Commission on Civil Rights as a temporary, bipartisan body, and charged it with "apprais[ing] the laws and policies of the Federal Government with respect to equal protection of the laws," among other tasks.[286] When the Commission inquired into the Office's funding of segregation, a gulf quickly emerged in the two agencies' legal positions. After the Commission asked HEW to address discrimination in its programs, the agency justified its continued funding of segregated institutions, citing the various statutory mandates, educational needs, deference to the judiciary, and the limits of executive power.[287]

Leading members of the Civil Rights Commission disagreed with HEW's view of its responsibilities. In 1959, several members called for the agency to withhold funds from segregated universities, thus "act[ing] in accordance with the fundamental constitutional principle of equal protection and equal treatment."[288] The former dean of Howard Law School, George Johnson, went further and called for officials to withhold funds from all segregated schools, on the premise that all three branches bore independent responsibility for implementing equal protection, not simply the judiciary.[289]

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[285] 1955 House School Construction Hearings, supra note 272, at 1060 (prepared statement of Clarence Mitchell) ("Congress has a clear duty to require that any State receiving assistance must conform to the requirements of the Supreme Court's decisions handed down on May 17, 1954… [which] state that racial segregation in public schools is unconstitutional."); see also id. at 1064 (testimony of Clarence Mitchell) (likening the government to a "two-headed monster, with the Supreme Court . . . speaking one way and the Congress . . . voting another way"); Louis Lautier, In the Nation's Capital, L.A. Sentinel, Dec. 8, 1955, at A9 ("No member of Congress can keep his oath and vote to give federal aid to education to States which refuse to comply with the Supreme Court decisions.").

[286] Pub. L. 85-315, § 104(a)(3), (b), (c), 71 Stat. 634, 635 (1957).

[287] Letter from the Secretary, Dep't of Health, Educ., & Welfare to Gerald D. Morgan, Deputy Asst. to the President (July 16, 1959) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights); see also Report of the United States Commission on Civil Rights 321 (1959) (quoting HEW's reply).

[288] Report of the United States Commission on Civil Rights, supra note 287, at 329.

[289] Id. at 329, 556.

A year later, the Commission issued a scathing report detailing the federal government's support for segregation in higher education. The report asked bluntly: "Is the Federal Government itself guilty of unlawful discrimination as a result of subsidizing discrimination by a State or its agent?"[290] While acknowledging that no court had held that federal funding for segregation violated the Fifth Amendment, the Commission argued that at a minimum such subsidies constituted bad policy, and recommended that the executive, or if necessary Congress, act to assure that federal funds flowed only to non-discriminating public colleges and universities.[291]

Education officials forcefully rejected the Commission's legal suggestions. Assistant Commissioner Ralph Flynt, a twenty-six-year veteran of the Office, wrote a memo attacking the Commission's report and calling into question the ability of any executive branch body to resolve questions of constitutionality.[292] Flynt argued that no court had invalidated the 1890 Morrill Act's "separate but equal" clause and "there is manifest Congressional intent that the Acts be administered as they are. The Civil Rights Commission is not a judicial body—nor a legislative one—hence their arguments as to constitutionality cannot govern our administration of an Act of Congress."[293] That the Office of Education disagreed so sharply with the Commission highlighted how different the agencies were—the bipartisan, independent Commission designed for the single purpose of engaging questions of civil rights, versus the Office of Education, constructed to serve education interests without interfering in local schools.

As soon as President Kennedy took office, the debate over the executive branch's constitutional authority to enforce civil rights heated up. Reverend Martin Luther King, Jr., penned a clarion call for executive action, "Equality Now: The President Has the Power."[294] King condemned the federal government for its prior "self-nullifying" approach to civil rights, terming it "the nation's highest investor in segregation."[295] The *New York Times* previewed the constitutional arguments for withholding funds from segregated institutions on the president's first day in office.[296]

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[290] U.S. Comm'n on Civil Rights, Equal Protection of the Laws in Public Higher Education 180 (1960).

[291] Id. at 180, 266–67.

[292] Letter from Wilbur J. Cohen, Asst. Sec'y-designate, to Ralph Flynt, Asst. Comm'r of Educ. (Feb. 23, 1961) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights); Memorandum: Office of Education Views Regarding Commission on Civil Rights Report (Feb. 2, 1961) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights). Flynt, a native Georgian, alumnus of Princeton and the University of Virginia, and former schoolteacher, had begun working at the Office in 1934. Ralph Flynt to Visit Livingston, Tuscaloosa News, Nov. 12, 1964, at 12. Commissioner McMurrin recalled him as "a major player in the Office of Education" by the early 1960s. McMurrin & Newell, supra note 106, at 284.

[293] Memorandum, supra note 292, at 2.

[294] Martin Luther King, Jr., Equality Now: The President Has the Power, The Nation, Feb. 4, 1961, at 91.

[295] Id. at 92.

[296] Anthony Lewis, Administration Studies Moves on Integration: But Actions by Executive Can Stir Some Unwanted Repercussions, N.Y. Times, Jan. 22, 1961, at E4 (writing that the President might interpret the "take care" clause of Article II "to mean that he must not let any legislation be administered in an unconstitutional way—for example, let Federal money be used to reinforce segregation . . .").

Soon the primary legislative coalition of civil rights supporters, the Leadership Conference on Civil Rights (LCCR), delivered two memos to Kennedy, detailing the rampant discrimination in federally funded programs, and urging him to issue a sweeping order barring funding in such instances.[297] The LCCR memos pointed to the government's longstanding position against segregation, the Court's decisions in *Brown* and *Bolling*, congressional inaction, and the President's Article II duties to uphold the Constitution. "That the President has the constitutional authority to prohibit the expenditure of Federal funds in any instance where such funds are found to be used in a discriminatory manner seems to us to be beyond dispute."[298] And they suggested that the Fifth Amendment's prohibition of racial discrimination *required* the federal government to avoid supporting segregated institutions.[299]

Within the White House, however, political pragmatism reigned over constitutional considerations. Presidential aide Lee White noted the risks that even incremental steps might pose to education legislation, and firmly rejected the idea of a broad executive order barring discrimination in federally funded programs.[300] There were too many "areas in which we are not ready to move or in which other policy factors would override the desire to eliminate discrimination."[301] Moreover, the agencies might not comply with a presidential order. "[F]ailure of any department or agency to act—and there are some tough fields—could be construed as

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[297] Wilkins & Aronson, supra note 102; Arnold Aronson & Roy Wilkins, Priorities in an Effective Federal Civil Rights Program (Feb. 6, 1961) (on file with John F. Kennedy Presidential Library and Museum; Papers of John F. Kennedy; Presidential Papers; White House Central Subject Files; HU: Equality of Races (2): General, 1961: 16 June-31 July), https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHCSF-0361-004.aspx.

[298] Wilkins & Aronson, supra note 102, at 13.

[299] Id. at 11-12. The report's authors argued that the President had "the power to regulate the expenditure of Federal funds in such a manner as will be consistent with the Fifth Amendment and to set up the necessary administrative machinery to accomplish this purpose." Id. at 12-15. The Library of Congress came to more moderate, but similar conclusions in a memo addressing the president's power to withhold funds: a President who wished to deny funds "may conclude that he has not only the power, but under some circumstances even the duty to withhold payment of any funds to be used by the recipient for a purpose which the Supreme Court has indicated would be unconstitutionally discriminatory." 107 Cong. Rec. 8,067 (1961) (reproducing memo by the American Law Division, Library of Congress from March 1961, entitled "The Power of the President to Withhold Federal Funds from Educational Institutions Which Discriminate Among Students on Grounds of Race"). Senator Kenneth Keating (R-NY) argued even more strongly on the floor of the Senate: "It is my view that . . . the executive department would be required by the overriding mandate of the Constitution to prevent any Federal funds from going to schools operating in defiance of the law of the land." 107 Cong. Rec. 8,530 (1961) (statement of Sen. Keating).

[300] See Draft Memorandum for the President (Nov. 17, 1961) [hereinafter 11/17/61 Memo] (on file with John F. Kennedy Presidential Library and Museum; Papers of John F. Kennedy; Presidential Papers; White House Central Subject Files; HU: Executive, 1961: 11 May-15 November), https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHCSF-0358-012.aspx; see also, Memorandum from Lee C. White to the President (Nov. 13, 1961) [hereinafter 11/13/61 White Memo] (on file with John F. Kennedy Presidential Library and Museum; Papers of John F. Kennedy; Presidential Papers; White House Central Subject Files; HU: Executive, 1961: 11 May-15 November), https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHCSF-0358-012.aspx. The papers of the Assistant Attorney General for Civil Rights, Burke Marshall, contain similar notes on the risks that taking action would pose to education legislation. See Comm'n on Civil Rights, 1961 Report Recommendations 1 (undated) (on file with John F. Kennedy Presidential Library and Museum. Burke Marshall Personal Papers; Assistant Attorney General Files, 1958-1965 (bulk 1961-1964); Subject File, 1961-1964; Commission on Civil Rights, 1964 and undated), https://www.jfklibrary.org/Asset-Viewer/Archives/BMPP-031-002.aspx.

[301] 11/13/61 Memo, supra note 300.

inability on the part of the President to carry out his orders."[302] White concluded that the administration should offer a statement highlighting its commitment to ending discrimination, but simply tell HEW to study the possibility of more incremental reforms without publicity until some achievements were forthcoming.[303]

Scrutiny of the administration's support for segregation continued. In early 1962, for the first time ever, a Congressional body openly and systematically evaluated the South's compliance with *Brown*—and federal officials' role in funding segregated Southern schools.[304] Representative Adam Clayton Powell, in his new role as chair of the House Committee on Education and Labor, convened a special subcommittee to examine the government's ongoing support of segregated schools, through the land grant college, vocational education, and impact aid programs.[305]

In his appearance before the subcommittee, HEW Secretary Ribicoff emphasized that administrators were limited in their authority to interpret the Constitution, given countervailing statutory mandates.[306] Commissioner of Education Sterling McMurrin justified his agency's passivity by citing Congressional will, long administrative practice, the risk that states would withdraw from education programs, and the underlying "principle" of non-interference in state and local practices.[307] In other words, both leaders relied on all the factors that the education agency had long cited as constraining its ability to enforce *Brown*: the agency's statutory mandates, legislative history and Congressional will, educational policy goals, and the competing constitutional principle of traditional state sovereignty over education.

Back at the agency, HEW's General Counsel provided a legal analysis that firmly rejected the idea that the agency might withhold funding from segregated schools. In a memo to Secretary Ribicoff, General Counsel Alanson Willcox compared federal grants to a "gift."[308] Under existing

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[302] Id.

[303] White also recommended issuing Kennedy's long-awaited executive order on fair housing along with several more miscellaneous ones. Id.

[304] See Integration, supra note 140, at 264 (statement of C. Sumner Stone, Jr.).

[305] Id. at 13–82 (testimony of HEW Secretary Abraham Ribicoff and Commissioner of Education Sterling McMurrin); Letter from Adam C. Powell, Chairman, House Comm. on Educ. & Labor, to Sterling McMurrin, U.S. Comm'r of Educ., Dep't of Health, Educ. and Welfare (Feb. 5, 1962) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Court Decisions (segregation-integration) General).

[306] Integration, supra note 140, at 14 ("[T]he initial task of the Administrator is to observe carefully the boundaries marked out by Congress."). Statutes written in detailed, mandatory terms left him no alternative but to obey, even if the result was to provide federal funding to segregated institutions. Id. at 15 ("Sometimes the statute defines the Administrator's role with such precision that little if any administrative authority remains that might be used to end discriminations.").

[307] Id. at 62–66. McMurrin explained that the Office's remedial actions were limited "in some cases by the language of a statute, in other cases by quite clear legislative history as to the intent of the Congress, and in still others by many years of administrative practice." Id. at 63. Nor did the Office police the "separate but equal" requirements in prior laws like the Second Morrill Act, in keeping with its policy of "noninterference." McMurrin explained: "We have required . . . that . . . as a condition for receiving the funds, the States certify that the institutions, though separate, are equal. The Office of Education has simply accepted this certification made by the State." Id. at 66, 73.

[308] Memorandum from Alanson W. Willcox, Gen. Counsel, to the Secretary 1, 4 (April 25, 1962) (Frances White personal collection, on file with author).

law, he thought it unlikely that donating funds to an unconstitutional activity itself violated the Constitution. Willcox argued that administrative officials should not "project the Court's decision into areas where its applicability is open to serious legal doubt," given that the grant-in-aid statutes were expressed in mandatory, detailed terms.[309] The Justice Department "agreed informally," Willcox recalled later.[310] The General Counsel's later memos indicated that he based his position both on federalism principles and the pragmatic burdens that constitutional enforcement might place on HEW.[311] As the chief lawyer for the entire department, Willcox had to consider the question of constitutional enforcement as it might affect all the department's programs, not just its grants to schools.[312]

Outside the executive branch, though, commentators increasingly rejected the agency's legal position. During Representative Powell's 1962 subcommittee hearings, the NAACP's Clarence Mitchell and Senator Kenneth Keating (R-NY) argued that executive branch officials were duty-bound to obey the Constitution, and that federal grants for segregated schools violated the Constitution.[313] The Library of Congress's analysis also supported this proposition.[314] Further support began to appear in the pages of law reviews.[315] By 1963, Harvard Law School Dean Erwin Griswold testified to Congress that the executive had the constitutional power to withhold funds.[316]

In spring 1963, Congressional liberals once again asked HEW to take stock of its support for segregation and clarify its legal position. Senators Jacob Javits (R-NY) and Phillip Hart (D-MI) sent formal inquiries to a number of federal agencies, asking about their views of their legal

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[309] Id. at 1 n.1, 2; cf. Pasachoff, supra note 109, at 315 (noting that Congress is especially likely to object to agency efforts to withhold funds from mandatory programs).

[310] Letter from Alanson W. Willcox, Gen. Counsel, to Professor Archibald Cox 1–2 (Sep. 10, 1968) (Frances White personal collection, on file with author).

[311] Memorandum from Alanson W. Willcox, Gen. Counsel, to Sec. Wilbur Cohen 2 (Sep. 13, 1968) (Frances White personal collection, on file with author); see also Tani, Administrative, supra note 16, at 878–81 (discussing HEW attorneys' reliance on the Social Security Act as a basis for applying equality principles to the agency's welfare programs, as a way to avoid "the segregation landmine" that might arise if the agency relied on equal protection principles, which would presumably apply to all its programs).

[312] Willcox to Cohen, supra note 311, at 3 (citing the potential need for constitutional oversight in child welfare services, addiction treatment, church-state issues, mental health programs, medical experimentation, and family planning services).

[313] Integration, supra note 140, at 203, 431.

[314] 107 Cong. Rec. 8,067 (1961).

[315] See Kranz, supra note 267, at 49, 78 (arguing that the president has the power to withhold funds from segregated institutions based both on the relevant statutes and the Constitution itself); Daniel H. Pollitt, The President's Powers in Areas of Race Relations: An Exploration, 39 N.C. L. Rev. 238, 274 (1961) (suggesting that the HEW Secretary could refuse hospital grants to states that authorized segregation); see also Arthur Selwyn Miller, Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making, 43 N.C. L. Rev. 502, 533–34 (1965) (arguing in favor of the view that "the command of the Constitution is that executive officers have a duty in the disbursement of funds to take action to insure that the recipient does not discriminate"). But cf. Robert E. Goostree, The Power of the President to Impound Appropriated Funds: With Special Reference to Grants-in-Aid to Segregated Activities, 11 Am. U. L. Rev. 32 (1962) (arguing against any broad executive power to withhold funds from segregated institutions).

[316] Civil Rights—Public Accommodations: Hearings before the S. Comm. on Commerce on S. 1732, A Bill to Eliminate Discrimination in Public Accommodations, 88th Cong. 805 (1963) (testimony of Dean Erwin Griswold).

authority to withhold funds from discriminatory programs under existing law.[317] In June, a HEW official forwarded the agency's draft response to the White House, which bluntly rejected any constitutional power to withhold funds from segregated institutions. "We have not believed that the Constitution affords us justification for withholding grants which the Congress has directed us to make."[318] The department continued to study the problem, but it relied on the absence of case law to conclude that federal grants supporting segregation did not inherently violate the Constitution.[319] To find otherwise would expose HEW to the potential task of attempting to police its grant recipients' constitutional violations, of any sort, as General Counsel Willcox had pointed out.[320]

Throughout both administrations, education officials held firmly to the position that the Constitution did not empower or require them to prevent federal funds from supporting segregation. The Commission on Civil Rights (and some leading law professors) eventually disagreed, as did the Library of Congress's research arm. By 1963, the Wall Street Journal even reported that high administration officials were shifting their views.[321] But the Office of Education had managed to stay steadfast.

Reinterpreting federal statutes, grudgingly

In the 1960s, presidential pressure began to overcome the Office of Education's resistance to halting support for segregated schools. Education officials haltingly began to reinterpret (or, at least, consider reinterpreting) their governing statutes. Those efforts originated with a small internal task force, originally formed in the HEW Secretary's office to respond to the U.S. Commission on Civil Rights' inquiries of the late 1950s.[322] The civil rights task force's proposals drew harsh criticism within the Office of Education, but they eventually served as a template for incremental reforms under the Kennedy administration. Even with direct White House pressure and support from the agency's leaders, though, career staff and lawyers met proposed reforms with grumbling and resistance—continuing to cite contrary legislative intent, the need to defer to state and local control over schools, and the possibility that pursuing integration would simply hurt educational goals, without helping children.

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[317] 109 Cong. Rec. 12,089–12,115 (1963) (statement of Sen. Javits).

[318] Proposed Answers to Javits-Hart Letters 10 (June 14, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Court Decisions (segregation-integration) General).

[319] Id. at 10, 12.

[320] Id. at 11 (reasoning that a grant recipient's Fourteenth Amendment violation "does not automatically call for Federal administrative action" given that federal authorities did not police First Amendment or procedural due process within grantee institutions).

[321] Joseph D. Mathewson, Pressure Tactic: Government Readies Cutoff in Federal Aid to Force Integration, Wall St. J., Aug. 6, 1963, at 1.

[322] Memorandum from Jarold A. Kieffer, Asst. to the Sec., to Parke M. Banta, Gen. Counsel (Mar. 16, 1960) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights).

In August 1960, the HEW task force produced a Staff Paper on Civil Rights, after "a very hard process."[323] The Staff Paper laid out a litany of discrimination in the programs HEW funded, though the authors originally soft-pedaled their findings as "some inconsistencies and problems in civil rights matters."[324] Describing the area of federal funding for segregation as full of "untested legal theories" and little statutory or regulatory guidance, the authors nonetheless concluded that a reasonable legal basis existed for taking action against discrimination in certain instances, through arguments based on statutory interpretation.[325] For example, the report endorsed the idea of reinterpreting the phrase "suitable free public education" in the impact aid statutes to exclude segregated education, which would permit the Commissioner to establish integrated schools on bases and thereby redirect federal funds away from the local segregated schools.[326]

In separate sections of the Staff Paper, HEW's program agencies offered their own views, disagreeing with the legal analysis and presenting a laundry list of legal and policy arguments against taking action.[327] Those arguments were familiar ones, resting on federalism, the limited scope for executive officials to administratively enforce constitutional rights, and the political risks to education programs. In Appendix A to the August Staff Paper, the Office of Education provided an even more strongly worded argument against taking any concrete action, proposing "persuasion" instead.[328]

The Staff Paper "caused a great stir within the Department."[329] Office of Education officials sharply criticized it, even with the inclusion of their dissenting views. Commissioner of Education Lawrence Derthick wrote Secretary Flemming in September 1960, arguing:

> The Paper does not come to grips with the basic policy question of how Departmental programs are to be viewed in their relationship to civil rights: ie., should the Department proceed on the basis of carrying out its legal responsibilities or should it go further and use its programs as a positive force to achieve a purely social objective?[330]

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[323] OCR, HEW Administrative History, supra note 251, at 105, 108 (quoting Dr. Joseph H. Douglass, a leader of the task force).

[324] Office of Program Analysis, Office of the Sec'y, Dep't of Health, Educ., & Welfare, Staff Paper on Civil Rights for Secretary's Staff Meeting 2 (Mar. 7, 1960) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 133; 000.9 Civil Rights).

[325] Office of Program Analysis, Office of the Sec'y, Dep't of Health, Educ., & Welfare, Staff Paper on Civil Rights for Secretary's Staff Meeting 15–23 (Aug. 19, 1960) [hereinafter Aug. 1960 Staff Paper] (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 133; 000.9 Civil Rights).

[326] Id. at 42, 53.

[327] Id. at 35, 54.

[328] Id. at 62–69.

[329] OCR, HEW Administrative History, supra note 251, at 113.

[330] Memorandum from L.G. Derthick, Comm'r of Educ. to the Secretary 1 (Sep. 7, 1960) (underlining in original) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 181; LL 2-3 Civil Rights (Rosenzweig)).

Rall Grigsby, head of the federally impact aid program, forwarded more criticisms. Grigsby disagreed strongly with the idea that department could find off-base segregated schools not "suitable" under Public Laws 815 and 874 without severe repercussions, and recommended that Elliot Richardson's 1958 memo as to the legal pros and cons of a "suitability" ruling be consulted.[331] For his part, General Counsel Banta apparently disagreed with a basic legal premise in the paper: "that in the absence of enabling legislation, the grant-discrimination liaison could be related to Constitutional obligations."[332] To Banta, a later agency official wrote, "the only proper relationship for these questions, and in any case the governing one, was to statutory law and statutorily-conferred obligations."[333]

As the Eisenhower administration wound down, HEW's Office of Program Analysis developed a final template for action on civil rights. At the Secretary's request, they created "a checklist categorizing the various departmental programs where racial discrimination occurs according to where the possible Executive authority to eliminate such discrimination is clear, debatable, or entirely lacking."[334] Using what they acknowledged to be a deliberately conservative approach, the authors hewed close to the statutory text, classifying HEW grants and awards made with "discretionary" authority as providing "clear" authority to act, while those with mandatory formulas but some open-ended language in the authorizing statute were termed "debatable."[335] Statutes that contained clear endorsements of segregation (e.g., the Second Morrill Act) or bars on federal interference with administrative matters (e.g., the NDEA) were classified as areas where executive authority was "lacking." The checklist's authors also cited the "long administrative history" of sanctioning segregated schools as a reason for inaction in certain areas.[336]

Though the Staff Paper and the civil rights checklist offered only modest reform proposals, both remained unused at the end of the Eisenhower administration. Lacking political support from above, the small core of civil rights proponents on the task force had been unable to overcome education officials' strong resistance to taking even mild actions that might risk Congressional retribution or fray their ties to their primary constituencies, state and local education officials (and

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[331] Memorandum from Rall I. Grigsby to Lucille Anderson, Admin. Asst. to Comm'r 1-2 (Sep. 2, 1960) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 181; LL 2-3 Civil Rights (Rosenzweig)).

[332] OCR, HEW Administrative History, supra note 251, at 113 (citing a review of the General Counsel files).

[333] Id.

[334] Memorandum from Jarold A. Kieffer to the Secretary, Dep't of Health, Educ. And Welfare (Jan. 9, 1961) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights).

[335] Id.; Office of Program Analysis, Office of the Sec'y, Dep't of Health, Educ., & Welfare, Staff Paper on "Checklist" on Civil Rights for Secretary's Staff Meeting (Jan. 5, 1961) [hereinafter Checklist] (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights). The distinction between mandatory and discretionary grants likely reflected not just legal considerations, but also political considerations. See Pasachoff, supra note 109, at 314–15 (noting that "different types of grants are . . . subject to different political forces" and that Congress may object more to cutting off ongoing formula grants than one-time project grants, and more to cut-offs of mandatory grants than discretionary ones).

[336] Checklist, supra note 335.

their various professional associations).[337] As the task force's leader recalled later, "We were few and our voices were feeble."[338]

Under the Kennedy administration, the political calculus in the White House shifted. As the administration wore on and JFK failed to take the kinds of bold actions on civil rights that he had promised during the campaign, the White House came under significant pressure from its liberal allies to show some progress. In a draft of his 1961 memo to Kennedy discussing the possibilities for a civil rights program, aide Lee White had noted that HEW was prepared to at least "explore" steps toward requiring integration in schools receiving impact aid, the land grant colleges, and vocational education, though the department was "leery" of acting on impacted area schools.[339] Behind the scenes, the White House encouraged those steps.[340]

The most visible legal shift came in direct response to Representative Adam Clayton Powell's ad hoc subcommittee investigation in 1962. After sharp questioning from the subcommittee members and under public scrutiny, HEW leaders relented slightly. In March 1962, a month after his first appearance denying any power to address segregation, Secretary Ribicoff returned to testify again. Ribicoff now declared that "suitable" education under the federal impact aid statutes could no longer be understood to include segregated education—an interpretation that would allow him to set up integrated schools for children on federal installations in places where local schools were segregated.[341] The legislative history of the statutes indicated that the enacting Congress understood "suitable" differently, but Ribicoff had decided that the text's broad language empowered him to make his own determination.[342] Though Ribicoff added many caveats, the policy shift appeared dramatic, given his own claim just a month earlier that the statute left him no discretion.[343]

The new policy engendered resistance from the Office of Education's staff, both overt and subtle. Career officials there had opposed the ruling before Ribicoff acted. An assistant director for the impact aid program, B. Alden Lillywhite, sent a memo arguing against action.[344] Like Rall

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[337] For a list of such education groups, see, e.g., Meeting with Representatives of Education Associations (ca. Jan. 29, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 101; LL 7-5 Legislative proposals (General)) (listing attendees from education associations).

[338] OCR, HEW Administrative History, supra note 251, at 101.

[339] 11/13/61 White memo, supra note 300, at 2–3.

[340] See, e.g., Memorandum from Lee C. White to Honorable Anthony J. Celebrezze (June 24, 1963) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights) (praising HEW for "significant progress" in other areas and encouraging further steps with respect to vocational education, public health grants, and land grant colleges).

[341] Integration, supra note 140, at 456.

[342] Id. at 455–56.

[343] See supra note 306 and accompanying text.

[344] Memorandum from B. Alden Lillywhite to Dr. Peter Muirhead 2–3 (Mar. 21, 1962) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: SAFA). Lillywhite, before coming to the Office of Education in 1950 as an assistant commissioner had been a staff member of the House Committee on Education and Labor (under chair Graham Barden, a notoriously conservative Democrat from North Carolina), and assistant director for federal grants and loans for

Grigsby before him, Lillywhite highlighted the financial costs of establishing and maintaining integrated schools. He thought the unprecedented step of federal authorities operating so many schools would run contrary to the very purpose of the impact aid statutes, which was "to avoid such a situation."[345] Lillywhite feared educational quality would suffer both in the new schools and in the local ones deprived of federal funds.

Lillywhite did acknowledge that *Brown* made it "difficult . . . to maintain that the fact of segregation ought not to be considered in determining suitability."[346] But he argued that removing federal children from local schools might retard integration, by removing their positive influence and depriving the federal government of valuable leverage over local authorities.[347] Though Lillywhite's worries did not ultimately stop the Secretary from acting, they reflected long-repeated concerns from federal education officials over the consequences of implementing *Brown*.

After Ribicoff announced his reinterpretation of "suitable" education, the impression spread that Ribicoff had cut off federal impact area funds to all segregated schools in the South.[348] The actual effect of Ribicoff's new interpretation was much narrower, though. Under the impact aid statutes, the new interpretation authorized the Office of Education to fund and operate integrated schools on federal installations—potentially diverting funds from local segregated schools, but only insofar as the Office actually built and opened new schools, and federal children living on the bases actually chose to shift from local schools to those new federal ones.[349]

Publicly, education officials emphasized how narrow the suitability ruling was, retreating from its more radical implications. When the White House forwarded a letter from Mississippi that began, "Your Mr. Ribicoff's plan to cut off federal funds for segregated schools is about the most brazen attempt at dictatorship attempted in this country in a long time,"[350] the Commissioner's assistant assured the writer that "No money is to be withheld."[351] He explained "local schools will be paid for every federally affected child in attendance"—though he acknowledged that fewer

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public works at the Federal Works Administration. Obituaries, Wash. Post, Jan. 3, 1996, at D5; McClure, supra note 185, at 94; Powell, Jr., supra note 165, at 199-200; Barden, Graham Arthur, Biographical Dictionary of the United States Congress, http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000139.

[345] Lillywhite Memo, supra note 344.

[346] Id. at 3.

[347] Id.

[348] Meeting of the Subcabinet Group 3–4 (Nov. 30, 1962) (on file with National Archives at College Park; Record Group 453: Records of the United States Commission on Civil Rights, 1957-1996; Records Relating to Special Projects, 1960-1970 [hereinafter USCCR Special Projects, RG 453, NARA II]; Box 31; WH/KA - Subcabinet Group on Civil Rights (memoranda) [1961-1963]).

[349] See Act of September 30, 1950, Pub. L. No. 81-874, §6, 64 Stat. 1100, 1107 (1950) (charging the Commissioner, in cases where "no local educational agency is able to provide suitable free public education" with making other arrangements for "free public education" for children living on federal property).

[350] Letter from George Johnson, Jr. to John F. Kennedy (Apr. 3, 1962) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: SAFA).

[351] Letter from Robert M. Rosenzweig to George Johnson, Jr. (May 10, 1962) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: SAFA).

children might attend once integrated schools were offered as alternatives.[352] Secretary Ribicoff also worked to limit expectations that the policy might be extended. To Representative Charles Diggs (D-MI), who had asked that the policy be extended in order to bar federal aid to segregated universities,[353] he responded that the action was grounded in the language of P.L. 815 and 874, hence "does not establish a precedent which can be extended to other Federal programs."[354]

Career officials also worked to limit the practical impact of Ribicoff's suitability ruling. In April 1962, Rall Grigsby suggested restricting the policy's application, emphasizing the many unknowns concerning the 360 federal installations, 242 school districts, and some 58,000 children that attended off-base schools in the 17 states with de jure segregation.[355] Citing legal uncertainties, he concluded that arranging for integrated education for all children in all affected states "would not be practicable nor would it in some instances appear to be necessary beginning in September 1963 [the date Secretary Ribicoff had set for implementing the ruling]."[356] The agency ultimately limited the ruling to bases serving 200 or more schoolchildren, applied it only to elementary students, and did not apply it in places where desegregation litigation was already pending.[357] In 1963, the administration determined that it would build eight new elementary schools on bases for the fall.[358] Even with this limited application, though, the New York Times

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[352] Id.

[353] Letter from Charles C. Diggs, Jr. to Abraham A. Ribicoff (May 16, 1962)(RG 12 Education Commissioner Box 100).

[354] Letter from Abraham Ribicoff, Sec'y, Dep't of Health, Educ., & Welfare, to Rep. Charles C. Diggs, Jr. (June 8, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: SAFA). Diggs was the first black representative elected from Michigan, and the first chair of the Congressional Black Caucus; he served in the House from 1955 to 1980. Jennifer E. Manning & Colleen J. Shogan, Cong. Res. Serv., African American Members of the United States Congress, 1870-2012, at 20 (2012).

[355] Memorandum from Rall I. Grigsby, Dir., Sch. Assistance in Federally Affected Areas, to Sterling M. McMurrin, U.S. Comm'r of Educ. 3 (April 17, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: SAFA).

[356] Id. Grigsby raised a number of legal questions: Were segregated schools suitable for white children, if no black children lived on the base in question? Was education sufficient if a district integrated the particular school serving on-base children, but not its other schools? If the number of children were too small to support a robust school, then Grigsby suggested that a segregated school off-base actually would be "more 'suitable'. . . than would be that which it would be practicable to arrange on-base." Id. at 2-3.

[357] Francis Keppel, Comm'r of Educ., to Lisle C. Carter, Jr., Deputy Assistant Sec'y, Dep't of Health, Educ., & Welfare (May 8, 1963) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Court decisions (segregation-integration)(General)); Claude Sitton, U.S. Accused of Planning Illegal School Integration, N.Y. Times, Feb. 28, 1963, at 1, 5.

[358] Meanwhile, the Justice Department had lived up to an earlier pledge to Powell's subcommittee to bring litigation regarding federal impact aid flowing to segregated districts. Beginning in fall 1962, the Civil Rights Division had sued five Southern school districts that received federal impact area funds. The Justice Department argued that districts had provided assurances, as a condition of impact aid under P.L. 815, that they would not discriminate against federal children. Federal judges in the deep South quickly dismissed three of the suits, on the ground that the Department lacked standing and/or a cause of action because the statute clearly authorized aid to segregation. United States v. Bossier Parish Sch. Bd., 220 F. Supp. 243, 248 (W.D. La. 1963), aff'd 336 F.2d 197 (5th Cir. 1964); United States v. Madison Cty. Bd. of Educ., 219 F. Supp. 60, 61–62 (N.D. Ala. 1963), aff'd 326 F.2d 237, 243 (5th Cir. 1964); United States v. Biloxi Mun. Sch. Dist., 219 F. Supp. 691, 694-96 (S.D. Miss. 1963), aff'd 326 F.2d 237, 243 (5th Cir. 1964). However, one federal judge in Virginia accepted the Justice Department's arguments. United States v. Cty. Sch. Bd., 221 F. Supp. 93, 101-104 (E.D. Va. 1963).

reported that some integration had taken place in every state by September 1963, attributing the progress partly to HEW's suitability ruling and its implicit threat that impacted area schools would lose their federal children—and with them their federal funding.[359]

Education officials had also objected to applying a presidential non-discrimination directive to the impact aid program during the same period, thereby opposing equal employment requirements for contractors building federally financed schools.[360] Rall Grigsby wrote in February 1962 that enforcement would present "grave difficulty" for the Office.[361] Many Southern school authorities would likely refuse to comply and even if they accepted, Grigsby worried that enforcing anti-discrimination requirements would disrupt the building of local schools.[362] In March, Commissioner Sterling McMurrin reiterated Grigsby's concerns to HEW leaders, writing that "it would be difficult to obtain compliance."[363] The General Counsel's office followed up the following year with a letter to the Justice Department, which apparently argued that the impact aid statutes did not permit such a requirement.[364] A year later, the Justice Department finally overruled the agency, citing the government's probable "constitutional and moral responsibility" for discrimination on federally funded projects.[365]

Beyond the suitability ruling, civil rights pressure brought other halting steps toward reform from the Office of Education. But career officials showed little change in their views, opposing many of the changes.[366] The staff's attitude seemed perfectly embodied in the notes from a March

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[359] John Herbers, Now All States Have Some Integration, N.Y. Times, Sep. 6, 1964, at E8; U.S. Uses Courts, Funds to Push Desegregation, Chi. Daily Defender, Mar. 13, 1963, at 13.

[360] The proposed directive would be issued the next year as Executive Order 11,114, 28 Fed. Reg. 6485 (June 25, 1963).

[361] Memorandum from Rall I. Grigsby to Robert M. Rosenzweig (Feb. 14, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 182; LL 3 Executive Orders).

[362] Evaluating compliance would also be difficult, Grigsby hypothesized, spinning out a complicated scenario involving subcontracts with an Alabama skilled trades' local "which has no Negro members" that he believed might not involve discrimination. Id.

[363] Memorandum from Sterling M. McMurrin to Lisle C. Carter, Jr. (Mar. 27, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 182; LL 3 Executive Orders).

[364] See Letter from Norbert A. Schlei, Assistant Attorney Gen., Off.ice of Legal Counsel, DOJ, to Alanson Willcox, Gen. Counsel, Dep't of Health, Educ., & Welfare (Sep. 10, 1964) (on file with the Lyndon B. Johnson Library; DOJ Roll 8) (overriding the General Counsel's objection from the prior year).

[365] Memorandum, Office of Legal Counsel (unsigned), "Authority to Prohibit Discrimination in Employment on Federally Assisted School and Hospital Construction," at 31 (July 15, 1963) (on file with the Lyndon B. Johnson Library; DOJ Roll 8) (concluding that the president's order could be applied to the impact aid program); Schlei to Willcox, supra note 364; Memorandum from Norbert A. Schlei, Assistant Attorney Gen., Office of Legal Counsel, DOJ, to Lee C. White, Assistant Special Counsel to the President (Sep. 10, 1964) (on file with the Lyndon B. Johnson Library; DOJ Roll 8). Though the Office of Legal Counsel had concluded that the agency's legal conclusions were wrong in July 1963, Norbert Schlei and White House aide Lee White decided to postpone applying Executive Order 11114 to the impact aid programs until after the passage of the Civil Rights Act. Id.

[366] In spring 1962, the pressure from Representative Powell's subcommittee brought further incremental steps. Agency leaders considered the possibility of conditioning aid to public libraries on desegregation but decided to preliminarily commission a study, amidst protests from career officials that the relevant statutes did not permit such conditions. Memorandum from Ralph C. M. Flynt, Acting Assoc. Comm'r for BERD, to Dr. Sterling McMurrin, U.S. Office of

1962 meeting on the Office's legislative program, which placed "Recommendations Growing out of the Daniels Subcommittee on Problems of Desegregation" dead last among 22 areas of action, directly after the need to enact "[a]uthority for [a]ppointing [a]dvisory [c]ommittees."[367]

Nonetheless, the incremental steps taken during 1962 seemed significant given the Office of Education's past record of inaction. The Commissioner of Education's chief assistant wrote a civil rights leader to say that there was "a new climate . . . in the Office of Education" that had brought about "some significant departures from past practices and a willingness to consider constructive alternatives to existing policies."[368] The assistant also urged the Commissioner to continue on this course, arguing: "We can avoid the grand, but empty, gestures, and concentrate on the seemingly smaller but perhaps more meaningful steps."[369]

Despite the Office's "smaller steps," questions persisted about the Office's funding of segregated libraries, land-grant colleges, and vocational education programs—not to mention the limits of the suitability ruling itself. In late summer 1962, new leadership arrived: a new Secretary,

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Educ. (June 8, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries); Memorandum from John G. Lorenz, Director, Library Servs. Branch, to Mr. Robert M. Rosenzweig, Office of Comm'r (Mar. 27, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries); Spot Information Report (attachment to Memorandum from Ralph C.M. Flynt, Assoc. Comm'r, to Francis Keppel, Comm'r of Educ. (Apr. 11, 1963)) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries); Memorandum from Robert M. Rosenzweig, Office of Comm'r, to John Lorenz, Director, Library Servs. Branch (Mar. 26, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries); Memorandum from Robert M. Rosenzweig, Office of Comm'r, to Sterling M. McMurrin, Comm'r of Educ. (Dec. 8, 1961) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 181; LL 2-3 Civil Rights: Rosenzweig). Vocational education officials also seemed deaf to the changing meaning of equal protection. In response to a complaint from a local Congress of Racial Equality (CORE) group about segregation in practical nurse training, the head of the vocational education program dismissed the charges, writing that "nothing in [the statute authorizing the practical nurse training program] . . . requires that classes be integrated." Memorandum from W.M. Arnold, Assistant Comm'r for Vocational and Tech. Educ., to Dr. Robert M. Rosenzweig, Assistant to the Comm'r (Apr. 12, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Practical Nurse). Only after the Commissioner's assistant intervened, did the vocational education official learn that state authorities had already mandated integration. Memorandum from W. P. Beard, Assistant Dir. of Vocational and Tech. Educ., to Dr. Robert M. Rosenzweig, Assistant to the Comm'r (May 25, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Practical Nurse).

[367] Suggestions at the March 28, 1962 Meeting on the Legislative Program (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 101; LL 7-5 Legislative proposals (general)).

[368] Letter from Robert M. Rosenzweig, Assistant to the Comm'r of Educ., to Leslie W. Dunbar, Exec. Dir., Southern Reg'l Council (April 9, 1962) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Court Decisions: Segregation Integration).

[369] Memorandum from Robert M. Rosenzweig, Assistant to the Comm'r of Educ., to Sterling McMurrin, U.S. Comm'r of Educ. (Aug. 31, 1962) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 181; LL 2-3 Civil Rights (Rosenzweig)).

Anthony Celebrezze, and a new Commissioner, Francis Keppel.[370] The following year, the agency's new leaders took further steps toward reinterpreting the relevant statutes while continuing to reject any suggestion that they had broader constitutional authority.[371] That spring Senator Hart and Senator Javits' inquiry regarding discrimination in HEW programs renewed pressure on the agency. As education officials consulted with the White House on their responses to the Senators regarding discrimination in library services, vocational education, and other areas, the president's aides encouraged them to find ways of furthering integration.[372]

Over the next year, the agency revised its interpretation of the library services law to exclude segregated libraries from funding,[373] applied a federal appellate ruling to read the "separate but equal" clause out of the land-grant colleges statute,[374] and contemplated but did not act on

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[370] Celebrezze was the former mayor of Cleveland, Ohio, while Keppel had been dean of the Harvard School of Education. Orfield, supra note 1, at 161, 165.

[371] In summer 1963, General Counsel Willcox laid out the agency's legal position at more length in a memo directly addressing the agency's authority to withhold funds under its various grant programs. Consistent with the Office's previous approach, Willcox argued that grant statutes that contained mandatory language foreclosed any administrative action to enforce integration. Only in instances where the statutes' language itself suggested administrative discretion did Willcox see the possibility of such steps. Willcox also distinguished between outright exclusion from benefits, and segregation, which he apparently did not see as undermining the statutory program in the same way as actual exclusion. Memorandum, Authority under Mandatory Grants (July 9, 1963) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 133; 000.9 Civil Rights).

[372] White House aide Lee White responded encouragingly to the draft response in June, including HEW proposals to take further action on NDEA fellowships and library services. White also pressed Secretary Celebrezze, urging that it was "desirable, if not imperative" to develop civil rights policy regarding vocational education, research grants, and the land-grant colleges. Memorandum from Lee C. White, Asst. Special Counsel to the President, to Anthony J. Celebrezze, Secretary, Dep't of Health, Educ., & Welfare (June 24, 1963) (on file with National Archives at College Park; Record Group 235: General Records of the Department of Health, Education, and Welfare, 1935-1981; Subject Correspondence Files, 1956-1974; Box 148; 031.3 Civil Rights).

[373] The issue of library services had generated considerable friction within the agency, with an internal report demonstrating that federal funds were indeed supporting segregated and unequal services in the South. But OGC attorneys had critiqued the proposal to reinterpret the statutory phrase "public library" in the Library Services Act to exclude segregated libraries, arguing that legislative intent and the Office's past practice favored interpreting the language to bar only total exclusion from services. Library Services Desegrgation [sic] (unsigned June 7, 1963) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries); Memorandum from Reginald G. Conley, Asst. Gen. Counsel, to Harold W. Horowitz, Assoc. Gen. Counsel (May 14, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Segregation: SAFA). Finally, in July 1963, Commissioner Keppel and HEW's leadership went forward with the new interpretation, overriding their attorneys' legal doubts. Memorandum from John G. Lorenz to William L. Taylor (July 25, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries); LSA Administrative Memorandum No. 41 (July 9, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: Libraries).

[374] Throughout these years, education officials had refused to consider overriding the explicit terms of the Morrill Act's "separate but equal" funding provisions for the land-grant colleges. E.g. Nondiscrimination in Federally Assisted Education Programs, Hearings Before the Select Subcomm. on Educ. of the H. Comm. on Educ. & Labor, 88th Cong. 24 (1963) [hereinafter Nondiscrimination] (Asst. HEW Sec. Quigley). Finally, the judiciary resolved the Office's longstanding dilemma by striking down the Hill-Burton Act's similar separate but equal clause regarding federal funding for hospitals in November 1963. In Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959, 969 (4th

segregation in vocational education.[375] Yet career officials and lawyers continued to assert countervailing principles, including the need for local control over schools, deference to legislative intent, and the importance of preserving federal education programs.[376] As one HEW leader commented, the department's career officials "felt that they were saving the appointed officers of the agency from making terrible errors" by attempting to stave off civil rights reforms that might be in tension with their statutory mandates.[377]

Outside the agency, its new, incremental approach to implementing equal protection principles attracted further critique. After reviewing various agencies' responses to discrimination in their programs, Senators Hart and Javits singled out HEW for criticism.[378] They argued that HEW stood alone among federal agencies in distinguishing between its statutes and reading its legal authority so narrowly—which they described as "selecting among the statutes which that Department administers, enforcing nondiscrimination under some but not under others."[379] Javits argued that this piecemeal approach was "unwarranted, since the power and duty to withhold funds from unconstitutional activities is derived from the Constitution itself, not from the individual enactments of the Congress."[380] Other agencies had taken a much broader view of their own authority: "Almost all the replies [from other federal agencies] indicated that there is constitutionally derived authority to remedy this situation even without further congressional authorization . . . ."[381]

Thus, as the Civil Rights Act came increasingly close to enactment, HEW was distinctly reluctant to exercise any responsibility over equal protection principles. The department had finally

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Cir. 1963), the en banc Fourth Circuit ruled that the "federal provisions undertaking to authorize segregation by state-connected institutions are unconstitutional." After waiting to see whether the Supreme Court would grant certiorari (it did not), Commissioner of Education Keppel wrote the land-grant college presidents in May 1964, advising them that going forward the Office would apply the Fourth Circuit's ruling on segregated hospitals to withhold funds from segregated land-grant colleges. Letter from Francis Keppel to Presidents of Land-Grant Colleges and Universities (May 27, 1964) (on file with the National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 182; LL 2-3 Court decisions (segregation-integration)); High Court Leaves Ban on Separate-but-Equal Clause in Hill-Burton Act, Wall St. J., Mar. 3, 1964 at 13.

[375] The problem of vocational education lingered unresolved through 1964. The Office of Education had adopted an antidiscrimination regulation for the program in 1946, but had never shifted its basic interpretation of that rule as requiring at most "separate but equal" education. On the eve of the Civil Rights Act, agency officials continued to debate the possibility of adopting non-segregation requirements in selected parts of the program. Letter from Francis Keppel to David S. Seeley (Sep. 20, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: NDEA Title VIII); Memorandum from Dave S. Seeley to Francis Keppel, Comm'r of Educ. (June 25, 1963) (on file with National Archives at College Park; Record Group 12: Records of the Office of Education, 1870-1980; Office Files, 1928-1980; Box 100; LL 2-3 Desegregation: NDEA Title VIII).

[376] See supra notes 373–374 and sources cited therein.

[377] Notes on Meeting of Subcabinet Group on Civil Rights, U.S. Comm'n on Civil Rights (May 27, 1963) (on file with National Archives at College Park; USCCR Special Projects, RG 453, NARA II; Box 31; WH/KA - Subcabinet Group on Civil Rights (memoranda) [1961-1963]).

[378] 109 Cong. Rec. 23,526 (1963) (statement of Sen. Javits).

[379] Id.

[380] Id.

[381] Id. (reproducing various agencies' replies, including one from the Department of Labor stating "we have sufficient legal authority to condition grants of Federal funds upon assurance that the funds will be administered in a nondiscriminatory manner" but that this "legal position . . . may not be identical to that of other Departments").

begun to contemplate reinterpreting its statutes to acknowledge equal protection concerns, but ultimately did so only for the impact aid statutes and the Library Services Act. Those steps engendered internal opposition, and the practical impact of the suitability ruling in particular was narrow, leading the Office of Education to construct only eight new elementary schools among the 360 federal installations in Southern states.

Defending an older administrative constitution

Why did federal education officials defend their support for segregation for so long—even when it put them at odds with their own administration? What finally shifted their stance? In this Part, I link administrators' conservative positions on equal protection, federal power, and the executive role to the education agency's historical design, and I show that design changes helped bring about a new legal attitude within the agency. First, I consider the evidence that the Office of Education's mandates and structure influenced its administrators' legal stances, contrasting the agency's positions to those of other federal actors and tracing the consistency in the Office's interpretations over time, despite leadership changes. Second, I show that Congress reacted to education officials' reluctance to enforce equal protection principles during this period, by overhauling the agency's mission and institutional structure in the Civil Rights Act of 1964. Changing those basic features of the agency led education officials to assume a far more expansive role in enforcing equal protection in subsequent years.

Agency design and an older administrative constitution

In the decade between *Brown* and the Civil Rights Act, federal education officials consistently took narrow views of federal power over schools, the executive role in constitutional interpretation and enforcement, and the meaning of equal protection itself. Those interpretations reflected the pre-*Brown*, pre-Civil Rights Act constitution. In that vision, federal authorities could not interfere with states' and localities' control over schools and lacked any independent obligation to enforce constitutional constraints in federally funded activities. The substantive equal protection mandate did not automatically govern federal grants, and even where a statute did impose anti-discrimination requirements, the enacting Congress's understanding of discrimination governed—meaning that "separate but equal" might provide the operative rule. Education officials also distanced equal protection from their own educational goals, arguing that segregation was unrelated to the primary imperative of improving education by providing more federal support.

The net result of these interpretations was to render the Office of Education a conduit for federal funds, without any sort of constitutional obligations or authority over the recipient schools' practices. The Office's raison d'être was to provide, as the NEA put it, "federal aid without federal control." That substantive vision was itself directly rooted in the Office's historical design as a weak and politically vulnerable agency, with little exposure to judicial review, and with a mission and programmatic tasks that focused agency personnel's attention on serving the needs of professional educators. Below, I discuss the Office's institutional attributes and their impact in more detail.

1. *Political dependence*

The Office of Education and HEW's structure left its officials highly exposed to Congressional politics, and to state and local backlash. As a grant-making agency dependent on continued program appropriations for its very existence, deriving its political support primarily from state and local public education professionals, and staffed by career officials with similar education backgrounds to those officials, the Office was uniquely susceptible to those pressures.[382] The Office's personnel's primary incentives were to orient themselves toward Congressional will and to preserve their relationships with state and local educators. Federal education officials and these groups shared practical interests in protecting and expanding federal aid programs, and similar professional backgrounds, networks and experiences.[383] The Office relied on professional educators for information and political support, and its officials worked closely with them in their day-to-day work.[384]

The Office's positions did not simply reflect education officials' alliance with professional educators. Officials' narrow interpretations also responded to the perceived need to maintain a Congressional coalition supporting federal aid, with Southerners providing key votes. Because of the long, unsuccessful quest to expand their agency's mandate to include general federal aid to schools, education officials were well-trained in responding to the concerns of aid opponents. They cited the principle of "non-interference" in local schools as a core agency value, adhered to over many decades—and used that as a reason to continue avoiding segregation questions.[385] Unsurprisingly, federal education officials' positions on federal power and equal protection largely aligned to those of the largest educational lobby, the NEA, and other leading education associations, as well as Congressional conservatives.[386]

2. *Narrow mandates*

Education officials also prioritized continuing and extending their primary mission of providing material support to public education. Congress almost never included equal protection concerns among the agency's delegated tasks, and in the rare instance that it did, equal protection was understood to mean only "separate but equal."[387] As a result, education officials had scant incentives, experiences, or relationships that might bring them to actively pursue equal protection goals.

Within the Office of Education, officials viewed racial segregation and discrimination as secondary questions at best, while increasing resources for meagerly funded schools was primary. Sometimes they suggested that education and equal protection were separate goals—existing in

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[382] See supra Chapter 4.

[383] See supra notes 119–122, 187–195 and accompanying text.

[384] See supra notes 187–191 and accompanying text.

[385] E.g., Integration, supra note 140, at 62 (Comm'r McMurrin); Statement of Comm'r McGrath, supra note 203.

[386] See supra notes 153–155, 185–195 and accompanying text.

[387] See Second Morrill Act, ch. 841, § 1, 26 Stat. 417 (1890).

parallel, as one Commissioner of Education put it.[388] More often they framed improved education and integration as goals that were in direct conflict, fearing that attempting to enforce anti-discrimination principles would lead to Congressional or state-level backlash that would endanger their programs and hurt education.[389] As for the sanction of withholding funds, they described that threat as risking harm to all children, with little hope of changing Southern segregation practices.[390]

More generally, officials simply did not view policing discrimination as part of their mission. In the words of Kennedy's first education commissioner, "[T]he Department of Justice assumed the responsibility for enforcing school desegregation. We would certainly pitch in to solve problems, but it was not the task of the Office of Education to enforce the law."[391]

3. Lack of White House or judicial checks

The White House and the courts might have counteracted the influences of the Office's constituencies, Congress, and mission, had they directed the agency to stop funding segregated schools. But neither Eisenhower nor Kennedy wished to take a strong stand backing administrative enforcement of equal protection, for reasons rooted in Eisenhower's federalism commitments and both presidents' pragmatic desire to maintain alliances with Southern legislators. Even when the White House did exert pressure on the agency, the agency was staffed almost entirely with civil servants and distanced from direct political control, so resistance was possible. Office personnel used that leeway to oppose and delay presidential directives to enforce anti-discrimination principles, as with Eisenhower's order to integrate schools on military bases, and Kennedy's order to apply equal employment principles to contractors building federally funded schools.[392]

The Office's practices were also shielded from constitutional review in the federal courts, so few cases came to the courts challenging the Office's funding of segregation. Standing doctrines insulated the officials' decisions from judicial scrutiny, while for plaintiffs seeking relief against the school districts likely appeared sufficient in any case.[393]

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[388] See Integration, supra note 140, at 62, 65 (Comm'r McMurrin).

[389] For example, in 1960, the Office warned of the political consequences of amending the Second Morrill Act to withhold funds from segregated land-grant colleges in the following terms. "The Commissioner of Education… advises that it would be disastrous to Federal-State relations in education to use purely educational programs as a weapon to force desegregation….With respect to all programs of the Office of Education, moreover, the Commissioner stresses the practical legislative effect of conditioning Federal grants and payments upon desegregation, in that it would make it politically impossible for Members of Congress from a number of States to support Federal programs in education. The probable effect of this would be to cripple Federal educational programs designed to assist all phases of American education and achieve imperative national educational objectives." See Aug. 1960 Staff Paper, supra note 325, at 62–69.

[390] For example, in 1960, the Office staff argued that amending the federal impact aid statutes to withhold aid from segregated schools "would completely corrode Federal-State relations in education to the detriment of both Negro and white students in a number of States, and would foreclose the possibility of enactment of further educational legislation—all without any gain in the process of racial desegregation of the public schools." See id. at 67.

[391] McMurrin & Newell, supra note 106, at 284.

[392] See supra notes 207–232, 360–365 and accompanying text.

[393] See supra notes 267–268.

4. Older constitutional commitments

Federal education officials' positions did not simply reflect the agency's vulnerability to constituent pressures and its incentives to cater to Congressional will. Those legal stances also represented the enduring power of older constitutional settlements, transmitted in part through the agency's design.

One such settlement emphasized states' sovereignty over education. By the 1950s, it was not legally viable to argue that the Tenth Amendment shielded local schools from federal enforcement of constitutional conditions on federal grants.[394] Nonetheless, the Office of Education had embraced the principle of "non-interference" for many decades and continued to do so.

The Office's design had set up institutional attributes that embedded this older constitutional principle in the agency's incentives and norms. The federal statutes that the Office administered explicitly instructed education officials not to exert any form of federal supervision or control, while the Office's constituencies and structural incentives vis-à-vis Congress led its officials to continually affirm their commitment to non-interference.[395] Moreover, the officials worked against the backdrop of the spending clause power, which rested on the proposition that states could reject federal grants and any accompanying mandates.[396] In this period, both sides of the federal aid debates saw that as a live option, so education officials worked to persuade opponents that federal aid could come without substantive federal intervention.

Education officials also posited a very narrow view of the executive branch's role in constitutional and statutory interpretation. Officials argued that they could not act to implement desegregation in the face of statutes that were silent or explicitly sanctioned segregation. They asserted that the executive role was to carry out the statutes as Congress wrote them and to implement judicial rulings as the four corners of each decision required—but not to extend the constitutional principles in those rulings in ways that would override or revise explicit statutory commands or legislative intent.[397] While that position was certainly arguable, agency leaders also

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[394] See Helvering v. Davis, 301 U.S. 619, 641–45 (1937); Chas. C. Steward Machine Co. v. Davis, 301 U.S. 548, 585–93 (1937); see also Lindsey Cowen, What Is Left of the Tenth Amendment, 39 N.C. L. Rev. 154, 173–76 (1961) ("[S]hort of some remarkable self-denial on the part of individual states, political activity seems to be the only effective method of limiting the exercise of the spending power.").

[395] See supra notes 136, 203–206and accompanying text.

[396] Cf. Massachusetts v. Mellon, 262 U.S. 447, 483–85 (1923) (ruling that the state had no cognizable interest in challenging a federal grant program on Tenth Amendment grounds because the transaction was a voluntary one).

[397] As a prominent law professor concluded in the mid-1960s, the black letter law of the time did not clearly resolve these questions of executive power. Miller, supra note 315, at 503. Even commentators who believe the executive may not refuse to enforce duly enacted laws make an exception for laws that are "clearly unconstitutional," as the Justice Department traditionally has done. See, e.g., 8 Op. O.L.C. 183, 194 (1984) (suggesting that the executive had the duty to defend laws in order to ensure judicial review, except where such laws were "clearly unconstitutional"); 4A Op. O.L.C. 55, 56 (1980) (opining that the executive may in rare cases refuse to implement a statute it views as "transparently" unconstitutional); see also Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 Colum. L. Rev. 507 (2012). It is arguable that providing grants to segregated schools met this "patently unconstitutional" threshold either once Brown was decided, or at some point in the next decade. See Amici Curiae Brief of Former Attorney Generals Edwin Meese III and John Ashcroft at 20–21, United States v. Windsor, 570 U.S.

had clear incentives to accept this advice and cater to Congressional will. Those incentives were rooted in the Office's nature as a grant-making agency because education officials' most basic imperative was to maintain and expand their role in administering federal grants to schools.[398]

The Office's design itself reflected prior interpretations of equal protection's meaning and reach. Education officials' mandates, incentives, constituencies, and legal advisors all pointed toward the position that equal protection had no direct implications for them. Historically, the agency's grant statutes had ignored equal protection issues or specifically authorized segregation, enshrining the *Plessy v. Ferguson* principle of "separate but equal."[399] In practice, education officials' incentives to cater to Congressional will and state and local education authorities vitiated even that command. Officials told Congress that the mere act of inquiring into questions of equality might violate the non-interference principle.[400]

As a result, by the early 1960s HEW lawyers concluded that federal grant-making agencies were not obligated to supervise recipients' compliance with constitutional norms—a view that reflected the lawyers' perspective, based on their structural position advising all the department's program agencies, of the legal and administrative complications that such a principle might entail.[401] If equal protection requirements did not automatically attach to federal grants, then enforcing equal protection was a question for the "law enforcing agencies," not grant makers.[402]

5. Alternative explanations: excluding any role for design

The foregoing suggests that the Office of Education's design influenced its officials' constitutional interpretations, leading them to defend older constitutional settlements and resist new constitutional arrangements. More support comes from examining potential alternative explanations for the Office's positions: If design did not matter, what drove the agency's constitutional interpretations? It is difficult to find forces that would wholly account for the agency's legal stances, with no role for institutional mandate and structure.

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744 (2013) (No. 12-307) (arguing that the provision of federal grants to segregated hospitals was patently unconstitutional in 1962).

[398] In this case, administrative officials' mission of improving education coincided with the goal of increasing their budget because they saw expanding federal resources as the means to achieve that ultimate mission. Compare Steven P. Croley, Regulation and Public Interests: The Possibility of Good Regulatory Government 72 (2008) (positing that administrators work toward the public interest); Daryl Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 932–33 (2005) (questioning whether bureaucrats are motivated by their agency's mission or its budget); with William Niskanen, Bureaucracy and Representative Government 38–39 (1971) (discussing agency budget maximization as an objective proxy for bureaucrats' utility).

[399] Second Morrill Act, ch. 841, § 1, 26 Stat. 417 (1890).

[400] See, e.g., Integration, supra note 140, at 81 (Comm'r McMurrin) ("I am sure for us to go into [a segregated land-grant] institution and examine its curriculum will open up . . . a genuine Pandora's Box of problems on Federal control and Federal involvement in the internal affairs of an institution.").

[401] See supra notes 308–320 and accompanying text.

[402] See, e.g., Integration, supra note 140, at 67 (Comm'r McMurrin); see also Integration Seen a Legal Problem, N.Y. Times, Dec. 7, 1955, at 31 (quoting a HEW Under Secretary as saying, when questioned on HEW's policy on providing federal aid to segregated states, "The opinion of the Administration is that the question is now a legal question. The Supreme Court has ruled and enforcement becomes the responsibility of the law enforcing agencies.").

Majoritarian politics: One alternative explanation is that the Office's constitutional stance entirely reflected national political opinion concerning segregation—and that the majority did not yet support desegregation. More generally, the claim would be that popular opinion is what drives agencies' constitutional positions, regardless of agency structure. Under this thesis, though, public opinion should affect all federal officials similarly without regard to their structural exposure to public opinion and resulting political pressures, design-based incentives, or substantive statutory missions. If that were true, one would expect the entire executive branch to take similar positions when faced with the same substantive constitutional question.

But federal entities took different positions in this period. At various times, the Office's legal stance on funding segregated schools was in direct tension with the views of the White House, the Defense Department, the Justice Department, the Civil Rights Commission, and the Department of Labor, among others. While it is not surprising that such different entities would come to differing conclusions, some of the most salient reasons for that divergence are rooted in those bodies' distinct institutional designs. All those entities were differently exposed to political and legal pressures, and varied in their substantive missions, structural incentives, and constituents.

Leadership: Another alternative is that the Office of Education's distinctive constitutional interpretations merely reflected the vagaries of individual leaders. If that were the case, one would expect the agency's constitutional interpretation to shift in lockstep with changes in leaders—without any countervailing gravitational pull from the agency's hard-wired institutional attributes.

The Office of Education and HEW's leadership did influence the agency's positions. After all, shifts sometimes occurred when new leaders arrived, as when new HEW Secretary Anthony Celebrezze and Commissioner of Education Frank Keppel actively embraced civil rights reforms in the early 1960s. But those leaders could not work their will freely, without regard to the agency's institutional attributes and incentives. The agency's fundamental positions shifted slowly, if at all. As a HEW assistant secretary mourned in the early 1960s, career officials and lawyers were there to counteract political appointees and advise them of all the perils in departing from past administrative practices, statutory text, legislative intent, constituents' favored positions, and the essential principle of "federal aid without federal control."[403]

Mezzo-level officials: Some might argue that one would not expect agency leaders at the very top to determine policy outcomes, but rather the long-serving career officials that occupy the ranks immediately below political appointees (the "mezzo" level).[404] That claim does not contradict the idea that hard-wired design shapes agency's constitutional decision-making. The qualities of an agency's career personnel are heavily influenced by the agency's statutory mandates, constituency networks, and resources. An agency with a particular mission will tend to attract people who believe in that mission, who have the requisite professional background (as

[403] See Notes on Meeting of Subcabinet Group on Civil Rights, U.S. Comm'n on Civil Rights (May 27, 1963) (on file with National Archives at College Park; USCCR Special Projects, RG 453, NARA II; Box 31; WH/KA - Subcabinet Group on Civil Rights (memoranda) [1961-1963]).

[404] See Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928, at 18–25 (2001) (discussing power of bureau chiefs and other long-serving mid-level officials).

qualified by the agency's status and pay), and who are sympathetic to or part of the constituencies the agency serves.[405] The longer they serve, the more likely they are to incorporate aspects of the agency's norms, practical needs, and general culture into their own worldviews. To the extent mezzo level officials determine an agency's constitutional interpretations, their inputs quite likely reflect the agency's mandates and structure.

Revising the administrative constitution

In 1963, President Kennedy finally proposed civil rights legislation. Though Kennedy's initial proposal was, in the words of one civil rights leader, "the most picayune little nothing bill,"[406] the president changed his thinking once the nation saw Birmingham police turn fire hoses and dogs on peaceful civil rights protestors in May 1963.[407] The administration's June 1963 bill addressed voting, public accommodations, federal employment, and school desegregation.[408]

In Title VI of the bill, Kennedy proposed that Congress provide executive branch agencies with discretionary authority to enforce equal protection requirements.[409] Separately, Title IV authorized the Office of Education to provide technical and financial assistance to school districts engaged in desegregation.[410] Congressional liberals ultimately insisted that Title VI be made mandatory, explicitly barring racial discrimination in all federally funded programs and requiring agencies to enforce that mandate by cutting off funds if necessary.[411]

Once enacted, Title IV and Title VI had major implications for the Office of Education and HEW. Title IV provided resources and a new grant-making role for the Office to support its traditional school constituencies in the area of civil rights. Once the Office began implementing Title VI, Title IV's structural impact was crucial: it created an institutional nucleus of civil rights officials within the Office and gave them tangible financial support.[412]

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[405] See, e.g., Jonathan Bendor et al., Stacking the Deck: Bureaucratic Missions and Policy Design, 81 Am. Pol. Sci. Rev. 873, 873–74 (1987) (discussing the literature on career bureaucrats' "mission orientation"); David Fontana, Executive Branch Legalisms, 124 Harv. L. Rev. F. 21, 35–36, 38 (2012) (noting that civil service lawyers are selected in part for their "devotion to the cause"); see also Hugh Heclo, Issue Networks and the Executive Establishment, in The New American Political System 87 (Anthony King ed., 1978) (discussing agency officials within "issue networks" as opposed to traditional, interest-driven "iron triangles").

[406] Interview by Katherine Shannon of Joseph L. Rauh, Jr., Washington, D.C. 52 (Aug. 28, 1967), The Civil Rights Documentation Project.

[407] Robert D. Loevy, To End All Segregation: The Politics of the Passage of the Civil Rights Act of 1964, at 12–17 (1990); Interview by John Stewart of Norbert A. Schlei, Los Angeles, Cal. 43 (Feb. 20-21, 1968).

[408] See H.R. 7152, 88th Cong. (as introduced June 20, 1963).

[409] The White House and HEW declined to endorse bills that explicitly barred segregation in HEW programs that spring, arguing that the "broad discretionary" approach of Title VI was better. See Nondiscrimination, supra note 374, at 8–62.

[410] Civil Rights Act of 1964, Pub. L. 88-352, Title IV, §§ 403-406, 78 Stat. 241, 247–48.

[411] Id. Title VI, § 601, 78 Stat. at 252. Title VI also authorized federal agencies to adopt regulations with the force of law, and to enforce them via withholding of funds, referral to the Justice Department for litigation, or any other means authorized by law. Id. § 602, 78 Stat. at 252–53.

[412] Radin, supra note 187, at 58–59.

The White House had not requested appropriations to support the Title VI mandate, on the premise that it would simply be another condition on federal grants that all grant-making agencies could incorporate into their existing procedures for supervising recipients.[413] In practice, of course, it was extremely difficult for agencies to attempt to enforce desegregation requirements against state and local institutions without any dedicated funding to support monitoring and investigations. For the Office of Education, Title IV resolved the dilemma. While it meant that the desegregation assistance program suffered at times, the Office was able to draw on the Title IV resources to establish a dedicated compliance staff in the early months of implementing Title VI.[414]

At the same time, the substantive prohibition in Title VI created an entirely new role for the Office—that of civil rights regulator and enforcer.[415] To be clear, the law did not validate the sweeping authority that civil rights advocates had argued the Office already possessed under the Constitution itself to ensure that federal funds did not support rights violations. Title VI did not even authorize the Office to fully implement the equal protection mandate: The law applied only to race and national origin, not religion or gender, and exempted most employment.[416] Moreover, the law was laden down with procedural restrictions imposed by Congress in an attempt to ensure that the Office would not deviate too far from the will of its political principals.[417] But the law did give the Office greater power over federal grant recipients, while explicitly imposing substantive constitutional conditions.

Further, the law delegated substantial discretion to the Office (and the executive branch as a whole) in interpreting constitutional requirements. Title VI authorized federal agencies to adopt substantive regulations to further the Act's purpose, while articulating the substantive principle in very broad terms: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[418] Congress explicitly anticipated that agencies would give flesh to the meaning of discrimination, applying their subject area expertise and practical experience.[419]

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[413] Orfield, supra note 1, at 64.

[414] Discussion by W. Stanley Kruger of Title IV of the Civil Rights Act of 1964 14, 31, 33-38, 41-42, 50-51 (Aug. 13, 1968) (on file with LBJ Library; Documentary Supplement to the OEO Administrative History; Volume I; Box 3A); Radin, supra note 187, at 59; see also U.S. Comm'n on Civil Rights, Title IV and School Desegregation: A Study of a Neglected Federal Program 3 (1973) (discussing "the diversion of Title IV staff to Title VI activities during the first 2 years following passage of the Civil Rights Act of 1964").

[415] Civil Rights Act of 1964, Pub. L. 88-352, Title VI, §§ 601, 602, 78 Stat. 241, 252-53.

[416] Id. at §§ 601, 604.

[417] Presidential approval was required for agency regulations issued under Title VI, and agencies attempting to enforce those regulations were required to run a procedural gauntlet. Id. at § 602. Agencies had to (1) provide notice and attempt voluntary conciliation, (2) offer a formal hearing on the record, and (3) give thirty days' prior notice before termination to the respective oversight committees in the Senate and House of Representatives. Id.

[418] Id., § 601, 78 Stat. at 252.

[419] See Comment, Title VI of the Civil Rights Act of 1964—Implementation and Impact, 36 Geo. Wash. L. Rev. 824, 833–34 (1967); see also Olatunde C. A. Johnson, The Agency Roots of Disparate Impact, 49 Harv. C.R.-C.L. L. Rev. 125, 139 & n.97 (2014) (quoting Attorney General Robert Kennedy's testimony).

In providing this new institutional role, Congress also opened up the civil rights practices of the education agency to greater judicial scrutiny. Once the Act was in place, the courts would review education officials' interpretations of Title VI, and often defer to them, even when they came in the form of informal guidance, while education officials would in turn rely on judicial decisions in fleshing out its legal views.[420] But the courts would also at times intervene to instruct the agency to enforce equal protection principles (as embodied in Title VI) differently.[421] That had not occurred under the prior framework.

Within the first year after the Act became effective, the Office's active implementation of school desegregation guidelines drew Congressional ire. The new personnel hired to carry out Title VI enforcement within the Office's new civil rights unit represented such a sharp change from the agency's prior status quo that they were perceived as "activists and fanatics."[422] Unsurprisingly, the new mandate and the enforcement unit's activities provoked tension with other, older agency priorities and the personnel who had long carried them out. A New York Times journalist reported that Title VI was "not popular," with administrators "say[ing] privately they wish it did not exist. It involves them in the emotional area of race relations that they would rather avoid. And it distracts them from what they consider to be their major concerns."[423] For some in the Office, "civil rights problems … interfered with its major job of building quality schools, whatever the racial balance."[424]

In 1966, a firestorm ensued when the Office began imposing numerical goals for school desegregation outcomes on Southern school districts.[425] One particularly vociferous stream of invective by a Southern legislator characterized the education commissioner as "the Commissar of Education."[426] As part of the subsequent upheaval, Congress demanded that civil rights responsibilities be shifted to the HEW Secretary's office, in an attempt to secure easier, more centralized political control over civil rights.[427] That shifted power to the Office for Civil Rights in the HEW Secretary's office, which eventually became the present day Office for Civil Rights in the Department of Education.[428]

Thus, the Office of Education's long resistance to exercising constitutional authority provoked a legislative overhaul—one that immediately changed the agency's legal stance, and opened up the door for education officials' more aggressive administrative constitutionalism over

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[420] Halpern, supra note 17, at 52–80.

[421] Id. at 52–80, 91–105.

[422] As a later interviewer noted, David Seeley, who led the Office's initial Title VI work, was "criticized severely for hiring what were allegedly civil rights activists. Seeley responded that "many people were seen as activists and fanatics who from most standards would be seen as pretty moderate people." Interview of David Seeley by Joshua Zatman, in Staten Island, NY, 36-67 (July 25, 1968) (on file with LBJ Library; Documentary Supplement to the OEO Administrative History; Volume I; Box 3A).

[423] John Herbers, Congress Eroding Integration Law, N.Y. Times, Oct. 9, 1966, at 48.

[424] Id.

[425] Id.

[426] Harold Gal, Howe Attacked in House on Integration of Schools, N.Y. Times, Oct. 1, 1966, at 1 (quoting Rep. L. Mendel Rivers (D-NC), who also referred to the commissioner, Harold Howe, as "ignorant" and an "idiot").

[427] Orfield, supra note 1, at 320–24.

[428] Id.; Radin, supra note 187, at 67, 87–88.

the long term. Soon afterward, Congress attempted to subject the agency's civil rights staff to more effective political control—a battle that rages to this day.[429] The changes that the Civil Rights Act of 1964 wrought in the federal education agency and its interpretative approach also testify to the power of design.

[429] See James S. Murphy, The Office for Civil Rights's Volatile Power, The Atlantic, March 2017 (discussing efforts of newest political appointee, Education Secretary Betsy DeVos, to shift civil rights policy within OCR).

PART III: PUBLIC WORKS AND HOUSING

Part III examines how the public works and public housing bureaucracy shaped an early constitutional regime around the "separate but equal" principle of *Plessy v. Ferguson*. It then asks why the Public Housing Administration (PHA) later resisted pressures to abandon the *Plessy* framework after the Supreme Court's dramatic revision of equal protection principles in cases like *Shelley* and *Brown*.

Chapter 6 shows that the federal housing agencies' design led them to defer to state, local, and private actors; insulated them from White House control and judicial review of the racial practices; and exposed the public housing agency in particular to harsh political scrutiny from Congress, the real estate industry, and ideological opponents of the welfare state. That structure gave the public housing agency strong political incentives to defend local sovereignty and segregation. Chapter 7 engages the early public works and public housing agencies' creation of a "racial equity" approach to jobs and housing, which was an attempt to realize the "equal" aspect of *Plessy*'s "separate but equal" directive, and argues that it emerged in the favorable political environment of direct federal implementation of public housing, along with powerful liberal leadership. Chapter 8 examines the federal housing agencies' subsequent, decades-long resistance to adopting the jurisprudence of *Buchanan v. Warley*, *Shelley v. Kraemer*, and *Brown v. Board of Education*. Focusing on the question of why the PHA—once in the vanguard of liberal reform—took this approach, I argue that the agency's structure and political tenuousness led officials to see opposition to segregation as an existential threat to its program. They sought to preserve public housing for low-income families rather than implement the Supreme Court's revised interpretation of equal protection.

This Part focuses on the PHA (and its administrative precursors) throughout, while using broader federal housing policies and agencies like the Federal Housing Administration (FHA) to provide context. I probe the PHA's approach most closely because the constitutional issues raised by financing segregation in public housing were far more obvious than in federal programs supporting private housing. Further, the reformist PHA's failure to reconcile its programmatic approach with evolving equal protection mandates presents more of a puzzle than that of the FHA, which had adopted and promoted racially exclusionary policies from its start.

Chapter 6 The Federal Housing Agencies: Political Precarity, Legal Insulation

From their origins, the federal housing agencies were structured in ways that oriented them toward minimizing the federal role, while serving primarily local governmental and private real estate interests. Constitutional doubts concerning federal intervention in housing underlay this structure, which required the federal government to provide financial assistance and supervision without undertaking a more direct role. Subsequent legal doctrine served to insulate such grant-in-aid programs from legal challenges, while constitutional ambiguity around equal protection principles gave administrators particular autonomy to craft their own racial policies.

Congress also used its power over executive organization to prevent the housing agencies from operating under direct, centralized control by the White House's political appointees, delegating statutory power directly to the individual housing agencies rather than to the

Administrator of the Housing and Home Finance Agency, which oversaw the consolidated agencies. Powerful Congressional committees kept a close watch over the housing agencies, while real estate interests simultaneously supported programs aimed at home ownership and fought to destroy the public housing program. As a result, the public housing agency in particular was highly vulnerable to political pressure, operating under constant threat of extinction at Congress' hands.

Channeling federal power through other actors

Allowing the federal government to play a role in providing housing to private individuals was a radical notion in the 1930s—on both constitutional and political grounds. In light of profound constitutional and political attacks on the federal government's legitimacy, federal housing programs were structured in ways that devolved responsibility onto local government and private actors.[430] Effectively, federalism norms and market-based norms were translated into a legally limited role for federal housing authorities.

In practice, of course, federal housing policies were enormously powerful in reshaping American communities, the physical landscape, and economic life; but their power operated behind an apparent delegation of decision-making power to the state, local, and private authorities. As social programs, then, the policies and the agencies that implemented them reflected a set of compromises between a new sense of federal power to address social issues like the housing market's collapse and the problems of urban slums—and older constraints, embedded in constitutional principles of federalism and limited public power. Federal housing officials embraced those constraints on their own power in rhetoric if not always in their action.

Two primary forms of federal housing aid emerged during the New Deal, with each taking on a very distinct institutional character within its own agency. One was aimed at the working class and poor, while the other benefited the middle class and private real estate interests. "Public housing" provided low-rent, government-owned housing to the poor and working class. It first developed as a temporary public works program to create jobs, then became permanent in 1937 under the auspices of the United States Housing Authority (USHA), which later evolved into the PHA.[431] "FHA" insurance helped stabilize the housing market and expand the possibilities of home ownership to a broader swathe of the middle class, by offering federal guarantees to lenders for mortgages that met certain conditions. The program was inaugurated by the National Housing Act of 1934 and housed within the Federal Housing Administration (FHA).[432]

Such federal housing programs faced serious constitutional questions at their start. Not just the propriety of federal involvement was at stake, but also the legitimacy of any government role in providing housing at all. In the nineteenth century, courts had struck down some forms of

[430] See Keyserling, supra note 63, at 32-33 (1939).
[431] United States Housing Act, Pub. L. 75–412, 50 Stat. 888 (1937).
[432] National Housing Act of 1934, Pub. L. 73-479, 48 Stat. 1246. Title I of the NHA (establishing FHA and short term improvement loans) Title II of the NHA (establishing mutual mortgage insurance program for 1-4 family homes in Section 203); conditions included that mortgage be limited to 80% of home value and that it be fully amortized over a term of up to 20 years. FHA underwriting standards focus on improving housing quality as well. Kenneth A. Snowden, Research Inst. for Hous. Am., Mortgage Banking in the United States, 1870-1940, at 84 (2014).

government intervention in housing markets as beyond the power of the state.[433] In the twentieth century, the primary legal question was whether assisting in the construction of housing qualified as a "public use"—thus justifying the use of public funds and/or the eminent domain power—or whether it was an illegitimate use of public resources on behalf of select classes of taxpayers.[434] There were also separate questions regarding the legitimacy of federal involvement, specifically whether the federal power to spend for the "general welfare" extended to housing.[435]

Those questions remained unanswered as the federal government took on a direct role in offering low-rent housing in the 1930s. The Public Works Administration (PWA), under the direction of Secretary of the Interior Harold Ickes, began by offering loans for public housing developments.[436] When that proved inadequate, PWA began constructing federal low-income housing directly in 1934.[437] At that time most states lacked legal structures with the requisite authority to develop and finance such projects themselves, which was part of the justification for the federal initiative.[438]

By 1936, several federal courts had ruled that the federal housing programs exceeded constitutional limits.[439] The Sixth Circuit Court of Appeals ruled that the federal government could not use the eminent domain power to obtain privately owned lands in order to construct low-income housing.[440] The court reasoned that the federal power to spend for the "general welfare" simply did not reach that far, even if a state government might be able to use its police powers to do so. Later the D.C. Circuit Court of Appeals blocked another agency, the Resettlement Administration, from acquiring private land to construct low-income housing, on the grounds that Congress lacked the constitutional power to regulate housing or resettle low-income groups.[441] In 1936, just hours before the Supreme Court was to hear arguments in the Sixth Circuit case, the Justice Department asked the Court to dismiss the case.[442] A leading historian of housing policy

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[433] For example, in 1873, the Supreme Court of Massachusetts had barred government loans for the purpose of replacing fire-destroyed buildings, reasoning that this was not a public use. Lowell v. City of Boston, 11 Mass. 454 (1873). See also Joseph Lesser & Vigdor D. Bernstein, The Evolution of Public Purpose, General Welfare, and American Federalism, 19 Urb. Law. 603 (1987).

[434] See generally Philip Jr. Nichols, The Meaning of Public Use in the Law of Eminent Domain, 20 B.U. L. Rev. 615 (1940) (tracing the development of the public use doctrine in eminent domain, including its application to government condemnation for housing programs); Breck P. McAllister, Public Purpose in Taxation, 18 Cal. L. Rev. 137 (1930); see also Green v. Frazier, 253 U.S. 233 (1920). The public purpose requirement was sometimes rooted in due process and in some instances was codified in specific terms in state constitutions. McAllister, supra, at 138, 147. However, the uncertainty had largely dissipated by the 1940s. See Myres S. McDougal & Addison A. Mueller, The Public Purpose in Public Housing: An Anachronism Reburied, 52 Yale L.J. 42, 43-55 (1942).

[435] For detailed discussion of the federalism questions at stake, see supra Chapter 3.

[436] See Keyserling, supra note 63, at 31; Timothy L. McDonnell, The Wagner Housing Act: A Case Study of the Legislative Process 29-36 (1957).

[437] See McDonnell, supra note 436, at 36-38.

[438] When the Reconstruction Finance Corporation was authorized in 1932 to offer loans to develop low-income housing, only the New York State Board of Housing was equipped to meet the law's conditions. Id. at 27. Cleveland, Ohio created the nation's first local housing authority in October 1933.

[439] See Keyserling, supra note 63, at 32.

[440] United States v. Certain Lands in City of Louisville, 78 F.2d 684, 686-88 (6th Cir. 1935); United States v. Certain Lands in City of Detroit, 12 F. Supp. 345, 347-48 (E.D. Mich. 1935).

[441] Franklin Township v. Tugwell, 85 F.2d 208, 220-22 (D.C. Cir. 1936).

[442] Ebstein, supra note 94, at 893.

wrote two decades later, "No one knows how that body would have decided the issue."[443] As a result, federal authority to directly provide low-income housing remained unsettled.

While legal doubts about federal power grew, national housing reformers themselves advocated localized control for their own substantive reasons, based on critiques of the early PWA projects' high costs and federal authorities' failures to work cooperatively with local officials.[444] Secretary Ickes himself backed state and local prerogatives, rather than attempting to push forward on a model of direct federal control. With support from President Franklin Roosevelt and the PWA Housing Division's lawyers, he steadily prodded states to create the legal framework for local public agencies that could authorize and oversee low-income housing.[445]

As a result, in the absence of a tradition of "local control," federal actors themselves helped create a new set of local governing institutions to administer public housing.[446] The United States Housing Act of 1937 confirmed this approach by setting forth a structure of local operational control, backed by deep federal subsidies. The new agency that it created, the United States Housing Authority (USHA), was designed "to act in the capacity of a banker, providing advice, technical assistance, and funds" to local authorities.[447] USHA absorbed the PWA Housing Division's projects and staff.[448] Going forward, the agency was authorized to provide initial loans and annual subsidies to local housing authorities for the capital costs of constructing low-income housing, with localities were required to share in the costs of the housing. By 1937, thirty states had enacted enabling legislation.[449] By spring 1938, 140 local authorities had been created to initiate such projects.[450] And by 1942, a Yale law professor could confidently write that, "'housing' has in recent years in the United States achieved the status of a governmental function."[451]

In contrast to the USHA, the FHA's mortgage insurance programs were not designed to serve the interests of social reform or poverty alleviation. Rather, the agency took enduring shape

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[443] McDonnell, supra note 436, at 48. The Tenth Circuit ruled differently two years later. Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938).

[444] Ebenstein, supra note 94, at 885-88; D. Bradford Hunt, Was the 1937 U.S. Housing Act a Pyrrhic Victory?, 4 J. Planning Hist. 195, 197-200 (2005).

[445] Gilbert A. Cam, United States Government Activity in Low-Cost Housing, 1932-38, 47 J. Pol. Econ. 357 (1939); Ebenstein, supra note 94, at 885-86. President Franklin Roosevelt himself wrote all the nation's governors urging them to enact enabling legislation for local housing authorities. Secretary Ickes followed up by sending the PWA lawyers' model bills. McDonnell, supra note 436, at 4.

[446] As McDonnell noted, it was "necessary for the Federal Government, which was primarily interested in public works to relieve unemployment, to bring pressure to bear upon the state legislatures to get some action with regard to housing legislation" Id. at 42.

[447] Cam, supra note 445, at 374.

[448] See Exec. Order 7732, 2 Fed. Reg. 2,707 (Oct. 27, 1937); J. W. Brabner-Smith, The Wagner Act: A Definite Housing Program, 23 ABA J. 681, 681 (1937). Brabner-Smith was the counsel for the FHA at the time.

[449] Brabner-Smith, supra note 448, at 682.

[450] Cam, supra note 445, at 375-76.

[451] McDougal & Mueller, supra note 434, at 43. The highest courts of twenty-three states had so held. Id. at 45-47 & n.13. New York State's highest court had led the way in clearing away any doubts regarding the propriety of state and local government intervention in housing as a "public use" of legal authority and taxpayer resources. New York City Housing Authority v. Muller, 1 N.E.2d 153 (N.Y. 1936); see also Nichols, supra note 434, at 630 (crediting the Muller decision with having "established the law").

as "basically… an insurance company with middle-class housing its prime concern."[452] The FHA's mandate was to encourage lending by insuring mortgage lenders against default, while setting basic standards for the housing it would underwrite: the overall mission, as Congress defined it, was "[t]o encourage improvement in housing standards and conditions [and] to provide a system of mutual mortgage insurance."[453] FHA did succeed in expanding the reach of the private housing market to expand home-ownership, by reducing risk for lenders and changing production patterns in ways that reduced building costs.[454] In the process, the agency endeared itself to commercial developers.[455]

Together, the creation of the USHA and FHA set up a long-term "two-tier" pattern in housing policy, like other social welfare programs set up in the 1930s, consisting of "well-legitimized, relatively generous state support for the middle and upper segments of the population and poorly regarded, poorly funded programs for the least affluent."[456] Low-rent public housing for the poor operated as the lower tier, while FHA mortgage insurance (and the similar programs of the Veterans Administration) for privately built housing formed the top tier.[457]

In both settings, the federal approach was framed as one of assistance to local governments and private industry, avoiding any form of "federal control."[458] As the National Association of Housing Officials explained in 1939, "The central principle… is that the responsibility for planning, designing, building, and managing public housing rests directly upon the shoulders of the local housing authorities."[459] Promising a maximum of local "responsibility" was integral to public housing's political viability.[460]

These original structural decisions had profound consequences for the federal housing agencies' understanding of their legal responsibilities, their constituencies, and their political fortunes. The upshot was that housing officials understood federal power in limited ways. Administrators saw their mission as serving an independent, more legitimate provider of housing.

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[452] See Charles L. Edson, Affordable Housing: An Intimate History, in The Legal Guide to Affordable Housing Development, 3, 4 (Tim Iglesias, Rochelle E. Lento, & American Bar Association eds., 2nd ed. 2011).
[453] National Housing Act of 1934, Pub. L. 73–479, 48 Stat. 1246.
[454] Gail Radford, Modern Housing for America: Policy Struggles in the New Deal Era 193-94 (1996).
[455] Id. at 193-94.
[456] Id. at 1, 197-198.
[457] Housing reformer Charles Abrams once critiqued the extensive federal supports for middle-class housing as reflecting "the philosophy of socialism for the rich and private enterprise for the poor." A. Scott Henderson, Housing and the Democratic Ideal: The Life and Thought of Charles Abrams 208 (2010) (quoting Abrams' 1959 congressional testimony).
[458] Davis McEntire, Residence and Race 294-95 (1960). But cf. id. at 317 (remarking of the PHA, "In practice, the federal government works closely with local authorities in the planning of projects and exercises extensive supervisory authority.").
[459] Nat'l Ass'n Housing Officials, Local Housing Authority Administration: A Manual from Early Experience v-1 (1939).
[460] For example, a pamphlet in the NAACP's files that urged political support for passage of the 1936 Housing Act listed "decentralized operations" among its favorable features, noting "Local housing authorities... will assume the fullest possible responsibility for initiation, construction, and management. Federal supervision will merely guarantee low-rentals and physical safeguards." Pamphlet, "I am for it!, I:C257, NAACP Papers.

Federal officials understood the program of providing public housing for low-income renters to be primarily a domain of local governmental initiative and choice. A coalition of labor, slum reformers and social workers, minority groups, and urban leaders originally supported public housing. Over time, however, the most organized constituency of public housing became the local officials who operated the housing, organized in the National Association of Housing Officials (NAHO).[461]

In the federal mortgage insurance program, the officials saw themselves as supporting one of the country's largest economic forces—the homebuilding and real estate industry. Framed originally as a means to save the "private enterprise system" during the worst of the Depression, the FHA understood its core imperatives as supporting that system in an economically sound manner.

Legal insulation and constitutional uncertainty

As federal authorities crafted a "cooperative federalism" framework for public housing, Supreme Court precedent increasingly shielded such Spending Clause programs from constitutional scrutiny. In 1923, the Court indicated that it would be rare for any individual or entity to have standing to challenge federal grant conditions. In a decision that involved a state and an individual taxpayer's separate challenge to a federal maternal health grant program, as being beyond the federal government's spending clause powers and invasive of the states' Tenth Amendment reserved rights, the Court refused to address the merits and dismissed the cases for lack of jurisdiction.[462] During the New Deal years, though the Court did review challenges to federal Spending Clause programs, it both affirmed the broad scope of the Spending Clause authority and increasingly indicated that the states' consent to the conditions of such programs vitiated any constitutional concerns.[463] In the subsequent decades, observers argued that the Court's standing doctrine prevented equal protection challenges to federal grant-in-aid programs.[464]

Even if civil rights lawyers had been able to overcome standing barriers, they believed that the courts would be reluctant to remedy plaintiffs' constitutional harms by ordering a halt to federal funding practices, and would instead limit them to remedies against the state or local officials actually operating the programs.[465] Federal officials' insulation from actual operation of public housing gave them practical legal insulation as well, while sovereign immunity shielded them in instances where it could be argued that no statutory waiver applied.[466]

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[461] Harold Wolman, Politics of Federal Housing 153 (1971) (describing the organization as the public housing agency's "main clientele group").
[462] Massachusetts v. Mellon, 262 U.S. 447 (1923).
[463] See Chas. C. Steward Machine Co. v. Davis, 301 U.S. 548 (1937); see also Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947); United States v. Bekins, 304 U.S. 27 (1938).
[464] See Kranz, supra note 267, at 76 n.192.
[465] See, e.g., Motley Memorandum, supra note 268, at 17-18.
[466] See Marshall W. Amis, General Counsel, to Warren R. Cochrane, Director of Racial Relations (Nov. 29, 1951), Racial Discrimination (1) (1938-1961), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II (discussing public housing agency's successful argument in several cases that Congress had not waived the agency's sovereign immunity).

While the structure and doctrine surrounding federal Spending Clause programs made it unlikely that federal officials would face equal protection challenges in the courts, the substantive meaning and scope of the Equal Protection Clause itself was deeply contested. That constitutional uncertainty created still greater space for administrators to exercise legal discretion, even as they were shielded from defending their decisions in litigation.

From at least the 1930s forward, civil rights advocates had begun developing the argument that the federal government was legally barred from using federal funds to support racial discrimination or segregation in housing. That argument was rooted in equal protection principles, and rested on a set of interlocking premises:

First, that the Fourteenth Amendment barred not just disparate treatment but racial segregation itself—contra *Plessy v. Ferguson*'s "separate but equal" theory. Beginning with *Buchanan v. Warley* in 1917, the Supreme Court had struck down local governments' attempts to require residential segregation by law. For NAACP lawyers, *Buchanan* and the cases following it indicated that regardless of segregation's legality in other realms, government-imposed segregation in housing was distinct and impermissible under the Constitution.

Second, that the federal government, though not directly subject to the Fourteenth Amendment, was subject to the same constraints on discrimination by virtue of the Fifth Amendment. By the early 1940s, the Court's rulings in the Japanese-American internment cases, indicated that due process likely barred at least some forms of race discrimination. In 1954, the Court squarely applied the Fifth Amendment to strike down federal government discrimination until *Bolling v. Sharpe*, the federal companion case to *Brown v. Board of Education*.

Third, that just as the federal government could not impose segregation directly, nor could it supervise, approve, and fund or otherwise aid other actors' efforts to impose segregation. NAACP lawyers argued for the broad principle that the Constitution barred any governmental support for residential segregation, whether imposed by public or private actors. They found support in cases testing the boundaries of the state action doctrine, from the white primary cases to Marsh v. Alabama.[467]

Finally, if federal aid for other actors' segregation practices violated the Fifth Amendment, then civil rights advocates argued that this constitutional prohibition bound the executive branch just as it bound the legislative and judicial branches. Administrative officials could not avoid constitutional responsibility by arguing that statutes did not address the problem or seemed to require them to continue aiding those actors despite discrimination. Nor could they wait passively for a court to directly pass on the question (a practice which would simply return the NAACP and

[467] In the context of support for private discrimination, such as through FHA mortgage insurance, this was a "state action" problem—did federal support for private builders constitute sufficient government involvement to invoke the Constitution at all? In the public housing context, one might term this a "federal action" problem—did federal support for local government's discrimination represent sufficient involvement to bring into play constitutional restrictions on federal, as opposed to state, actors?

its allies to the fundamental difficulties involved in challenging federal aid programs in the courts, as discussed above).[468]

As the Supreme Court reconfigured its equal protection jurisprudence in the 1940s and 1950s, the legal foundation for each of these premises strengthened. However, enough uncertainty persisted to give agencies leeway for judgment. In particular, two questions remained especially murky: First, how much "federal action" sufficed to invoke constitutional prohibitions? State and local discrimination might violate the Fourteenth Amendment, but it was unclear at what point federal funding, supervision, or regulatory approval of other government actors' discrimination would also invoke the Fifth Amendment, meaning that federal officials themselves were violating the Constitution. Second, to what degree were executive agencies entitled to independently interpret the Constitution, especially if that meant acting contrary to statutory mandates or perceived Congressional will?

Political vulnerability

Though the federal public housing program was sheltered from constitutional scrutiny in the courts, the agency drew intense political scrutiny from its earliest days. The first dozen years of the program were "marked by… repulsing attacks on [its] very existence."[469] Many members of Congress—particularly in the House of Representatives—opposed the "government as landlord," both because they associated the program with socialism and because they feared its impact on the powerful private housing industry. In contrast to the politically powerful and popular Federal Housing Administration, which provided financial guarantees for private industry and lowered barriers to middle-class home ownership, the PHA was politically embattled and resource-starved. Further, Congress intentionally resisted rendering the agency more susceptible to top-down executive branch control, even as its own powerful oversight and appropriations committees kept a watchful eye on the agency.

When the public housing agency took statutory form in 1937, it inherited the institutional structure and staff of the Public Works Administration's Housing Division, which had grown up under leading liberal and Secretary of the Interior Harold Ickes' protective supervision.[470] Though the new agency remained nominally within Interior under Ickes' supervision, it gained its own

[468] Federal housing administrators responded to these arguments in three ways. First, they argued (or simply assumed) that the Plessy v. Ferguson "separate but equal" principle applied to public housing programs, permitting segregated housing as long as the facilities were of similar quality. Second, to the extent that the federal government was not itself building and providing housing, but instead providing financial support to other governmental or private actors to do so, federal housing administrators did not believe the federal government itself was engaged in discrimination. And third, federal administrators doubted support for private discrimination, such as through FHA mortgage or support for private builders, constituted sufficient state action to invoke the Constitution at all. If solely private discrimination was involved, they saw no federal constitutional problem.

[469] Harold Robinson & John I. Robinson, A New Era in Public Housing, 1949 Wis. L. Rev. 695, 695 (1949).

[470] See, e.g., People in the News, Chi. Defender, Feb. 16, 1952, at 10 (writing that Ickes "initiated the liberal trend in Government employment which eventually led to the wide acceptance of Negroes in Federal jobs," "broke down segregation in government cafeterias by instituting complete integration on his own," and secured the Lincoln Memorial for singer Marian Anderson after the DAR refused to allow her to sing at Constitution Hall).

Administrator directly appointed by the president for a five-year term.[471] Nathan Straus, a New Yorker and friend of Roosevelt's, became the first Administrator.[472] Straus' early political missteps with Congress were blamed for rendering the agency quickly politically vulnerable.[473]

But powerful interests targeted the public housing agency from the beginning, even apart from any errors by Straus.[474] Private housing interests were "unflagging" in their attempts to kill it.[475] The real estate groups opposing public housing included the National Association of Real Estate Boards, the National Association of Home Builders, and the United States Savings and Loan League.[476] They claimed that public housing would lead to the death of private enterprise. Later they circulated ads asking, "Can you afford to pay someone else's rent?"[477]

Public housing never attracted a forceful constituency in its favor. Housing reformers did not reflect a national grassroots movement for public housing, but rather a limited coalition of labor unions, reformers, and local officials.[478] Commentators have described the forces that allowed the initial enactment of the federal public housing program in 1937 as "a conjuncture of unemployment, labour organizing, homelessness, the harsh conditions of tenement housing…, and compromises made with the building, real-estate and banking industries."[479] A "massive Democratic majority" in Congress also eased the way.[480] Housing reformers had "good leadership, wide public support, and considerable political influence"—but they lacked a well-organized lobbying organization.[481] The only such group, the National Public Housing Conference, was limited by its "shaky finances, low membership, limited purpose, and inability to develop grassroots support."[482] After enactment, the program's political support remained

[471] Brabner-Smith, supra note 448, at 681; Hunt, supra note 444, at 201-202; see also McDonnell, supra note 436, at 306 (noting that Ickes' dislike for Nathan Straus, the first administrator, led him to "have nothing to do with" the agency and allowed it effective independence).
[472] Mark I. Gelfand, A Nation of Cities: The Federal Government and Urban America, 1933-1965, at 63 (1975); Hunt, supra note 444, at 212.
[473] D. Bradford Hunt, How Did Public Housing Survive the 1950s?, 17 J. Pol'y Hist. 193, 195 (2005).
[474] McDonnell, supra note 436, at 60-63 (describing opposition of National Association of Real Estate Boards, US Building and Loan League, National Retail Lumber Dealers Association, and the Chamber of Commerce).
[475] McEntire, supra note 458, at 316.
[476] David L. Mason, From Buildings and Loans to Bail-Outs: A History of the American Savings and Loan Industry, 1831–1995, at 153-54 (2004)
[477] Hunt, supra note 473, at 193.
[478] See McDonnell, supra note 436, at 42 (arguing that the groups in support "could not be said to constitute a mass or grass-roots movement in favor of public housing" and noting that the federal government had to pressure states to establish local housing authorities); id. at 53 (describing lack of coordination among groups); id. at 54-59, 67 (describing formation of National Public Housing Conference in 1931, National Association of Housing Officials in 1933, and Labor Housing Conference in 1934, as well as enlistment of American Federation of Labor (AFL) support).
[479] James Fraser, Deirdre Oakley & Joshua Bazuin, Public Ownership and Private Profit in Housing, 5 Cambridge J Regions Econ. Soc. 397, 399 (2012).
[480] Hunt, supra note 473, at 195.
[481] Richard O. Davies, Housing Reform During the Truman Administration 15 (1966).
[482] Id.

geographically concentrated in the South and in large cities.[483] NAHO, the organization of local housing officials, became the program's most entrenched clientele.[484]

Another federal housing agency served as the perfect foil to the vulnerable Public Housing Administration. The Federal Housing Administration (FHA) served the world of private housing. Its popularity reflected its success in catering to powerful real estate interests.[485] Unlike public housing, FHA's mortgage insurance was expressly seen as a way to aid the middle class and industry. The program was designed to fight the worst category of unemployment in the Depression, the building trades, where housing starts had fallen to 10% of their former level in less than a decade. Its backers described the program as "the last hope of private enterprise."[486]

The FHA approach, initially proposed by a Federal Reserve official, was intended to encourage lending by insuring mortgage lenders against default, while setting basic standards for the housing it would underwrite.[487] The overarching goal was "to stimulate home building and improvement with the least possible governmental interference in the private enterprise system and the least cost to the taxpayer."[488] From the beginning, the agency saw itself as a "helper" to "builders, lenders, realtors and other members of industry" as well as American families.[489] At its origins in 1934, its first administrator was a Standard Oil executive who "lifted bodily an advertising agency, a time payment crew, a legal department, and a banking and accounting division from the best known institutions in America."[490]

The agency's mission and constituents shaped its basic conservatism.[491] As one observer said: "Because FHA has functioned as a mortgage insurer, it has tended to act more like an insurance company than a housing agency."[492] The agency was "largely staffed by former private real estate men."[493] In the words of one federal housing Administrator, the FHA "was never

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[483] Hunt, supra note 473, at 196.

[484] The group was later renamed National Association of Housing and Redevelopment Officials (NAHRO). Wolman, supra note 461, at 60-61. It had a "vested interest in the continuance of the large public housing projects they ha[d] constructed and managed since the 1930s." Id. at 35.

[485] Real estate interests were "one of the most effective pressure groups in Washington." Davies, supra note 482, at 22.

[486] Fed. Housing Admin. (FHA), The FHA Story in Summary, 1934-1959, at 4 (1959). In 1933, new housing starts had fallen to one tenth of their level in 1925. Id. at 2. The building trades represented the greatest category of unemployed workers. Joshua L. Farrell, The FHA's Origins: How Its Valuation Method Fostered Racial Segregation and Suburban Sprawl, 11 J. Affordable Hous. & Comm. Dev. L. 374, 375 (2002).

[487] The objective was "[t]o encourage improvement in housing standards and conditions [and] to provide a system of mutual mortgage insurance." National Housing Act of 1934,

[488] FHA, supra note 486, at 4.

[489] Id. at 22.

[490] Id. at 7.

[491] See Wolman, supra note 461, at 27 ("FHA, which operates on a decentralized local basis, has developed quite good relations with local financial institutions, and its lending policy reflects the same conservative direction that characterizes its clientele. Because of this, it has gained the reputation of an institution not readily sympathetic to the needs of the poor.").

[492] Tom Forrester Lord, Decent Housing: A Promise to Keep: Federal Housing Policy and Its Impact on the City 58-59 (1977).

[493] Norman Williams, Discrimination and Segregation in Minority Housing, 9 The American Journal of Economics and Sociology 85, 96 (1949).

intended to be" a "welfare organization."[494] The agency subscribed to this vision of itself even though, as public housing supporters pointed out, "the large portion of so-called private housing is, in fact, publicly financed, even though privately owned, and…today government bears all the financial risk in the construction of new homes."[495]

By lowering down payments, extending mortgage terms, and ensuring full amortization, FHA sparked a "revolution in home finance."[496] The agency expanded home-ownership, by reducing risk for lenders and changing production patterns to lower building costs. At the outset, "'value' itself had to be defined," agency administrators later recalled.[497] FHA's subsequent valuation policies, embodied in an underwriting manual that the agency itself referred to as its "Bible," systematically favored suburban development and disfavored cities.[498] With Congressional blessing, research on the housing market also formed a core part of the FHA mission from the beginning.[499]

With these programs, the FHA became both popular and financially independent.[500] Early on, in sharp contrast to the public housing program, the agency acquired the powerful political support of the real estate industry, including groups like the National Association of Real Estate Brokers, the National Association of Home Builders, and various lender organizations such as the Mortgage Bankers Association and the US Savings and Loan League.[501] Initially intended as a temporary program, the federal guarantee of home loans became permanent in the postwar years.[502] The agency was self-sustaining by 1940, and by 1954 it repaid the Treasury amounts initially advanced to it, with interest. At the end of the 1950s, the FHA had almost $700 million in cash reserves.[503] By then, the agency congratulated itself on having helped "three of every five American families to own their homes."[504]

Organization and political control

Members of Congress jealously guarded their control over federal housing agencies, and sought to thwart the President's ability to direct housing programs against their preferences. As a

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[494] Civil Rights, Hearings before Subcommittee No. 2 House Comm. on the Judiciary, at 218-19 (statement of Albert Cole, agreeing with Rep. Forrester).
[495] Robinson & Robinson, supra note 469, at 697.
[496] Richard Harris, A New Form of Credit: The State Promotes Home Improvement, 1934–1954, 21 J. Pol'y Hist. 392, 392 (2009).
[497] FHA, supra note 486, at 10.
[498] FHA, supra note 486, at 11; Farrell, supra note 486, at 379-82.
[499] Richard Harris, The birth of the housing consumer in the United States, 1918–1960, 33 International Journal of Consumer Studies 525, 527 (2009).
[500] Farrell, supra note 486, at 376 (writing that the FHA's mortgage insurance program "was, and still is, an enormously popular program"); Snowden, supra note 432, at 89 (describing FHA business as "the lifeblood of the mortgage banking industry" by the mid-century); Wolman, supra note 461, at 113 (attributing FHA's popularity on the Hill to its "wide beneficial impact on large numbers of middle-income constituents").
[501] Karen Marie Hult, Agency Merger and Bureaucratic Redesign 90 (1987).
[502] Snowden, supra note 432, at 80, 84.
[503] FHA, supra note 486, at 14, 19, 21.
[504] Id. at 21; see also Harris, supra note 499, at 529 ("[F]ederal housing policy, from the 1930s onwards, focused on helping people to buy.")

result, the White House struggled to gain levers with which to direct the agencies and shape an overarching, coherent federal housing policy. Multiple presidents tried to centralize their control over housing in a single agency with top-down control over the various programs, achieving only mixed success. President Roosevelt in 1942 used his war powers to temporarily consolidate all federal housing bodies within a single entity, the National Housing Agency.[505] Five years later, with Senate approval, President Truman permanently created the Housing and Home Finance Agency (HHFA) to house the federal housing agencies under one institutional umbrella.[506]

In both instances, Congress carefully safeguarded the constituent housing agencies' independence—particularly that of the FHA, the powerful insurer of mortgages for middle-class housing. Legislators preferred to insulate the agencies from top-down, White House control, in favor of preserving administrators' responsiveness to their housing program constituents and Congressional oversight committees. They also feared that joining the agencies too tightly would shift the leader's power and sympathies toward the public housing agency.[507]

Originally, legislators created FHA as a free-standing, independent agency, headed by the Federal Housing Administrator.[508] When Truman did finally succeed in creating a consolidated housing agency structure with the HHFA, the 1947 Senate report emphasized that the new Administrator's coordinating role did not include the power "to direct and to control" the constituents.[509] Instead, even within the consolidated agency, the relevant statutory powers were vested directly in the heads of the Federal Housing Administration and Public Housing Administration.[510] The Administrator acquired only "advisory and supervisory authority to discuss matters with them."[511] That organization of the HHFA persisted until the creation of the Department of Housing and Urban Development in 1965.

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[505] Exec. Order 9070, Feb. 24, 1942, http://www.presidency.uscb.edu/ws/?pid=16225 (encompassing, inter alia, the Federal Housing Administration, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, and the United States Housing Authority).

[506] Statement by the President on the New Housing and Home Finance Agency, Aug. 7, 1947, https://trumanlibrary.org/publicpapers/viewpapers.php?pid=1914

[507] In fact, Congress rejected a 1946 proposal from Truman to reorganize the housing agencies in a single, permanent entity because the plan transferred statutory powers upward to the Administrator rather than leaving them vested in the constituent agencies. According to Senator Taft, private housing interests including the "FHA, the private builders the real-estate boards, the building and loan associations, and the savings and loan associations … had the fear that if [the housing agencies] were consolidated the man who dominated the whole thing would be a public-housing man." Nomination of Robert C. Weaver, Hearings before the S. Committee on Banking and Currency, 87th Cong., 1st Sess. 25 (1961) (quoting 79 Cong. Rec. 8986-8987 (1946) (statement of Sen. Taft)).

[508] National Housing Act of 1934, Pub. L. 73-479, § 1, 48 Stat. 1246. Part of the initial decision to make the FHA an independent entity apparently rested on the opposition of the Federal Home Loan Bank Board's chair to incorporating the FHA within it. Snowden, supra note 432, at 79.

[509] Nomination of Robert C. Weaver, Hearings before the S. Committee on Banking and Currency, 87th Cong., 1st Sess. 23 (1961) (quoting Memorandum, Extent of Power of Housing and Home Finance Administrator).

[510] Id. at 28 (quoting Memorandum, Legal Relation of Housing Administrator to Heads of Constituents of Housing Agency).

[511] Id. at 27 (quoting Albert Cole, Administrator of HHFA, in 1955). In contrast, the powers of the subsequently-created Urban Renewal Administration were vested in the Administrator and delegated to the URA head. Id. at 29-30 (quoting Memorandum, Legal Relation of Housing Administrator to Heads of Constituents of Housing Agency).

The overall set-up of the housing agencies that resulted was "an administrative monstrosity…. this was an impossible thing to run" from the executive branch perspective.[512] HHFA "was usually regarded as pretty disorganized and some of the agencies very independent."[513] Through the 1950s "the Public Housing Commissioner would just refuse to meet with the [HHFA] Administrator and the FHA would thumb its nose…"[514]

The decentralized structure of the housing programs aggravated the White House and the HHFA administrator's problems in controlling the constituent agencies. The obstacles to reigning in the FHA were particularly pronounced. In the deputy administrator's words, "when you get to the insuring offices, the FHA regional offices, the district offices … that's where the powers of the administrator were very minimal…."[515] Regional directors could be very slow in responding to Washington directives—sometimes the only recourse was to resort to civil service manipulation to move them.[516] Further, the chief underwriter in each FHA office had great power: "And in so many places, he was really a stinker."[517]

Southern legislators held key posts overseeing the housing agencies in this period, particularly after 1949. The oversight committee in the Senate, the Committee on Banking and Currency, was chaired by Southerners from 1949 through 1975, except for a two-year Republican chairmanship in 1953-1954.[518] Two Alabamans wielded special power over housing: Senator John Sparkman of Alabama headed the housing subcommittee from 1949 onward, except for the two-year Republican stint in 1953-1954.[519] In the House, the Rep. Albert Rains (D-AL) chaired the housing subcommittees in the House until his retirement in 1964.[520]

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[512] Interview by William McHugh of Booker T. McGraw, Washington D.C. 8-9 (Sep. 11, 1968), John F. Kennedy Library Oral History Program.

[513] Interview by William McHugh of Milton P. Semer, Washington, D.C. 46 (Sep. 10, 1968), John F. Kennedy Library Oral History Program.

[514] Interview by William M. McHugh of William L. Slayton, Washington, D.C. 12 (Feb. 3, 1967), John F. Kennedy Oral History Program. The metaphor of constituent agencies being able to "thumb their noses" at the HHFA head was popular: As another long-time staffer put it, "all the commissioner [of a constituent agency] had to do was to thumb his nose nicely and politely say, 'well Mr. Administrator, the statute is holding me responsible…'" McGraw Interview, supra note 512, at 8.

[515] Interview #2 by Larry J. Hackman of Jack T. Conway, Washington, D.C. 63 (April 11, 1972), Robert Kennedy Oral History Program of the John F. Kennedy Library.

[516] Interview by Larry J. Hackman of Oliver W. Hill, Richmond, Va. 40 (Feb. 29, 1968), John F. Kennedy Library Oral History Program.

[517] Id.

[518] The agency's appropriations were overseen by the Independent Offices subcommittees in both House and Senate. Wolman, supra note 461, at 141.

[519] Wolman, supra note 461, at 123 (describing Sparkman as "the key figure in housing legislation on the Senate side"). Sparkman was one of the Southern Democrats who supported New Deal type economic legislation, while defending racial segregation. See Interview by Paige E. Mulhollan with Senator John Sparkman 33 (Oct. 5, 1968), Lyndon B. Johnson Library Oral Histories.

[520] See Wolfgang Saxon, Albert McKinley Rains, 89, Dies; Backed Housing Bills in Congress, N.Y. Times, March 24, 1991; John Sparkman, 85, Ex-Senator, Dies, N.Y. Times, Nov. 17, 1985; see also Wolman, supra note 461, at 117, 127 (stating that Rains "dominated the housing process on the Hill" until 1965).

Racial policies

The public housing agency's origins left it with lasting institutional legacies in the area of race. The agency directly inherited a set of non-discrimination policies and staff from its original incarnation within the Public Works Administration (PWA). One of the staunchest racial liberals in FDR's Cabinet, Secretary of Interior Harold Ickes, oversaw the PWA and its nascent Housing Division. In a key early move, Ickes mandated non-discrimination in the agency's public works jobs. Though the public works program's original authorizing legislation did not bar discrimination, Ickes said, "it is to be assumed that Congress intended this program to be carried out without discrimination as to race, color, or creed of the unemployed to be relieved"—and he claimed the delegated power to implement that intent.[521]

Along with a non-discrimination mandate, Ickes also set up an institutional unit dedicated to issues of racial fairness. In 1933, after pressure by black leaders, Ickes created the Office of the Advisor on Negro Affairs to help oversee the Department as a whole.[522] The following year Robert Weaver, an African American economist who had earned his Ph.D. at Harvard, took on the post; from that position he also served as a consultant to the PWA's Housing Division. Weaver believed his job was "to serve his employer, the federal government, by protecting it from censure on racial grounds . . . [T]he best way to do this was to see that racial minorities were integrated throughout the programs of the housing agencies."[523]

Soon a Racial Relations office was formed to help implement what Weaver called "a positive racial policy" for public housing. Four areas were involved in that policy approach: "equitable participation of minorities as tenants, site selection, equitable participation of minorities in management, and fair employment practices in construction employment."[524]

Once the new public housing agency was formed in 1937, the agency inherited the PWA's housing projects and staff, as well as its the racial relations framework.[525] NAACP leader Walter White had endorsed the idea of a wholesale staff transfer, commenting: "Since we have been successful in getting Negroes appointed in strategic managerial positions, … it would be desirable to have the employees in the present Management Branch of the [PWA] Housing Division transferred [to the new agency]."[526]

As a result of these legacies, Gunnar Myrdal wrote in *An American Dilemma* that the public housing agency "has had the definite policy of giving the Negro his share." That approach had deep roots in the agency's culture and its leaders' beliefs. In addition to the racial relations branch,

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[521] W. J. Trent, Federal Sanctions Directed against Racial Discrimination, 3 Phylon 171, 177-78 (1942).
[522] Ickes generated backlash by appointing a white man, Clark Foreman to the position, and subsequently appointed Weaver as his assistant with the understanding that he would become Administrator upon Foreman's departure (which took place within a year).
[523] Lucia M. Pitts, A History of Public Housing for Negroes 17(1) (draft manuscript, ca. November 1954), Box 1, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[524] Weaver, supra note 19, at 158.
[525] Pitts, supra note 523, at IV-6.
[526] Walter White to Charles Houston (April 16, 1937), II:C257, NAACP Papers.

"many of the leading white officials of the agency . . . are known to have been convinced in principle that discrimination should be actively fought."[527]

Weaver attributed such achievements to the agency's early history: "From the start, public housing had … an effective and respected race relations office; it was accepted that both programs and projects were to be reviewed by that office, and other branches of FPHA had come to realize that racial participation was an agency concern." Achieving that acceptance within the agency had not been easy, but rather involved "a tremendous amount of spade work in developing certain basic principles and programs of action to assure Negroes were there at the start, helping to work out the various phases of the program."

In contrast to the public housing agency, the FHA's racial policy was regressive from the very beginning. Early on, the FHA reserved its mortgage insurance benefits almost exclusively for whites, while demanding that real estate developers implement racially restrictive covenants in the sprawling new suburban communities it financed nation-wide, North and South.

Gunnar Myrdal reported in 1944 that the FHA "[took] over the policy of segregation used by private institutions, like banks, mortgage companies, building and loan associations, real estate companies…. [which] is particularly harmful since the F.H.A. has become the outstanding leader in the planning of new housing."[528] Thurgood Marshall noted, "Not only does the FHA deny its responsibility for a positive social policy but it now considers itself rather as a private business organization."[529] The agency justified its policies as means of ameliorating the economic "risk" that integration or minority occupancy supposedly posed for property values. As a long-time housing official put it, "FHA is like a mortgagee. They are, in effect, concerned about the risks on a loan."[530] In adopting "traditional private real estate practices," the agency strengthened and extended racial segregation.[531]

[527] Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy 350 (1996).
[528] Id. at 349.
[529] Thurgood Marshall, Memorandum to the President of the United States Concerning Racial Discrimination by the Federal Housing Administration (Feb. 1, 1949), II:A311, NAACP Papers.
[530] Slayton Interview, supra note 514, at 13.
[531] Marshall Memorandum, supra note 529.

Chapter 7 Constructing "Racial Equity"

During the New Deal years, black leaders and their allies crafted a new set of "racial equity" principles governing public works and housing. They did so by drawing on administrative powers, in the face of statutory silence and constitutional ambiguity. The principles they designed echoed contemporaneous understandings of equal protection, as reflected in *Plessy v. Ferguson* and its progeny. "Racial equity" did not bar segregation, but it required that public resources and power be distributed equitably among the races—a relatively egalitarian approach for the time, and one supported by many civil rights leaders in a period when they weighed the trade-off between supporting social legislation and pursuing civil rights reforms.

The key figure in creating the new administrative regime was Robert Weaver. Weaver took on a leading role in early public works and public housing programs after African American activists pressured the Roosevelt administration to do more to ensure New Deal programs treated African Americans fairly. Appointed as the principal advisor on racial issues to Secretary of Interior Harold Ickes, Weaver fleshed out an ideal of "equitable participation" in the early public works programs. Weaver's vision included a "fair share" of public works employment and low-income housing units. Weaver went even further, though, in laying out principles for substantive participation by minorities in local housing policy, governance, and management. In his eyes, the result was "a racial policy … full of implications for American democracy."[532]

The core principles of "equitable participation" were these:

> [1] Since Negroes pay taxes just as other Americans, the Federal Government should see that they have their fair share of dwelling units in any housing program initiated by the Federal Government.
> [2] Negroes should be treated as other citizens and taxpayers and take part in the planning, development, and management of housing programs, particularly those in which they are to participate as tenants.
> [3] As taxpayers, Negroes should have, also, their fair share of employment created by construction of housing projects.[533]

Two core guidelines for implementing these equitable participation principles emerged. The first was "a sort of formula, developed by the Adviser's office, to define discrimination in the employment of construction workers, and thus to assure employment for Negroes."[534] The second was "a policy of equity, providing that in any public housing undertaken, units should be provided for Negroes according to their local population and needs."[535] In effect, then Weaver outlined a test of proportionality to measure whether jobs and housing were being accorded to African Americans in ways that met the "separate but equal" principle. Even if the federal agency were to countenance segregation (as the federal courts themselves had across many areas), a norm of distributive equity could be applied and enforced.

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[532] Robert C. Weaver, Racial Policy in Public Housing, 1 Phylon 149, 149 (1940).
[533] Pitts, supra note 523, at 18 (citing Frank S. Horne, Minority Group Considerations in Administration of Governmental Housing Programs 1 (1947), in which Horne offers a similar description of these principles).
[534] Id.
[535] Id.

A formula to ensure a "fair share" of jobs

The equity formula approach to fair employment arose out of Weaver's dissatisfaction with early experiences in attempting to enforce non-discrimination at the PWA. The PWA had adopted a non-discrimination provision for employment on its projects, based on Ickes' assertion of administrative authority. But it became clear, in Weaver's words, that "a pronouncement of policy did little if anything to assure equal job opportunities for minorities."[536] Moreover, it was difficult to monitor and detect discrimination on anything like a case-by-case basis. The number of parties involved exacerbated the problem: "it was humanly impossible to define discrimination in a situation where a borrower, a contractor and a labor union were involved," Weaver wrote.

In response, Weaver proposed "an administrative formula to guarantee equitable employment of non-whites on public housing construction contracts."[537] At the PWA, Weaver had begun collecting payroll data to aid in the enforcement of the agency's contractual non-discrimination clause for employment on its public works projects. Now he constructed an approach whereby the contractor's failure to pay a certain portion of its payroll to black labor would constitute prima facie evidence of discrimination.

Agency construction contracts contained a clause that "for the purpose of determining questions of… discrimination… it is hereby provided that the failure of the contractor to pay at least" a set percentage of the monthly payroll to black workers "shall be considered prima facie evidence of discrimination." Those percentages were set separately for black skilled and unskilled labor, relying on the 1930 occupational census figures for the local area and updated inquiries on the availability of black workers locally. Race relations officials reviewed monthly payroll data from all contractors to police the requirement.

After more than a year of applying the device to PWA projects, agency officials viewed it as "a workable solution to a difficult problem. Its use had made it possible to spot and correct discrimination in the early stages of the work rather than after it was completed." And it shifted the burden to the contractor to disprove discrimination, rather than vice versa. That the agency moved forward with this "racial equity" approach, given inevitable objections, "was due in large measure to the support of objective agency heads, and the cooperation of others, in and out of government."[538]

Once the 1937 Housing Act set up a new, separate public housing agency, administrators of the new agency immediately set up an Office of Racial Relations, headed by Weaver as Special Assistant to the Administrator. Weaver would endeavor to ensure that the PWA principles persisted in the new agency. Overcoming initial objections from the agency's legal staff, Weaver's percentage-based approach ultimately prevailed, though it was watered down slightly in the process.

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[536] Robert C. Weaver, Negro Labor Since 1929, 35 The Journal of Negro History 20 (1950).
[537] Id.
[538] Pitts, supra note 523, at 24.

In March 1938, Weaver sent the new agency's general counsel his proposal, arguing that any bar on employment discrimination "will not be effective unless discrimination is in some way defined."[539] He urged "a prima facie standard," providing an example of a PWA clause used in Atlanta, and noting that he already had secured the assent of officials in the agency's Labor Relations Division.[540] Weaver also highlighted the relative success of the practice under PWA, attaching a table showing the percent of the construction payroll paid to black workers for various PWA projects (alongside the percent that had been stipulated).[541]

Initially, agency lawyers pushed back, worrying that the prima facie clause might violate public bidding requirements or constitute "discrimination" against contractors who could not employ sufficient African American workers. The general counsel, Leon Keyserling, put off inserting the provision directly into the general contracts to be signed with local authorities, as research began on whether the formula might conflict with state competitive bidding laws.

A junior lawyer drafted a memo arguing that Weaver's proposal was likely illegal, in part because it discriminated against bidders.[542] The percentage approach restricted competitive bidding, conflicted with the Fourteenth Amendment by infringing contractors' rights to pursue their vocations, and violated public policy by raising the costs of building public works. In the lawyer's view, "a contractor unable to secure the required percentage of Negro skilled labor would be discriminated against and . . . the idea of equality to all bidders would be dispensed with."[543] Moreover, "the question presented here for determination is a sociological one, rather than legal"—surely other agencies were better equipped to address such issues. Finally, "to insert such a clause… would bring about litigation that is in no wise desirable."[544]

But the agency's Labor Relations Division supported Weaver. In a memo to the general counsel, the head of that Division advocated including the provision, so long as union interests would be protected in instances where local unions proved too resistant to employing black labor.[545] Perhaps Weaver was able to maintain an alliance with the labor officials because of his own sensitivity to the issues surrounding race discrimination by unions: he had written that "the need was to maintain job opportunities for Negroes and at the same time to prevent the utilization of these colored workers in the traditional manner—as tools for weakening labor organizations."[546]

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[539] Robert C. Weaver to Leon Keyserling (Mar. 9, 1938), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[540] Suggestions Regarding Labor Provisions in Draft of Loan Contract and of Terms and Conditions, Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[541] A Table Based on Data Derived from Reports of the Inspection Division of the Public Works Administration (Nov. 30, 1937), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[542] Legal Memorandum: Validity of Inclusion in Contract Documents of a Clause Setting up the Actually Determined Percentage of Negro Skilled Labor to be Employed on the Project (Mar. 24, 1938), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[543] Id. at 4.
[544] Id. at 5.
[545] Walter V. Price, Acting Director of Labor Relations, to Leon Keyserling (Apr. 26, 1938), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[546] Weaver, supra note 532, at 153.

Ultimately, the USHA adopted a compromise. Instead of defining failure to meet a set percentage of black employment as prima facie evidence of discrimination, the agency instead offered contractors a safe harbor.[547] Employment of the specified percentage of black workers would constitute prima facie evidence of *nondiscrimination.* That approach, once selected, endured.[548]

Officials openly acknowledged that the non-discrimination clauses, along with the "formula" approach, were based on the agency's discretionary powers. In an undated legal memo from the early 1940s, agency lawyers emphasized that the contractual provision setting forth percentage thresholds for black employment "does not exist by virtue of any statutory requirement…."[549]

By the 1940s, "the prestige of the non-discrimination provision in employment of construction labor was enhanced" with the 1941 publication in the Federal Register of the Federal Works Agency's "Regulation Providing Against Discrimination in Work on Defense Housing."[550] In 1942, former general counsel Keyserling, as Acting Federal Public Housing Commissioner, issued an order applying the prima facie, percentage-based approach to the construction of defense housing.[551] Contractors were required to submit Form FPHA 806, "Monthly Reports on Racial Employment" listing the wages paid to black and non-black laborers.[552]

Within the public housing agency, Weaver's policy also encompassed the participation of African Americans in all facets of project initiation and management, on the theory that "a program for housing or any other type of social betterment must be planned and executed by, as well as for, the elements which are to participate in it"—which meant inclusion "in the policy-making personnel as well as in the construction, management, and maintenance of projects."[553] In 1940, Weaver proudly cited black membership on twenty-two of 300 local public housing authorities, though he acknowledged that this number did not yet "afford adequate representation."[554] He also cited the role of black architects, engineers, lawyers, social workers, stenographers, real estate

[547] See Marshall W. Amis, General Counsel, to Thomas Edwards (Feb. 9, 1949), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II; Price, supra note 545.
[548] See, e.g., B.L. Grove, General Counsel, to Philip C. Sadler, Director, Intergroup Relations Branch (May 6, 1959), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[549] Memorandum of Law re: Amenability of the United States Housing Authority to Suit in an Injunction Proceeding Brought by Individual Negro Skilled Workers (ca. 1941), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II. (The memorandum refers to the agency as USHA and cites a judicial decision from 1941, suggesting that it was authored between 1941 and February 1942, when the agency changed names following Executive Order 9070.).
[550] Racial Relations Serv., Nat'l Housing Agency, Minority Group Considerations in Administration of Governmental Housing Programs 3 (ca. June 1947), Box 9, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II (dating the publication to Jan. 6, 1941) [hereinafter Minority Group Considerations].
[551] Federal Public Housing Authority, National Housing Agency, Order No. 6: Non-discrimination (Mar. 17, 1942), II:A311, NAACP Papers.
[552] Federal Public Housing Authority, National Housing Agency, Lanham Development Manual LC-500 (July 24, 1942), II:A311, NAACP Papers.
[553] Weaver, supra note 532, at 150.
[554] Id. at 151, 155.

appraisers, and clerical workers, among others, in developing and implementing public housing programs.[555]

In addition to encouraging black employment by local authorities, federal officials ordered attention to their agency's own employment practices—emphasizing the importance of "results." In 1941, Administrator Straus circulated a letter from President Roosevelt urging non-discrimination in federal hiring, emphasizing "the urgent necessity of according equal job opportunities" to all. Eight years later, Administrator Raymond Foley warned officials carrying out hiring to implement the 1949 Housing Act that "mere formal adherence" to non-discrimination policy would not suffice; rather, "the spirit" of implementation and "the results achieved" would be the true test.[556] Five months later, PHA Commissioner Egan directed his subordinates throughout the agency to report the number of non-white employees in each grade, reiterating, "results are the test of performance."[557]

The agency continued to adhere to its race-conscious, numbers-based approach to ensuring non-discrimination in public works jobs in the postwar years. After Congress renewed and expanded the public housing program with the Housing Act of 1949, Commissioner Egan replied to an Urban League inquiry about the agency's plans under the new program.[558] Egan assured the group that he "saw no reason for any change" in the agency's approach to assuring black workers "a fair share" of available employment. Local authorities would be required to include non-discrimination clauses in their contracts with builders, and local data on the racial make-up of construction workers would be used to create percentages serving as prima facie evidence of non-discrimination. The agency would do its best to ensure "adherence to the recommended percentages."

It is unclear how consistently enforced the clause was in practice. In February 1950, the Racial Relations Service summarized its experience in ensuring employment of black labor, dating back to the PWA Housing Division, as "generally successful"—though "the most serious difficulties have been with the carpenters' unions."[559] But in April 1955, associate general counsel Joseph Burstein approved the waiver of significant portions of the non-discrimination provisions for a fuel supplier that refused to agree to them, calling it a "relatively minor" change.[560]

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[555] Id. at 152; see also Weaver, supra note 19, at 200-01.

[556] Raymond M. Foley to Principal Staff, Staff Memorandum No. 20 (Aug. 17, 1949), Box 6, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[557] John Taylor Egan, Circular: Executive Order 9980 (Jan. 30, 1950), Box 6, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II. This is not to say that such directives were a panacea, though, as reports of discrimination persisted. For example, the Afro-American reported in 1953 that the housing agency refused to assign black managers to oversee its own projects that were occupied by whites. Louis Lautier, In the Capital Spotlight, Afro-American, Nov. 21, 1953, at 5.

[558] John Taylor Egan, Commissioner, to Julius A. Thomas (Sep. 6, 1949), Box 6, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[559] Racial Relations Branch, Employment of Negro Mechanics on Public Housing Projects (Feb. 13, 1950), Box 6, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[560] Joseph Burstein to Abner D. Silverman (Apr. 5, 1955), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

The race-conscious approach to enforcing non-discrimination in employment also faced periodic objections on the grounds that race should be eliminated from government procedures—what lawyers would recognize today as a "colorblindness" challenge. For example, officials sometimes grappled with apparent tension in state fair employment law and the housing agencies' race-conscious policies. In 1950, General Counsel Marshall Amis told the director of the racial relations service that Rhode Island's law, which barred employers from eliciting information or making any records regarding employees' race or national origin, meant that contractors in that state could not be asked to report racial payroll data.[561] Such "classification and listing by race…[was] clearly prohibited by the Statute."

Later memos within the agency suggested that the percentage clause might simply be superfluous in states with fair employment law—rather than barred by colorblindness requirements. An agency document noted that "PHA has waived the use of the Negro labor percentage clause in public housing construction contracts for New York, New Jersey, Connecticut and Rhode Island because of state fair employment statutes" as well as in Chicago and Philadelphia, based on municipal fair employment ordinances.[562]

In 1959, PHA attempted to quiet the colorblindness concerns of local authorities. The agency circulated a manual section, Report on Negro Employees and Authority Members, to its constituents. The agency advised that the request was "not to be construed as encouraging violation of any state or local prohibition against racial discrimination in employment or against recording the race of applicants." Such reports "generally won't be violative of such laws," they reassured.

Challenges to reporting racial data also arose from federal officials within the housing agencies themselves. In 1955, a dispute broke out within the HHFA over colorblindness and the use of racial data within the agency. When the Civil Service Commission years earlier did away with recording federal employees' race and agencies' reports on minority employment, the HHFA continued to canvass its employees and prepare its own minority employment reports semi-annually. The Racial Relations Coordination Committee recommended updating the format—but the Personnel Advisory Committee argued for doing away with it altogether. "We feel that the idea of any report at all is contrary to the concept of elimination of race identification."[563] And if any report was to be made, they argued that employment officials, not race relations advisors should control its contents

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[561] Marshall W. Amis, General Counsel, to Franklin Thorne, Director Racial Relations Branch (May 17, 1950), Racial Discrimination (1) (1938-1961), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II. A hand-written note on the memo points out that Rhode Island's statute was later amended so that it covered only applicants, not current employees—thus apparently permitting the reporting of racial payroll data. See also Karro to Joseph Burstein (Apr. 4, 1956), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II (commenting on whether Rhode Island's amended statute and Michigan's fair employment law barred local authorities from reporting their numbers of black employees).

[562] Employment of Negro Building Construction Workers on Public Housing Projects (Aug. 5, 1952), Box 6, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[563] Personnel Branch to Joseph Burstein (Dec. 27, 1955), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

Still, the public housing agency retained its percentage-based approach for public works employment, and in later decades argued that other agencies should adopt it as well.[564] The agency's early exercise of discretion had become well entrenched, despite the lack of statutory grounding. The Office of Legal Counsel in 1963 included the PHA when it noted "a number of agencies have for many years required adherence to a policy of nondiscrimination in employment in federally assisted construction"… and that the requirement was "neither clearly authorized nor clearly prohibited by statute. Such exercise of administrative discretion does not appear to have been challenged in the courts, or by the Congress or the Comptroller General."[565]

Equitable provision in low-income housing

As with public works employment, early officials worked in a context of legal ambiguity to fashion principles of racial fairness for the allocation of low-income housing. Frank Horne, the race relations chief, explicitly acknowledged the agency's use of discretion in fashioning its policy in 1947, in a statement drafted for Truman's Committee on Civil Rights. The agency's long-standing "equitable participation" policy "rested so far solely upon administrative policy without any specific legal authorization. No legislation affecting these programs has contained specific non-discrimination or equitable participation provisions."[566]

In the absence of legislative guidance, Weaver and his assistants called for a simple rule: that African Americans should be provided a share of public housing units "according to their local population and needs."[567] From his position as a consultant to the PWA's housing division, Weaver tried to ensure that black communities would be integrated throughout the public housing program. In 1935, he announced that African Americans would receive approximately 32% of the housing PWA built.[568]

Once USHA was formed, policies that had operated informally within the PWA Housing Division were institutionalized in written, general guidelines. "This meant that fair provision had to be made in local plans for all races in the eligible local population."[569] Further, agency procedure reinforced the racial equity policy by giving race relations advisors a key role in project approval. By "providing for review and comment by the Racial Relations Office of all applications for housing assistance… [the guidelines] insured that racial considerations became, as a matter of policy, one of the conditions to be taken into account in accepting or rejecting applications from various localities, and that equitable provision for Negroes was made in the local plans."[570]

But institutionalizing this sort of review for racial equity was not painless, even in a relatively liberal agency. For example, though regional USHA offices were established in 1939,

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[564] Marie C. McGuire, Commissioner, PHA, to Jack T. Conway, Deputy Administrator, HHFA (May 9, 1961), Box 9, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[565] Authority to Prohibit Discrimination in Employment on Federally Assisted School and Hospital Construction 13 (July 15, 1963), Reel 8, Department of Justice, Legal Counsel, LBJ Library.
[566] Minority Group Considerations, supra note 550, at 0.
[567] Pitts, supra note 523, at 18.
[568] Id. at 21 (citing "Weaver, Robert C., Newspaper Statement, 12/10/35").
[569] Id. at 6.
[570] Id. at IV-8.

initially only one office had a racial relations advisor assigned to it.[571] Regional officials might be ignorant, indifferent or worse toward racial issues. It took at least one crisis under the decentralized structure before early review by racial relations advisors of applications at the regional level was institutionalized, and more regional race relations advisors finally were assigned in 1941.[572]

Even as federal officials mandated that public works and public housing be fairly distributed among whites and blacks, they did not attempt to bar racial segregation. In fact, a number of early PWA-constructed projects were segregated.[573] Once the U.S. Housing Act of 1937 was enacted providing for local operational control, the agency allowed local authorities to determine the "racial occupancy" of future projects.[574] Under the "equity" policy, USHA simply demanded that non-whites receive a proportionate share of public housing, according to their representation among the local eligible population.

In 1942, the National Housing Agency issued Administrator's Order No. 9, prohibiting racial discrimination in determining the need for war housing, along with a subsequent supplement detailing procedures for implementing the directive.[575] In these years, the FPHA also issued its "Requirements for Urban Low-Rent Housing and Slum Clearance" requiring that projects under the 1937 Act submit racial breakdowns "to provide data essential for determining equitable distribution of units in the program submitted for approval."[576]

The close links of race relations advisors with civil rights groups like the NAACP appeared to pay off in at least some cases in this period. For example, during 1941-1942, the NAACP became involved in black homeowners' protest against the condemnation of their homes for the construction of a whites-only public housing project in Fort Smith, Arkansas—and actually managed to help stave it off through intervention with the public housing agency.[577] At the conclusion of the controversy, an NAACP official wrote to the group: "[I]t has been our experience in dealing with the United States Housing Authority that they have been most willing and anxious to cooperate in matters [like this one]."[578]

As the years wore on, the agency's equitable participation policy increasingly gave rise to formal race-consciousness throughout all aspects of the agency. In 1949, federal officials drafted a document called "Special References to Race in the Policies and Procedures of the Public Housing Administration."[579] The document was brief, and it began with a statement of general racial policy signed by the PHA Commissioner on November 14, 1950—but tellingly "(not circulated)" was noted. That policy called for "equitable provision for eligible families of all

[571] Id. at IV-9.
[572] Id. at IV-13, 14; 52.
[573] Id. at 21, 25, 27.
[574] David L. Krooth to Leon H. Keyserling (July 31, 1942), Racial Discrimination (1) (1938-1961), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II (writing that "it the responsibility of a local authority under our policy to pass upon matters relating to racial occupancy").
[575] Minority Group Considerations, supra note 550, at 4
[576] Id. at 6. The same issuance directed the local housing authorities to include non-discrimination clauses in their construction contracts. Id.
[577] See varied correspondence, Fort Smith, Arkansas, 1941-1942, II:A310, NAACP Papers.
[578] Frank D. Reeves to Rev. W.A. Washington (Feb. 25, 1942), II:A310, NAACP Papers.
[579] See Special References to Race in the Policies and Procedures of the Public Housing Administration from 1949, (Jan. 12, 1951), Box 7, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

races" and adherence to the statutory standards of the 1949 Housing Act in selection of tenants. Two pages dealt with the organization and function of the PHA Racial Relations Branch at the central and regional office level, and a final page reproduced a December 1949 provision of the Low-Rent Housing Manual specifying "the housing provided for all races shall be of substantially the same quality."

In the subsequent decade, the agency increasingly formalized its racial policies. For example, in 1951, PHA inserted its "equitable provision" policy in the Low-Rent Housing Manual as follows:

> 1. Programs… must reflect equitable provision for eligible families of all races determined on the approximate volume and urgency of their respective needs for such housing.
> 2. While the selection of tenants and the assignment of dwelling units are primarily matters for local determination, urgency of need and the preferences prescribed in the Housing Act of 1949 are the basic statutory standards for the selection of tenants.[580]

By 1953, race relations advisor Lucia Pitts could count 88 references to race in PHA's formal policies and procedures.[581] As the decade wore on, the agency's formal practices incorporated more and more accounting for race. For example, officials were to report racial occupancy of housing projects on Form PHA-2212 ("Racial Relations Data Card") (though only for those projects that were "(a) designated for Negro occupancy, (b) committed to an open occupancy policy, (c) open to nonwhite occupancy during the management stage").[582] Monthly reports on changes were submitted on Form PHA-2214. After periodic updates, a complete re-issuance of "Special References to Race" was released in 1960, with numerous items.[583]

Race relations advisors and other civil rights advocates outside the agency occupied an equivocal position with regards to the agency's racial reporting and focus on "equity." Early on, particularly before the Supreme Court itself struck down the entire concept of "separate but equal," equity may have seemed sufficient. In fact, a race-conscious approach to equal participation in social programs became sufficiently widespread in New Deal agencies that a commentator wrote

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[580] HHFA-PHA, Low-Rent Housing Manual, 102.1, Racial Policy, Feb. 21, 1951 (reprinted in HHFA-PHA, Open Occupancy in Public Housing,

[581] Pitts, supra note 523, at 118.

[582] Low-Rent Housing Manual § 407.3A, Recording and Reporting Racial Occupancy Data (May 1957), Box 7, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II. The form provided for groups other than African Americans to be "identified as CA (Chinese-American), JA (Japanese-American), F (Filipino), (H) Hawaiian, I (Indian)." Latin-Americans could be designated "LA"—"but it should be remembered that the U.S. Census and PHA consider Latin-Americans white."

[583] Philip G. Sadler, Director, Intergroup Relations Branch, PHA, Transmittal #10 (March 1960), Box 7, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II. By then the subject index listing alone was four pages. Highlights included the "Racial Policy" of Low-Rent Housing Manual § 102.1, "Racial Equity in Communities with Small Minority Population" in § 102.2, Construction Payrolls in § 216.8 et seq., "Recording Racial Occupancy Data" in § 407.3A, "Reports on Negro Employees and Authority Members" in § 102.3, "Living Space Available to Racial Minority Families" in Local Public Authorities Letter #16, and Handling of Correspondence on Racial Matters in an agency Circulate dated 11/29/54.

in 1942 "it has been found increasingly necessary for the Federal Government to take positive and direct action to insure a proportionate and proper distribution of Federal funds and an equitable and uniform administration of program."[584]

Within the public housing agency, the long-serving chief of the racial relations service, Frank Horne, in 1947 had called for Congress to enact statutes sanctioning the "racial equity" approach. He responded to the civil rights committee's request for recommendations by pointing to the need, inter alia, for "Legislative support for the non-discrimination policy pursued by the Federal housing agencies in the administration of governmental housing programs."[585] Horne also emphasized the need to strengthen the race relations advisors' roles, and thereby to "approach[] equity in the utilization of public funds and powers."[586] But by 1954, Horne argued against any more race-conscious "equitable provision" efforts, in favor of a more absolute right of equal access to all federally aided housing.[587]

Race relations officials—even as they might differ on how to achieve equal opportunity in housing—were generally clear on one thing: that racial reporting was crucial, even if separate minority housing were outlawed. Booker McGraw, Horne's deputy and later chief of the Racial Relations Service, reflected on disputes over reporting racial data, in a 1968 oral history interview: "I remember when I first came down here some of the Civil Rights people don't want you to have any race statistics or any breakdown in statistics, and then they come back next week and want to know how many Negroes in this and that." As he explained, "we had to tell them you can't have it both ways, that if we're going to get this problem we need to have some figures, some facts on the problem, what its characteristics are, and that you've got to have some race breaks in the data."

McGraw acknowledged racial data had potential risks, but thought it was too crucial to forgo: "Now, [the racial data] can be used for you or it can be used against you. If you want to do something about the problem and overcoming it, it's invaluable to have the data so you know what you're working on and the people, the guys who are trying to block you from doing anything, they're going to do that whether they have any data or not." He also argued that colorblindness arguments most often served to cloak inaction on questions of racial justice: "When people get so holy about, well, we don't have any race statistics and we can't tell you, then I'm not sure that they're doing very much. They don't want to have any; this is a good cover." Ultimately, he said, "I don't know how you solve a problem if you don't have the facts."

Creative constitutionalism

What drove the Public Housing Administration to adopt "racial equity" as its approach from the New Deal forward? Several aspects of the early PWA situation made it possible for

[584] Trent, supra note 521, at 172. In addition to the PWA and the USHA's approach, he cited the National Youth Administration's formula setting a minimum percentage of school work funds to be allocated to each minority group within a state; the Civilian Conservation Corps minimum enrollment requirements; and the Division of Defense Housing of the Federal Works Agency, which relied on a percentage approach like USHA's, as well as pending legislation with similar requirements. Id. at 175-82.
[585] Minority Group Considerations, supra note 550, at 25.
[586] Id. at 26.
[587] See infra notes 765-766 and accompanying text.

Weaver to construct this "racial equity" approach, against the backdrop of legal ambiguity. Two were structural elements of the early housing program; a third rested on its leadership. First, providing housing was a new area of social intervention, where states and localities had not already established programs. Weaver himself attributed agency leaders' ability to construct progressive racial policies to the fact that they working on a blank slate: "Action was facilitated by the newness of the program and the absence of traditional patterns."[588]

Second, PWA initially directly operated its own low-income housing program, giving it the ability to design its procedures without significant pushback from local authorities. Frank Horne, long-time head of racial relations in the public housing agency, wrote that it was "important to observe that these approaches [of the PWA Housing Division] were established in a housing program which the Federal Government initiated, constructed, and managed the projects…."[589] Weaver also emphasized the early federal role: "[I]t was fortunate for Negroes that a Federal agency planned, constructed, and managed the first public housing developments because a centralized program can do much to establish desirable precedents in racial participation."[590]

Finally, Ickes at the top of the agency, as well as lower-level agency officials, provided crucial support. Weaver wrote that, "At the outset of the PWA program Secretary Ickes reaffirmed the policy of non-discrimination in employment." In subsequent years, leaders in the public housing agency also demonstrated their commitment. According to Gunnar Myrdal in the 1940s, "many of the leading white officials of the [public housing] agency . . . are known to have been convinced in principle that discrimination should be actively fought."[591]

[588] Weaver, supra note 532, at 150; or as he put it in 1938 "Public housing is practically a virgin field" Dr. Robert C. Weaver, "The Negro in a Program of Public Housing," 16 Opportunity 196, 200 (1938).
[589] Minority Group Considerations, supra note 550, at 2.
[590] Robert C. Weaver, Federal Aid, Local Control, and Negro Participation, 11 J. Negro Educ. 47, 48 (1942).
[591] Myrdal, supra note 527, at 350.

Chapter 8 Preserving *Plessy*

In this chapter, I trace how federal housing officials addressed the NAACP's constitutional arguments for halting their support for residential segregation, from the end of the New Deal through the Civil Rights Act of 1964.

First, I show that from the federal housing programs' origins through the Supreme Court's 1948 decision in *Shelley v. Kraemer*, federal housing lawyers adhered to *Plessy*'s "separate but equal" theory of the Constitution. In 1947 the Justice Department used its *Shelley* amicus brief to argue, on behalf of the United States, that *Buchanan*—not *Plessy*—governed housing and barred government imposition of residential segregation. But the housing agencies resisted the full implications of this argument. In particular, the political vulnerability of the federal public housing program led its leaders and allies to maintain the agency's support for segregation. That position crystallized in the fight over a non-segregation amendment to the 1949 Housing Act. Because the 1949 Act was critical legislation that revived the public housing program and set its future course, the agency and many leading liberals opposed the prohibition on segregation as too politically risky.

I then demonstrate that housing officials' legal justifications for their actions in aid of segregation eventually shifted, deemphasizing *Plessy* in favor of other rationales. They argued that federal aid was too remote to create any legal obligation or authority vis-à-vis the ultimate providers of housing. They emphasized the principles behind that supposedly tenuous federal role—the goal of maximizing local power and control, as well as the role of private enterprise. Agency lawyers also argued that they were bound by Congressional intent—even if not expressed in the governing statute, but in the legislative history of rejecting non-segregation amendments to housing programs. Most pragmatically, agency leaders simply pointed to the "adverse consequences" of opposing segregation, implying that political upheaval and critical damage to the programs would result.

Yet even well after *Brown v. Board of Education* and subsequent rulings made clear that segregation was unconstitutional across all spheres, federal public housing officials did not shift course. Rather than defending segregation on the merits, they relied on those alternative justifications for maintaining the agency's "separate but equal" regime—and did so in multiple contests, in response to litigation, calls for executive action and legislation. The PHA relied on the supposedly tenuous nature of federal involvement in public housing to defend against the NAACP's first major suit challenging its program, filed in 1952 over the agency's backing of Savannah, Georgia's plan to evict black homeowners and build all-white public housing on their land.

Those rationales also led the federal housing agencies to firmly and repeatedly reject any suggestion that the Court's decision in *Brown v. Board of Education* signaled the need for executive action to halt government backing of segregation. Though President Eisenhower voiced support for the principle that federal funds should not back discrimination, he never followed through to enforce this order within federal housing programs. Congress also declined to take action, leaving the housing agencies to continue to assert that they neither had—nor wanted—the power to enforce *Shelley* and *Brown* within their programs. Though more and more groups joined

the call for action to halt federal support for housing segregation by the late 1950s, the status quo within the housing agencies persisted through the end of that decade.

Finally, I turn to the bittersweet results of the Democratic administrations of the early 1960s, as Robert Weaver returned to become the housing agencies' first black leader, and civil rights reforms were finally adopted. The agencies' intransigence to change in those years and its limited reading of the civil rights principles at stake illustrates the ways in which structural and political constraints—along with institutional inertia—dominated over simple changes in who occupied the White House or led the agency, or in the governing statutory and regulatory law. Even though federal officials no longer defended *Plessy* as a constitutional principle, they continued to administer a regime premised on "separate but equal" long after the courts had defined a new meaning for equal protection.

Challenging *Plessy*

Segregation at the agency's origins

At the public housing program's birth, civil rights leaders warned that "separate but equal" could not give rise to truly equal treatment. When the PWA began its housing program in the early 1930s, the agency attempted to avoid the question of segregation by building primarily in "slum sites" and recreating the prior racial order in particular neighborhoods under a "neighborhood pattern" policy.[592] The asserted goal was to maintain the status quo, under the principle that "public housing should not establish racial patterns less democratic than those which now exist in any given community."[593] As Robert Weaver noted a decade later, though, the effect was to "strengthen residential segregation in the North." After all, he wrote, "[federally]-aided projects are built to last 60 years."[594]

Black leaders foresaw the dilemma of trading off federal aid against segregation from the start. In 1936, amidst the Congressional effort to enact a permanent federal public housing program, Robert Taylor, an African American social reformer who later became head of the Chicago Housing Authority, wrote NAACP head Walter White with "a deep-seated question": "Should we acquiesce to such a program if, in the planning, Negro areas are separated, thereby perpetuating for many, many years to come residential segregation?"[595]

Fully aware of the risks of such an approach, White pressed the federal government to support housing without segregation. In his 1936 testimony to the Senate on the public housing legislation, White supported the enactment but urged that that it be amended to expressly prohibit race discrimination and segregation.[596] His reasoning was rooted in considerations of substantive equality:

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[592] Weaver, supra note 524, at 75; Charles Abrams, Forbidden Neighbors 229 (1955).
[593] Weaver, supra note 532, at 156.
[594] Id.
[595] Robert R. Taylor to Walter White (June 15, 1936), I:C307, NAACP Papers.
[596] White urged the legislators to "ma[k]e clear in the act that these housing projects shall be available to all Americans without regard to race, creed, or color." White also foresaw that those displaced by slum clearance needed protection, by assuring them first priority in the new housing to be built on the site of their former homes. As slum clearance

> This should be done not only in deference to the American ideal... but because projects segregated on a basis of race or color prejudice are not kept up as are nonsegregated ones... [They] do not receive the same consideration in the matter of street paving and lighting, police and fire protection, vice conditions, and the like by municipal authorities....

White's proposal failed, and the United States Housing Act of 1937 was silent on questions of racial equality.

Two years later, White stood before the National Public Housing Conference, condemning the federal public housing agency for "establishing and requiring patterns of racial segregation in areas where members of various racial groups have lived together for generations."[597] In 1940, out of 115 new projects, the agency announced that 45 were slated for African American occupancy, and 9 would be integrated—with apparently the remaining 61 to be exclusively white-occupied.[598] Officials might claim that "the ideal is to keep the character of the neighborhood…intact" but black journalists pointed out that even prior black residents of those neighborhoods were being rejected from projects designated as white.[599]

By 1938, the NAACP also was clear that the FHA was actively discriminating against blacks in its mortgage insurance program for private housing. NAACP assistant secretary Roy Wilkins wrote the head of the agency: "The conclusion is inescapable" that the FHA had a policy of refusing to guarantee mortgages on housing for black families if located outside of a "Negro district" and often refused such guarantees regardless of location. Wilkins wrote, "We do not believe that the federal government, through one of its agencies, should use the public tax money to restrict instead of extend opportunities for home ownership and to enforce patterns of racial segregation."[600] The FHA did not alter course, sending a bland reply that cited its statutory purpose of creating a "sound mortgage market," while asserting that "people of many other races" as well as African Americans failed to meet their underwriting standards.[601]

Making the constitutional case against segregation, before and after Shelley

Faced with the housing agencies' embrace of segregation, civil rights advocates drew on the Constitution. In the years before the Court decided *Shelley v. Kraemer*, their first sustained

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became known as "Negro clearance," White's words proved prescient. Finally, White recommended that the agency be explicitly authorized to bar discrimination by building contractors. United States Housing Act of 1936, Hearing before the S. Comm. on Educ. and Labor, 74th Cong. 208 (1936) (statement of Walter White, Secretary for the NAACP).

[597] Plan would house a million families, N.Y. Times, Jan. 28, 1939, at 1.

[598] Marvel Cooke, Survey shows need for better housing, N.Y. Amsterdam News, Jan. 13, 1940, at 4.

[599] Id.

[600] Roy Wilkins to Stewart McDonald, Federal Housing Administration (Oct. 12, 1938), II:L17, NAACP Papers.

[601] Another official replied to Wilkins' letter to the FHA chief, saying that FHA's overriding purpose was the "creation of a sound mortgage market" and that the FHA had insured many mortgages for black buyers though they could not provide more precise figures as "we do not even keep our records on a racial basis." M.R. Young to Roy Wilkins (Oct. 18, 1938), II:L17, NAACP Papers.

fight was to convince executive branch leaders that they were drawing on the wrong judicial precedents to interpret the Fourteenth Amendment in the housing context. They argued that *Plessy* did not govern housing at all. Rather, *Buchanan v. Warley* meant that government could not impose or support segregation in housing.

The argument premised on *Buchanan* ran as follows: The Court had first barred legislative bodies from enforcing racial segregation in housing in 1917, and had since reaffirmed the decision in multiple rulings.[602] If the Fourteenth Amendment barred states and localities from imposing racial restrictions in housing, then the federal government must be similarly restricted under the Fifth Amendment. Further, aiding others to do so would amount to an unlawful circumvention of the prohibition, accomplishing indirectly what the government could not do directly.

The federal housing agency's lawyers did not doubt that the federal government was barred from discriminating, even in the 1940. But they did not necessarily accept two other key premises of the argument. First, they apparently believed that *Plessy v. Ferguson*'s "separate but equal" rule controlled government's actions in housing. Unlike the NAACP, agency lawyers did not entertain the idea that *Buchanan v. Warley* might represent a distinct line of precedent that applied a different rule to property than to other spheres, thereby barring all government-imposed residential segregation. Second, they doubted that the federal government's support for segregation—even if knowing—was sufficient to implicate it as engaging in discrimination itself, or to provide the agency with a legal foundation for halting that support.

As an initial matter, agency lawyers accepted the NAACP's claim that the federal government was barred from discriminating on the basis of race, just as the states were. Though judicial decisions did not yet explicitly apply Equal Protection standards to the federal government, by 1943 the public housing agency's attorneys correctly anticipated "an interpretation of the 'due process' clause of the Fifth Amendment which would bar racial discrimination by the Federal Government in just about the same manner as it is barred by the 'equal protection' clause in the Fourteenth Amendment with regard to the states."[603]

However, the agency's Office of General Counsel believed that *Plessy*, and the doctrine of "separate but equal," governed housing—meaning that segregation was lawful so long as equal housing facilities were provided. In 1943, the General Counsel, David Krooth, summarized Supreme Court equal protection jurisprudence, focusing on the "separate but equal" theory: "[D]iscrimination and segregation on account of race or color are violative of the Fourteenth Amendment, unless the facilities offered [African Americans] are substantially equal to those offered to white persons."[604] For that proposition, Krooth cited *Plessy v. Ferguson* and Missouri ex rel. Gaines v. Canada. Though Krooth also referenced *Buchanan v. Warley* in passing, he did

[602] Richmond v. Deans, 281 U.S. 704 (1930) (per curiam); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam); Buchanan v. Warley, 245 U.S. 60 (1917).
[603] Herman I. Orentlicher to David L. Krooth, Racial Discrimination in Federal Housing Projects (Aug. 13, 1943), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II. Alternatively, the General Counsel Office's memo suggested that the Court would "read into the… war housing acts a legislative intent that persons engaged in national defense activities be served without discrimination as to race." Id.
[604] David L. Krooth to Leon H. Keyserling (July 13, 1942), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

not consider whether *Buchanan* might imply that segregation in public housing was unconstitutional.[605] Krooth was discussing Hamtramck, Michigan, a city that had excluded black residents from its *only* housing project, so the issue of whether government-provided, separate but equal housing violated the Constitution was not squarely posed. Hamtramck had not even met the more minimal *Plessy* standard.

Further, though Krooth concluded that the city had violated the Fourteenth Amendment, he did not suggest that the constitutional violation conflicted with the federal agency's own policy. In fact, he explicitly disclaimed any overlap of the agency's policy with the Fourteenth Amendment, emphasizing the idea of "local responsibility" instead: "it is the responsibility of a local authority under our policy to pass upon matters relating to racial occupancy."

Shortly afterward, the General Counsel's office addressed discrimination in federal housing more comprehensively, writing that "separate but equal" was the governing rule.[606] Citing *Plessy*, the memo stated: "Segregation is permissible." The sole qualification was that "equal facilities [must] be made available to both races."[607]

In 1943, in the midst of the war, the NAACP again attacked federal housing authorities' acquiescence in segregation. Authorities were failing in their obligation to house black defense workers, by ceding too often to local authorities' demands.[608] "[T]he fundamental issue [was] whether or not public funds … can be designated by race at the will of local housing authorities with the concurrence of the federal agency." Moreover, the agency's decision to bar black defense workers from the Willow Run housing development outside Detroit—which had immediately followed a hearing before the housing agency's House appropriations sub-committee—suggested that "the NHA is acting in accordance with the demands of representatives of Southern states."[609]

National Housing Administrator John Blandford, Jr. sent the NAACP a placating but unsatisfying letter, arguing that "racial equity" should suffice and that federal control only went so far. "This agency… has pursued a fair and determined policy on housing for Negroes," he argued.[610] But "no federal agency alone can overcome attitudes of long standing or dictate in community affairs."[611] From the Administrator's perspective, the federal government did not have the power to override *Plessy* and impose a higher standard on local governments.

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[605] Krooth's memo appeared to be drafted based on a prior memo to him from one of his subordinates—and that lawyer did cite Buchanan at all, relying only on Plessy and the cases applying that doctrine. See Edward P. Lovett to David L. Krooth (June 30, 1942), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

[606] Orentlicher, supra note 603, at 1, 5-7.

[607] Id. at 5. However, drawing on the Court's recent decision in Hirabayashi v. United States, upholding a curfew for Japanese American citizens, the memo's author argued that "the special needs of the war effort" might make it a "proper exercise of administrative discretion" to provide housing for white but not black defense workers. That is, in the wartime context, the housing lawyer believed that separate housing might not even need to be equal housing. Id. at 1, 5-6.

[608] The Approach of the NHA to Meeting the Problems Faced in Housing Negro War Workers (ca. 1943), II:A310, NAACP Papers.

[609] Id.

[610] John B. Blandford, Jr. to Leslie Perry (June 10, 1943). II:A310, NAACP Papers.

[611] Id.

By 1944, the NAACP was clearly elaborating its argument that *Buchanan v. Warley* meant federal agencies could not achieve residential segregation through administrative policy, any more than legislative actors could do so through statutes. In a memo to President Roosevelt, they attacked the FHA, which was "with the use of Federal funds and power, … requiring residential segregation… not only without legislative authority, but in plain violation of ministerial duty."[612] The Constitution barred such behavior too, by analogy to *Buchanan* and the cases applying it: "the FHA tends to crystallize and extend through Federal influence segregation by race, which the Supreme Court itself has decided cannot be affected through municipal ordinance or state law."[613] However, the civil rights organization failed to convince the federal housing agencies to embrace that reading of the *Buchanan* line of cases.

Civil rights leaders did find support in other key parts of the federal government, though. By 1947 the Justice Department publicly supported the NAACP's key claims—most significantly, its broad understanding of "federal action" and the implications of *Buchanan* for federal action affecting residential segregation. That year the DOJ filed an amicus brief in *Shelley v. Kraemer*, a case challenging state judges' enforcement of racial restrictive covenants, and *Hurd v. Hodge*, a companion case involving federal enforcement of covenants in Washington, DC.[614]

In *Shelley* and Hurd, the United States took the position before the Court that state or federal court enforcement of restrictive covenants violated the Constitution and federal law. In fact, its brief endorsed even more sweeping readings of the restriction on federal racial discrimination, using language, which would arguably invalidate *any* federal executive action supporting or sanctioning residential segregation.

The DOJ laid the foundation for its argument in *Shelley* and Hurd as follows: "[T]he Fifth and Fourteenth Amendments are involved only if a discrimination based on race or color (a) [affects rights protected by federal law]….(b) constitutes 'federal' or 'state' action within the applicable principles laid down by this Court."[615] The DOJ then sided with the NAACP as to its most far-reaching claim in the judicial covenant cases: that court enforcement of private, discriminatory agreements represented "state action" in violation of the Fourteenth Amendment and "federal action" in violation of the Fifth Amendment.[616] Importantly, the brief did not

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[612] Memorandum Prepared by the National Association for the Advancement of Colored People, Concerning the Present Discriminatory Policies of the Federal Housing Administration 3 (Oct. 28, 1944), II:A268, NAACP Papers [hereinafter NAACP 1944 Memo]; see also Frank Horne to Walter White (July 20, 1948), II:A268, NAACP Papers (referencing "the memo filed in 1944 relative to the FHA").

[613] NAACP 1944 Memo, supra note 612, at 3-4; see also id. at 9 (discussing Buchanan) The NAACP eventually achieved its direct aim in the memo, as the FHA in January 1947 removed references to race in the Underwriting Manual and other formal policies. Even that proved a limited victory. FHA Commissioner Raymond Foley subsequently claimed that the agency's policy was race-neutral. "This administration does not use the mortgage insurance system either to promote or to discourage any proposal on the ground that it involves interracial characteristics." Nonetheless the FHA refused to insure integrated housing precisely on the grounds that such initiatives were accompanied by excessive "risk."

[614] Attorney General Tom Clark and Solicitor General Philip Perlman signed the brief. Brief for the United States as Amicus Curiae, Shelley v. Kraemer, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291).

[615] Id. at 48.

[616] Id. at 49-52, 78-85.

distinguish between the restrictions on state or federal discrimination under the respective Amendments, instead treating them in parallel.[617]

The DOJ's conception of state and federal action for Equal Protection purposes was sweeping—any governmental participation in discrimination could bring constitutional restrictions into play. "Only those actions of individuals which are in no respect sanctioned, supported, or participated in by any agency of the government are beyond the scope of the Fifth and Fourteenth Amendment."[618] The brief's language referring to "any agency of the government" was also intended to cover all levels of government, and all branches—including the executive branch. In the very next sentence, the DOJ lawyers quoted the Civil Rights Cases for the idea that support for private discrimination by "'State authority in the shape of laws, customs, or judicial or *executive proceedings*'" was sufficient to invoke constitutional protections.[619] On their face, those statements directly supported the NAACP's argument that federal aid could not flow to segregated institutions, without violating the Fifth Amendment.

In further contrast to the housing agency lawyers, DOJ lawyers did not believe that *Plessy* qualified the prohibition on government-imposed race restrictions in housing.[620] Instead, like the NAACP, they drew on the line of precedent beginning with *Buchanan*, arguing that, "the right to acquire, use, and dispose of property is a right which neither the States nor the Federal Government can abridge or limit on the basis of race or color."[621] The Civil Rights Act of 1866 added explicit statutory protection for this right.[622]

Beyond the constitutional arguments against government support for segregation, the Justice Department asserted that national public policy barred segregation, in language echoing the 1866 Civil Rights Act. "It is the policy of the United States to … to ensure equality of law to all persons, irrespective of race, creed or color, and more particularly, to guarantee to Negroes rights, including the right to use, acquire, and dispose of property, which are in every way equivalent to such rights which are accorded to white persons."[623]

The NAACP and Justice Department's arguments prevailed with the Supreme Court in *Shelley* and Hurd, with a key qualification. The Court ruled that state courts could not enforce private homeowners' agreements barring subsequent sales or occupancies to racial minorities, without running afoul of the Constitution. "Equality in the enjoyment of property rights" formed a key aspect of Fourteenth Amendment protections, the justices wrote, citing the Civil Rights Act of 1866, *Buchanan*, and subsequent cases.[624] Judicial action to enforce discriminatory private agreements fell within the constitutional prohibition on governmental discrimination, because the

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[617] Id. at 77 ("We urge that, by force of the Fifth and Fourteenth Amendments and the statutes enacted thereunder, the States and the Federal Government cannot establish rules of law which in their very terms make race or color relevant in their application.").
[618] Id. at 52.
[619] Id. at 52 (quoting Civil Rights Cases, 109 U.S. 3, 17) (emphasis added).
[620] See id. at 52, 59-60 & n.31.
[621] Id. at 62
[622] Id. at 70-73 (citing 8 U.S.C. § 43, currently codified at 42 U.S.C. § 1982).
[623] Id. at 93-94.
[624] 334 U.S. at 10-12.

Fourteenth Amendment governed "exertion of state power in all its forms."[625] However, in *Shelley*'s federal companion case, Hurd, the Court refused to rely on the Fifth Amendment as barring federal courts from enforcing discriminatory covenants, just as the Fourteenth Amendment barred state courts from so doing. Instead, the Court rested on the public policy of the United States, which opposed such discrimination, as well as the Civil Rights Act of 1866's statutory bar on racial discrimination in property rights. Thus, the precise reach of any Fifth Amendment bar on federal discrimination remained undefined.

Fighting to implement Shelley in the executive branch

After *Shelley* and Hurd, the NAACP stepped up its argument that all federal agencies were barred from supporting housing segregation—whether in the FHA's program of mortgage insurance to private builders, or PHA's public housing. Now the organization's reading of *Buchanan* was even more legally powerful, insofar as *Shelley*'s reasoning extended it. If neither legislatures nor courts could enforce or help others to enforce residential segregation, then how could the remaining branch of government—the executive branch—do so? Surely administrative agencies were as much bound by *Shelley* and *Buchanan* as the other branches. Civil rights advocates refined those arguments in memos to each other, as they prepared to lobby the administration to change its policies in light of the racial covenant decisions.[626]

From inside the housing agencies, the Racial Relations Service helped the NAACP lawyers strategize. The racial relations officials, even if they were not lawyers, understood the NAACP's constitutional arguments as well as anyone. The head of the Service, Frank Horne, was the leading voice for racial equality within the agencies throughout the 1940s and early 1950s. He had already

[625] Id. at 20.

[626] In the immediate aftermath of the racial covenant decisions, civil rights advocates believed it "essential to tackle the problem as soon as possible" as "the various housing agencies have not yet had time to formulate policies in light of [the decisions]." Loren Miller, an NAACP ally, formulated the arguments for the executive branch: "While the Court has not yet had occasion to consider the question of executive action to effect [racial residential] segregation there can be no doubt that the executive branch can no more reach the prohibited end than can the judicial and legislative arms of the government," Miller wrote to Walter White. The Shelley Court had made it clear that Buchanan was the relevant precedent governing residential segregation, not Plessy. The question now became whether "administrative agencies, as aspects of the executive power, are immune from the requirements of the Fourteenth Amendment…. State action is no more … hard to define in their case than in the instances of judicial or legislative undertakings" addressed in Shelley and Buchanan. See Loren Miller to Walter White (July 7, 1948), II:A268, NAACP Papers. They also recognized the political risk involved in the upcoming 1948 presidential election. Id. (referencing "the political situation").

Further, these constitutional arguments were intended for executive branch officials, not judges. Miller argued to White in July 1948 that the legal issues were "best deal with by direct representations to the government agencies involved, rather than by resort to litigation." NAACP planning thereafter centered on the idea of approaching the White House and top housing officials with their claims, lobbying for executive branch leaders to update policy directly to comply with the relevant equal protection principles. A week later Miller wrote White again to urge that the president might be persuaded to issue an executive order barring discrimination by federal housing agencies, analogizing to prior executive orders barring employment discrimination in defense industries and federal agencies. He proposed a meeting with AG Clark and SG Perlman, who had supported the civil rights organizations in their Supreme Court attack on covenants. Loren Miller to Walter White (July 27, 1948), II:A268, NAACP Papers ("It seems to me that the question of discrimination in housing is as fundamental as it is in the field of employment."). Miller was apparently buoyed by Truman's executive order the day prior barring segregation and discrimination in the armed forces. Exec. Order 9981, July 26, 1948, http://www.presidency.ucsb.edu/ws/index.php?pid=60737.

excelled in other careers before joining the housing agencies, having been an optometrist, college dean, and Harlem Renaissance poet in the years before Mary McLeod Bethune recruited him to join the "Black Cabinet" in Roosevelt's New Deal.[627]

Walter White forwarded Miller's July 1948 draft memos directly to Horne at the HHFA, asking him to "look this over with your most critical eye…." [628] Horne's vehement response to White focused on the FHA in particular, arguing that "FHA will need to be blasted high, wide and handsome out of its barnacled position of hidebound medievalism." Yet even so, Horne was optimistic that lobbying the executive branch could bring change, concluding that the desired reforms presented "a hell of a large order, but the same careful strategy that built up the covenant cases, if applied to the administrative side of the government can bring like results."[629]

NAACP officials and allies continued to meet in the coming months, focusing on the FHA, which had played such an explicit, prominent role in extending segregation through its underwriting practices.[630] That fall, after Thurgood Marshall wrote the FHA head asking him to cease support for the segregated suburban development of Levittown, New York, the FHA responded that it lacked authority under its governing statute to address racial discrimination by builders, and that the Court's decisions in *Shelley* and Hurd included "nothing… to indicate that the Government is authorized to withdraw its normal protection and benefits from persons who have executed but do not seek judicial enforcement of such covenants."[631]

The NAACP finally lodged a direct legal plea with the President the following year. In February 1949, Walter White wrote Truman asking him to assure "that the federal government will cease giving its support to racial restrictions in housing under its F.H.A. programs."[632] White attached a lengthy memo from Marshall, arguing that the FHA's support for whites-only developments (alongside its refusal to insure integrated ones due to the "risk" such housing entailed) violated not only national policy but also the Fifth Amendment.[633]

Marshall argued that the executive branch was subject to the same restrictions as Congress or the courts. "[T]he FHA continues to … lend its authority in support of the same private discrimination declared unenforceable by the United States Supreme Court," with "the purpose and the effect" of furthering segregation. The agency lacked the constitutional power to take such actions.[634] If state and federal courts could not enforce restrictive covenants, then "it is similarly true that the Federal government may not lend any portion of the panoply of government benefits

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[627] Frank S. Horne, Encyclopedia of American Urban History 346 (2007).
[628] Secretary Walter White to Frank S. Horne (July 12, 1948), II:A268, NAACP Papers.
[629] Frank Horne to Walter White (July 20, 1948) II:A268, NAACP Papers (underlining in original).
[630] Minutes of Conference on Strategy in Connection with Federal Housing Administration (Aug. 5, 1948), II:A268, NAACP Papers; Notes of Discussion on Federal Housing Administration, Washington, D.C. conference (Sep. 15, 1948), II:A268, NAACP Papers.
[631] Press Release, NAACP Anti-Bias Plea Rejected by FHA head (Nov. 4, 1948), II:A268, NAACP Papers.
[632] Walter White to the President 2 (Feb. 1, 1949), II:A311, NAACP Papers.
[633] Thurgood Marshall, Memorandum to the President of the United States Concerning Racial Discrimination by the Federal Housing Administration (Feb. 1, 1949), II:A311, NAACP Papers
[634] Id.

to a project designed to deny Negroes the rights of occupancy granted to them by the Constitution."[635]

The NAACP apparently found reason to hope for action, even from the public housing agency. In August 1949, the PHA general counsel invited Thurgood Marshall to a conference on "racial policy" in the public housing program.[636] Later that fall, Marshall wrote another civil rights advocate that "We have been bending every effort to see to it that the new provisions [of the PHA manual] prohibit segregation in all public housing projects. The matter is now in the high levels of the administration with our recommendations."[637]

In December 1949, the FHA finally relented. DOJ intervention made the difference in achieving even this moderate shift—as Frank Horne wrote later, "it was the guidance and insistence of the U.S. Department of Justice ... which resulted in the removal by FHA of its sanctions of racial covenants…."[638] The Solicitor General announced the change in policy in a speech to New York's State Committee on Discrimination in Housing, though he seemed to overestimate its impact. The New York Times front-page headline also exaggerated the policy, trumpeting "Truman puts ban on all housing aid where bias exists."[639] In fact, the policy shift was far more moderate: FHA would stop insuring properties with newly created racial covenants.[640] Properties with existing covenants would be unaffected.

All of the NAACP's constitutional arguments regarding the FHA's duty to avoid explicitly supporting segregation were equally applicable—and stronger—in the PHA context. Federal public housing funds went to state actors, not private ones, so the Fourteenth Amendment clearly applied. Though the federal government might claim its involvement was minimal, the public housing agency's funding directly paid for the housing, in contrast to the FHA situation which involved the provision of insurance to lenders, rather than direct subsidy of the housing's construction and maintenance.

But though the constitutional argument was even more compelling in public housing, "no comparable steps were taken to realign PHA policy" in 1949, Frank Horne noted.[641] Horne wrote in a later internal memo:

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[635] Id.
[636] Telegram, B.T. Fitzpatrick to Thurgood Marshall (ca. Aug. 1949) II:B81, NAACP Papers.
[637] Thurgood Marshall to Will Maslow (Oct. 14, 1949), II:B81, NAACP Papers.
[638] Observations Regarding Implications of Decisions of the U.S. Supreme Court for HHFA Programs and Policies (attachment to Frank Horne to Albert M. Cole (June 29, 1954), Box 748, Program Files, Race Relations Program 1946-1958, RG 207, NARA II; see also Joseph R. Ray to Albert M. Cole (Aug. 13, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II (repeating Horne's observations).
[639] Lewis Wood, Truman Puts Ban on All Housing Aid Where Bias Exists, N.Y. Times, Dec. 3, 1949, at 1. Other newspapers described the change similarly. The AP reported: "The government… plans to halt federal aid for housing projects that bar tenants because of their color or creed." FHA to Amend Rules to Halt Discrimination, Chi. Daily Trib., Dec. 3, 1949, at 3.
[640] Id.; see also Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 225-26 (1967).
[641] Joseph R. Ray to Albert M. Cole (Aug. 13, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

> As the result of discussions held among Agency officials and with public interest group leadership in 1949, it was clearly evident that both groups understood that PHA sanction of enforced segregation… had no supportable legal authority; it was tacitly understood that PHA application of the *Plessy v. Ferguson* theory of 'separate but equal' in the federally subsidized housing program rested upon no sound legal theory but rather reflected 'political expediency.'[642]

Saving public housing—at a high cost

What "political expediency" required the PHA to continue its embrace of *Plessy*'s "separate but equal" rationale after *Shelley*? The problem in 1948 and 1949 was simple. The federal public housing program was in a desperate fight for survival in Congress.

From its origins, public housing always attracted powerful opposition from real estate interests. During the fight to enact the 1937 Act, the bill came in for "rough treatment" by those that feared that public housing would crowd out private industry.[643] Opponents argued that "public housing was a dangerous socialistic experiment which threatened free enterprise and the traditional American principles of government."[644] When Republicans gained power in the 1938 elections, the agency's political fortunes dimmed further.[645] At the onset of World War II, the agency had built less than 100,000 units.[646]

During World War II, the public housing program was redirected toward defense housing. After the war, from 1944 to 1949, proponents of public housing fought to revive the program by securing new authorizing legislation. Though the housing legislation had the support of powerful Republican leader Robert Taft, conservatives in both parties combined to repeatedly defeat it.[647] Real estate interests refused to accept continuing the public housing program, even if other provisions of the legislative proposals would provide them with substantial benefits.[648]

Eventually however, with Truman's support, new housing legislation passed. The appointment of former FHA chief Raymond Foley as head of the HHFA, the umbrella organization which oversaw both the FHA and PHA, had partially quelled real estate interests' concerns.[649] The Housing Act of 1949 reinvigorated the low-income public housing program, authorizing slum clearance, redevelopment, and 810,000 new units of public housing over the next six years. A Division of Slum Clearance and Urban Redevelopment (DSCUR) was created to oversee the new programs. For the first time, national legislation declared "the goal of a decent home and suitable living environment for every American family."[650]

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[642] Id.
[643] Gelfand, supra note 472, at 62.
[644] McDonnell, supra note 436, at 62; see also id. at 81-83, 241-43, 315-16, 350 (describing groups' opposition in more detail).
[645] Gelfand, supra note 472, at 101.
[646] Id. at 122.
[647] Davies, supra note 482, at 24-35, 47.
[648] Id., at 38.
[649] Id. at 60-63, 72.
[650] Housing Act of 1949, Pub L. No. 81-171, § 2, 63 Stat. 413.

Southern support was key to the law's eventual passage. For example, one of the legislation's leading sponsors, Allen Ellender (D-LA), was both a "staunch and effective friend of public housing" and a segregationist.[651]

In exchange for enactment, liberal proponents of the Act explicitly promised to forgo any action against segregation in public housing. In spring 1949, conservative Senator John Bricker (R-OH) had proposed a non-segregation amendment to the bill, which was widely understood as a strategic tactic to kill the legislation.[652] Liberals widely opposed the Bricker amendment, because it would "defeat[] needed social legislation."[653] A leading Northern housing reformer, Charles Abrams, predicted that "if the device succeeds, it will become the forerunner of a whole series of efforts of use [of] the civil rights issue as an instrument for staving off social reform."[654]

Senator Paul Douglas (D-IL), who would later become one of the strongest proponents of civil rights measures, went further in attempting to save the public housing legislation, telling Southern Senators: "We are not proposing to abolish segregation in the South. We are not proposing to abolish it in housing, or in the Federal aid for education bill. We do not want to impose rules against segregation in the South."[655] He characterized segregation as involving "social relations" and thus constituting "an individual matter, and, in many cases, a matter for local decision."[656]

Thus, to ensure the low-income housing program's revival, liberals explicitly traded off civil rights. As Walter White of the NAACP wrote, "[B]attlers for public housing… would rather see no anti-segregation amendment introduced or seriously considered than to see housing itself jeopardized."[657] To preserve the social reform, they would accept segregation.

However, to White, there was a fundamental, but "very simple" issue at stake: "Is America going to create genuinely democratic housing with federal monies or is it going to build a gilded ghetto?" Many African American leaders, even as they staunchly supported the public housing program, were unwilling to make that tradeoff for a "gilded ghetto" and called for the Bricker non-segregation amendment's passage despite the political risk it entailed.[658]

The Senate nonetheless voted down the Bricker non-segregation amendment, with Douglas offering as consolation to those, like the NAACP's White, who had wished to see segregation

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[651] Davies, supra note 482, at 35 (quoting Senator Wagner)
[652] See, e.g., 95 Cong. Rec. 2669-70 (Mar. 17, 1949) (Sen. Douglas). White described Bricker and another sponsor of the amendment as "spokesmen for and defenders of real estate interests." Say Senators Cain, Bricker Conspire to Kill Housing, Chi. Defender, Apr. 9, 1949, at 4.
[653] E.g., 95 Cong. Rec. A2540 (April 29, 1949) (Sen. Morse).
[654] Say Senators Cain, supra note 652 (quoting Abrams editorial in the New York Post).
[655] A contemporary Washington correspondent called him "too idealistic to make a memorably effective legislator. Samuel Shaffer, On and Off the Floor: Thirty Years as a Correspondent on Capitol Hill 15 (1980).
[656] See 95 Cong. Rec. 2670 (Mar. 17, 1949) (Sen. Douglas).
[657] Walter White, Liberals' Fuzzy Views Aid Senate Coalition, Chi. Defender, Apr. 30, 1949, at 7.
[658] See 95 Cong. Rec. 4791 (Apr. 20, 1949) (reprinted statement of the director of the National Negro Council); id. at 4798 (reprinted NAACP press release). However, Mary McLeod Bethune and the National Council of Negro Women opposed the Bricker amendment. See 95 Cong. Rec. 4853 (Apr. 21, 1949) (Sen. Douglas).

barred: "I should like to point out to my Negro friends what a large amount of housing they will get under this act."[659]

Following the Housing Act's passage, and just "as the multibillion-dollar housing program approved by Congress . . . gain[ed] momentum," the PHA announced its intent to allow local authorities to segregate their housing projects at will.[660] An anonymous PHA spokesperson told the press that "there will be no change in the present practice of letting each community decide whether to have separate projects for racial groups under the new public housing law."[661]
The NAACP quickly, publicly challenged the PHA's stance. "[N]o State or Federal agency can require segregation in housing" after the racial covenant decisions, Thurgood Marshall wrote to Commissioner Egan—to no avail.[662]

Even after 1949 and despite its publicly stated acceptance of segregation, the public housing agency remained on the ropes, fighting for appropriations (and survival) in the face of a hostile Congress. A later commentator wrote that "between 1949 and 1952 the public housing program barely survived an intensive congressional onslaught; it was only the support of southern Democrats which prevented the program's demise."[663] Southern legislators that considered themselves economic liberals were willing to support such programs for the poor, but only so long as such programs did not expose the Jim Crow regime to federal attack.[664]

Despite liberals' accommodation of segregation, the 810,000 units of public housing authorized in 1949 were not built.[665] The political attacks continued. Each year, Congress' appropriations committees limited funding to less than half of the authorized units, and local opposition to public housing further limited requests by communities.[666] In 1953, the House appropriations committee voted to kill all funding for future units, and to allow only a third of the units already in contract to be built. Powerful Representative Albert Thomas commented that "for all practical purposes this program is wound up."[667]

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[659] 95 Cong. Rec. 4852 (Apr. 21, 1949) (Sen. Douglas); see also id. at 4853 (suggesting that the number of units constructed for African Americans would be enough to house nearly 10 percent of the black population).
[660] Racial segregation left up to cities, L.A. Times, Dec. 12, 1949, at 30. Curiously, in the same week, the PHA rejected Charlotte's public housing application because it specified that the units would be reserved for black families; apparently the goal was formal omission of references to races, with the understanding that "the policy of limiting occupancy to Negroes could [be] exercised later on the local level." Race curb blocks housing project, N.Y. Times, Dec. 14, 1949, at 35. The Times commented that "it was seen as the first local demonstration of Federal policy President Truman's declared intention to prevent racial discrimination in the use of public housing funds." Charlotte deleted the racial references and received 200 more units than it had originally requested. Housing race tag erased, N.Y. Times, Jan. 10, 1950, at 3.
[661] See Racial segregation left up to cities, L.A. Times, Dec. 12, 1949, at 30; Segregation up to localities, says homes aid, Chi. Daily Trib., Dec. 12, 1949, at 20 (citing a "spokesman [who] preferred to remain anonymous").
[662] PHA asked to withdraw Jim Crow housing rule, Afro-American, Feb. 11, 1950, at 19. The paper attributed the PHA's original position statement to Lawrence Bloomberg, the agency's chief economist.
[663] Jordan D. Luttrell, The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing, 64 Michigan Law Review 871, 877 (1966).
[664] See, e.g., Sparkman Interview, supra note 519, at 33.
[665] Wolman, supra note 461, at 37 (stating "nearly twenty years after, the full 810,000 units are still not completed").
[666] Hunt, supra note 473, at 195; Charles J. Orlebeke, The Evolution of Low-Income Housing Policy, 1949 to 1999, 11 Housing Policy Debate 489, 493 (2000).
[667] Hunt, supra note 473, at 197.

The program was revived only because the real estate industry came to believe that some public housing was necessary for profitable programs of slum clearance to continue, since otherwise the displaced poor would have nowhere to go.[668] President Eisenhower also thought that public housing might be useful as a fiscal tool to combat future economic recessions; even his conservative housing administrators opposed killing the program entirely.[669]

Given the political circumstances, most supporters of public housing apparently came to accept that the program would continue only if segregation was tolerated. In 1951, Clarence Mitchell reported that the NAACP was "the only major organization in the country that has taken an all out position against segregation in housing."[670] Other groups, though theoretically opposed to segregation, "either oppose or are indifferent to the possibility of having this principle included in legislation."

Within the agency, its lawyers continued to deem segregation permissible. PHA General Counsel Marshall Amis in 1951 reviewed the scant cases addressing racial segregation in public housing.[671] Technical barriers had precluded substantive rulings in most cases, but Amis noted that the courts had indicated that discrimination violated the Fourteenth Amendment while leaving the status of *Plessy*'s "separate but equal" theory ambiguous. "Whether the provision of equal facilities in separate projects constitutes such discrimination would appear to be uncertain"—given conflicting rulings from state and federal courts.[672] Amis appeared to lean toward maintaining *Plessy*, as he later forwarded the memo to a private attorney, commenting that the case law indicated that it was constitutional to condemn privately owned land for use as segregated public housing.

Structurally, the 1949 Act had changed the overall federal housing program in key ways; those changes in turn exacerbated racial segregation by shifting the program increasingly toward minority residents. Essentially, public housing survived into the 1950s only as an adjunct to urban renewal.[673] Title I of the Act had authorized a program of urban renewal and slum clearance, with loans for cities and grants to cover 2/3 of the difference between the cost of the land and its reuse value.[674] In Title III, the legislation authorized priority placement into public housing for those forced out of their homes by urban renewal. The urban poor who were displaced as central cities

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[668] Id. at 202-206.
[669] Id. at 199-200.
[670] 4 The Papers of Clarence Mitchell, supra note 59, at 257.
[671] Marshall W. Amis, General Counsel, to Warren R. Cochrane, Director of Racial Relations (Nov. 29, 1951), Racial Discrimination (1) (1938-1961), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[672] New Jersey appellate court in Seawell and the Eastern District of Pennsylvania in Favors v. Randall
[673] Bauman, Public Housing, at 352-In 1954, Title I was expanded and termed "urban renewal" to encompass rehabilitation and conservation as well as tearing down old buildings, and it included a requirement that cities develop "workable programs" CITE Abrams on "adjunct" infra The 1954 Housing Act accelerated the shift toward urban renewal, so that along with subsequent legislation, it "moved urban renewal from a a program whose primary purpose was to improve housing for poor people towards a program whose purpose is more to renew the central city tax base and to recall middle and high-income whites from the suburbs." Wolman, supra note 461, at 40.
[674] Housing Act of 1949, Pub L. No. 81-171, §§ 101-110, 63 Stat. 413, 414-21; see also Wolman, supra note 461, at 36 (noting that the grant provision "enabled private developers to obtain land from cities at a very substantial write-down of its actual cost with the difference being subsidized by the United States government."

were razed for redevelopment were given priority placement into public housing. Because those displaced residents were disproportionately minorities, public housing itself became increasingly occupied by racial minorities.[675]

As with other federal housing programs, officials refused responsibility for discrimination in the process of slum clearance and urban renewal—which quickly had come to be called "Negro removal" because it removed poor, largely African American residents from central cities while repurposing the land for higher-income housing and commercial development.[676] In many instances, subsequent developments were explicitly "whites only."

Mitchell reported in 1951 that "Housing agencies have taken the position that even when colored people are displaced from areas because of Federally aided housing programs, nothing can be done by the Federal government to require that the new housing be open to all persons without regard to race."[677] The following year, the NAACP decided to challenge this position—and the public housing program's ongoing complicity in funding segregation. The constitutional principles barring government imposition of segregation seemed clear—and were even upheld in an initial ruling by the Fifth Circuit that the organization's Fifth Amendment challenge to federal approval and funding of segregated public housing could proceed. However, the procedural legal barriers to holding federal officials responsible under the Constitution first delayed the suit for years, then defeated it.

Litigating federal aid for segregation—into a procedural wall

African Americans had lived for generations in the "Old Fort" area of Savannah, Georgia, a church-filled district just blocks from downtown, overlooking the Savannah River.[678] But by the mid-twentieth century, Savannah authorities, with the support of federal public housing officials, developed a plan to raze existing buildings and build new public housing there. As of 1952, over 300 black families had been forced to sell their homes and relocate—excluded from any possibility of returning to the site, because the new housing project was to be for whites only.[679]

In fall 1952, the NAACP filed suit on behalf of thirteen former residents of the area, challenging what the Chicago Defender termed the "effort to rob the colored citizenry of their riverfront section on the bluff of the beautiful Savannah."[680] NAACP lawyers used the case, *Heyward v. Public Housing Administration*, as a vehicle to directly challenge the agency's funding for segregation on constitutional grounds; they did not even name the local housing authority in the suit, in an attempt to force adjudication of the potential constitutional violation by the federal government.

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[675] From 1948 to 1959, the share of black occupancy in public housing rose from 35% to over 45%. U.S. Comm'n on Civil Rights, 1959 Report of the U.S. Comm'n on Civil Rights 476 (1959).
[676] Wolman, supra note 461, at 37-38.
[677] 4 The Papers of Clarence Mitchell, supra note 59, at 280.
[678] NAACP files suit against FHA to stymie biased Ga. housing project, Chi. Defender, Sep. 27, 1952; Our opinions: Public housing snafu, Chi Defender, Jan. 12, 1952, at 10.
[679] Suit Filed in DC, Atlanta Daily World, Sep. 14, 1952 at 1; NAACP files suit against FHA to stymie biased Ga. housing project, Chi. Defender, Sep. 27, 1952Our opinions: Public housing snafu, Chi Defender, Jan. 12, 1952, at 10.
[680] NAACP files suit, supra note 678; Snafu, supra note 678.

The lawyers were well aware of the procedural and substantive difficulties ahead. In March 1953, the NAACP convened a conference aimed at developing legal theories and strategy for attacking housing discrimination.[681] In a memo that NAACP lawyer Constance Baker Motley sent to the attendees beforehand, she set forth the key challenges to be addressed. Second in the list was: "How are we to challenge the use of federal funds for racially segregated public housing?"[682]

As Motley noted, the NAACP's *Heyward* suit was the first to be brought solely against the federal government, alleging violations of Civil Rights Act of 1866, the Housing Act's statutory priorities, the implied duty to administer the Housing Act without discrimination, the public policy of the United States, and the Fifth Amendment.[683] Motley explained to the conferees: "In this case every possible theory was intentionally thrown in on the theory that use of federal funds for segregated public housing must somehow be enjoined."[684]

The *Heyward* plaintiffs sought an injunction barring further federal funding for segregated housing in Savannah.[685] However, the procedural barriers to challenging federal grants-in-aid loomed large. According to Motley, "the difficulty we anticipate is with the standing of plaintiffs to seek this kind of remedy." In the PHA's pending motion for summary judgment, the federal agency had acknowledged the segregation but justified it as "the sole determination of the local authority." The agency's primary defense focused on attacking plaintiffs' standing. Motley was pessimistic, believing that the court was likely to rule that the remedy lay in a suit against the local housing authority for admission to the whites-only project, rather than in enjoining the expenditure of federal funds.

But the NAACP hoped to exploit the gap between the Justice Department's position in the racial covenant cases, and the actual policies of the housing agencies. Motley wrote that the litigation "should… be pressed if for no other reason than the fact that it puts pressure on the federal government… and [i]t also embarrasses the federal government, especially in view of its position in the restrictive covenant and other cases."[686]

Less than two months after the NAACP housing conference, the D.C. district court, where the NAACP had filed the suit, granted summary judgment to the PHA in *Heyward*.[687] The court thought the plaintiffs' standing doubtful under *Massachusetts v. Mellon*, but ultimately chose to reach the merits and rely on *Plessy* itself.[688] No constitutional violation had occurred, the court

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[681] Motley Memorandum, supra note 268, at 1.
[682] Id. at 2. The fourth challenge related to the identical problem in the FHA context: "How are we to challenge the use of federal mortgage assistance in the form of F.H.A. mortgage insurance which makes … lily-white developments possible?" Id.
[683] Id. at 6; see also Heyward v. Public Housing Admin., 214 F.2d 222, 223 (D.C. Cir. 1954).
[684] Motley Memorandum, supra note 268, at 17.
[685] Suit filed in DC May Have Local Effect, Atl. Daily World, Sep. 14, 1952, at 1.
[686] Motley Memorandum, supra note 268, at 18.
[687] NNPA, Federal segregation is upheld, Baltimore Afro-Am., May 2, 1953, at 22.
[688] Heyward v. Public Housing Admin., 214 F.2d 222, 223 (D.C. Cir. 1954); Federal segregation, supra note 687 (quoting the court's order: "The court has grave doubt whether this action lies in the light of the doctrine enunciated in the case of Massachusetts v. Mellon.").

reasoned, because the Savannah public housing program had provided equal, though segregated, public housing to whites and blacks. [689]

On appeal, with *Brown* pending before the Supreme Court, the D.C. Circuit punted. Rather than decide the "important constitutional issues raised," the appellate panel ruled that the Savannah Housing Authority, which was not named in the suit, was a "conditionally necessary" (if not indispensable) party under the federal procedural rules.[690] It ordered the district court not to exercise jurisdiction without the presence of the local authority. The NAACP would have to add the Savannah Housing Authority to the suit in order to proceed. Until then, the decision left unresolved the Fifth Amendment question of whether the federal government could constitutionally fund segregated housing. NAACP lawyers soon pursued the necessary steps to overcome the procedural problem, refiling the *Heyward* suit in the Southern District of Georgia against both the PHA and the Savannah Housing Authority.[691]

As Motley had suggested, the litigation exposed divisions between the Justice Department and the housing agency. After the NAACP refiled in 1955, a debate took place within the federal government over the PHA's position. The DOJ-suggested affidavit aligned the agency against segregation, while the PHA position was simply "we… will follow the law."[692]

The PHA's general counsel cited the legislative history of the 1949 Housing Act to argue, "Congress recognized there would be some segregation." Quoting Robert Taft, the conservative Republican leader, the general counsel noted "it is significant… that Senator Taft did not appear to consider the terms 'discrimination' and 'segregation' as synonymous."[693] The general counsel's memo borrowed from a memo by staff lawyer Joseph Burstein to argue that the legislative history amounted to a directive to the PHA not to prohibit segregation.[694] Though *Brown* had already been decided, the memo noted that the Supreme Court had not yet addressed segregation in public housing specifically, or in housing sales and leases more generally. The agency's top lawyer concluded by acknowledging that two federal courts had recently "held that segregation in public housing was a violation of the Civil Rights Act and the 14th Amendment"—but offered no further analysis on the question of constitutionality. According to a handwritten note penciled on the memo, the "PHA position prevailed [over the DOJ stance] and no policy statement was made in *Heyward* pleading."[695]

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[689] Heyward, 214 F.2d at 223-24 (describing reasoning of district court).
[690] Id. (relying on Federal Rule of Civil Procedure 19(b)).
[691] Heyward v. Pub. Hous. Admin., 135 F. Supp. 217 (S.D. Ga. 1955) (resolving only the Savannah Housing Authority's motion to dismiss, not that of the federal defendants); Heyward v. Pub. Hous. Admin., 238 F.2d 689 (5th Cir. 1956). The complaint was filed in May 1954, just three days after the Supreme Court issued its decision in Brown. Heyward, 238 F.2d at 691.
[692] John L. McIntire to Commissioner (May 4, 1955), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[693] Id. at 1.
[694] See infra notes 747-758 and accompanying text (discussing Burstein memo).
[695] The note's writer, initials "JB"—most likely Burstein—thought the memo should have been even stronger in defending the PHA status quo on segregation, noting "legislative history is more forceful than indicated." John L. McIntire to Commissioner (May 4, 1955), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

The Georgia district court soon granted the PHA's motion for summary judgment on the constitutional and statutory claims against it.[696] The court rested on a slew of jurisdictional grounds, particularly that "plaintiffs lack sufficient legal interest in the expenditure of federal funds by PHA to give them standing to challenge the validity of such expenditure" and that given that the federal agency allowed local authorities to decide their segregation policies "there is no justifiable controversy between plaintiffs and PHA…." [697] Procedural barriers thus blocked resolution of the federal claims on the merits.

A year later, the Fifth Circuit reversed, holding the PHA potentially liable for Fifth Amendment violations in authorizing and funding racially segregated housing. "While it is true that PHA has not been charged by Congress with the duty of preventing discrimination in the leasing of housing project units, what these plaintiffs are saying in effect is that the federal agency is charged with that duty under the Fifth Amendment," the panel wrote. The facts were too unsettled for summary judgment, given that the "the complaint sets forth allegations which, if proven, would show a failure on the part of the PHA to comply with the [statutory] tenant selection policy, …[which] would constitute a violation of plaintiffs' rights to due process under the Fifth Amendment." Citing *Bolling v. Sharpe*, the court indicated that the Fifth Amendment could be used to bar such federal participation in racial segregation.[698]

As the *Howard Law Journal*'s editors perceptively flagged, the *Heyward* decision was unique in allowing the Fifth Amendment claim to proceed against the federal agency: "The significance of this holding cannot be overlooked, for it affords the first instance of a finding of a statutory and constitutional duty running from the PHA to the tenants of a public housing project."[699] Previously, courts "had no trouble in finding that PHA was not amenable to suit."[700] According to the journal, the Fifth Circuit's ruling "placed upon the PHA the Constitutional responsibility of striking racial discrimination and segregation from their public housing policy...." by finding an implied constitutional command to the agency to avoid funding segregation.[701]

Despite the Fifth Circuit's promising ruling on the government's constitutional responsibility to address segregation in its programs, *Heyward* fizzled. On remand, the case was dismissed when plaintiffs failed to show that they had actually applied and been denied admission to the housing projects in question.[702] Within the PHA, there was no sign that the Fifth Circuit's 1956 ruling made any difference in its policies, which continued unchanged. In 1953, Motley had advised the attending lawyers not to add federal defendants to their suits against public housing segregation, citing delay and the NAACP's sense that it was sufficient to sue the local housing

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[696] Heyward, 238 F.2d at 692.
[697] Id. at 694 (describing district court's reasoning).
[698] Id. at 697; see also Recent Developments: Discrimination in Public Housing Brought within Purview of the Fifth Amendment, 3 Howard L.J. 307, 309-10 (1957) (stating "it seems that the court deliberately brought the case within the purview of Bolling v. Sharp[e], thereby charging PHA with the Fifth Amendment duty of preventing discrimination and segregation in the leasing of units in public housing projects").
[699] Recent Developments, supra note 698, at 309.
[700] Id. at 311.
[701] Id. at 312 n.24 (stating that the decision "seems to imply that there is no need for an anti-discrimination clause in the Housing Act; that the 5th Amendment makes this clause unnecessary").
[702] Cohen v. Pub. Hous. Admin., 257 F.2d 73, 74 (5th Cir. 1958).

authorities.[703] Lawyers apparently continued to follow that advice, as no federal court ruled on the PHA's responsibility for Fifth Amendment violations in the ensuing decade—the first published decision finding such a constitutional violation by the agency appears to have come in 1971.[704]

The procedural barriers had doomed the NAACP's primary attempt to halt segregation in federal public housing via litigation. Holding federal officials to account for their compliance with constitutional principles was too difficult to pursue in the courts, at least in the 1950s. That left the executive branch free to form its own racial policies, without serious fear of judicial oversight.

A decade of constitutional arguments

Throughout the 1950s, the gap between the Court's decisions, executive branch rhetoric, and the actual practices of the housing agencies only increased, as agency leaders continued to reject any possibility of halting their support for segregation. The NAACP continued to lobby the executive branch for action, pressing its constitutional arguments and highlighting the contradictions between presidential rhetoric and the Justice Department's position in the Supreme Court, as compared to the actual practices of the federal housing agencies. As Clarence Mitchell put it, "The HHFA... seems bent on doing the exact opposite of what the President, the Supreme Court, and the Department of Justice say is the policy of our government."[705]

Framing the constitutional arguments for executive branch authority

In the last year of the Truman administration, the NAACP continued to press its constitutional theory that the housing agencies had the power and legal responsibility to stop supporting segregated housing. Earlier, the housing agencies had appeared to claim that they could resolve the problem without further legislation. In 1951, Representative Abraham Multer (D-NY) asserted on the floor of the House that the housing agencies had agreed to address segregation and discrimination in their programs using their administrative powers—thus obviating the need for an anti-segregation amendment to housing legislation.[706] Yet the agencies quickly belied this claim. "The Housing Agencies, on the advice of their lawyers and after counseling with White House advisers, have taken the position that the Federal Government cannot require those who

[703] Motley Memorandum, supra note 268, at 16-17.
[704] In 1971, the Seventh Circuit found the HUD Secretary's actions, in continuing to fund and oversee Chicago's public housing system and thus using his discretionary powers in a way that he knew "perpetuated a racially discriminatory housing system in Chicago," amounted to "racially discriminatory conduct in their own right" that violated the Fifth Amendment. Gautreaux v. Romney, 448 F. 2d 731, 739-40 (7th Cir. 1971). The district court had found that "HUD's decision was that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negroes of [Chicago]."[704] But the appellate panel ruled that even good faith provided no warrant to carve out an exception to the non-discrimination requirements "firmly established… for at least the last sixteen years" since Brown and Bolling. Id. at 737. See also Shannon v. HUD; Hicks v. Weaver (finding violations of Title VI of the Civil Rights Act on analogous facts).
[705] Clarence Mitchell to Nathan Keith (Dec. 17, 1951), Box 751, Program Files, Race Relations Program 1946-1958, RG 207, NARA II.
[706] 4 The Papers of Clarence Mitchell, supra note 59, at 288.

build housing with Federal assistance to refrain from segregating or excluding tenants or buyers solely because of race."[707]

NAACP leaders sought to discredit the housing agencies' purported lack of authority to address segregation. In early 1952, Walter White, Robert Weaver (in his capacity as an NAACP board member), and Clarence Mitchell met with HHFA Administrator Raymond Foley to urge that the federal housing agencies "deny any assistance or finances unless there is a guarantee that the housing made available will be open to all qualified applicants without regard to race."[708]

To counter the housing agencies' claims that they lacked legal authority to bar discrimination within the housing they supported, the NAACP officials delivered up another legal memo.[709] All the housing agencies currently had the power to bar discrimination in their programs, the 1952 memo argued. Statutory silence was irrelevant, because the federal Constitution had to be read into any grant of statutory authority: "it is completely unnecessary for an Act of Congress to contain an expressed prohibition against discrimination including segregation, for the reason that any Act of Congress is proscribed by ... the prohibitions of the Fifth Amendment."[710]

The logic of prior housing cases, from *Buchanan* to the Court's ruling in *Hurd v. Hodge*, implied a series of necessary conclusions. "If the states cannot constitutionally prescribe the segregation of the races in housing neither can the federal government, nor can the federal government ... give support or effect to discrimination or segregation by private individuals, ... as such would violate the public policy of the United States." Further, the Civil Rights Act of 1866 itself barred racial discrimination in the sales or rental of real property—and governed both the national and state governments.[711] The statute guaranteed all citizens "the same right... as is enjoyed by white citizens" to own and transact property.

In the context of public housing, the NAACP memo extended its argument that the federal government could not legally support segregation by others, reasoning by analogy that public housing was a "federal function" which the government was required to regulate according to constitutional norms. "[T]he aid and authority given by the federal government to [local public housing] makes it a function of the federal government and thus subject to the same restrictions imposed upon the federal government itself." For support, the authors cited state action cases, including the white primary case, Smith v. Allwright, and the case of Marsh v. Alabama, which applied constitutional constraints to a private "company town." Just as government support could

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[707] Id. at 280.
[708] Id. at 302.
[709] The 1952 memo's title—a mouthful—described its core claim concerning executive power: "The Authority and Power of the Administrator of the Housing and Home Finance Authority, the Federal Housing Administration, the Public Housing Administration, and the Division of Slum Clearance and Urban Redevelopment, Constituent Units of the Housing and Home Finance Agency, to Prohibit Discrimination in Federal and Federally-Aided Housing Programs Administered by Them" (Jan. 11, 1952), Box 748, Program Files, Race Relations Program 1946-1958, RG 207, NARA II.
[710] The memo also referenced the public policy of the United States (relied upon in Hurd v. Hodge) and the laws of the United States. Id. (citing the Japanese internment cases and Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) in which the Court had read an implied non-discrimination requirement into a federal labor statute).
[711] Id. (citing statute now codified at 42 U.S.C. § 1982).

convert ostensibly private acts into state action, so too could federal support convert ostensibly local government acts into federal actions. Under that logic, federal officials themselves became perpetrators of constitutional violations when they financed and oversaw segregated local institutions.[712]

Moreover, the memo's authors argued that public housing's statutory framework itself foreclosed any reliance on race. The 1949 Housing Act codified a set of preference schemes that favored families displaced by urban renewal and those of disabled or deceased veterans. Any use of race to segregate families and channel them only into specified projects would conflict with those schemes. For example, a white family not entitled to the priority preference might be admitted to a whites-only project long before a black family entitled to the preference could obtain public housing in another, segregated black project.

However persuasive the memo may have been on legal grounds, it produced no results. The Truman administration did not counter the NAACP's substantive arguments, but declined to take action in 1952. Shortly after Republican candidate Dwight Eisenhower's victory in the presidential election that fall, HHFA Administrator Foley wrote White that "under the present circumstances, I believe that ... I should make available to the new Administration such recommendations as I may have"—without taking any concrete action.[713]

Within the housing agencies, racial relations officials were caught between political pragmatism and the more far-reaching goal of ending federal support for segregation. In this period, they generally took the pragmatic approach, fighting for limited gains rather than for opening all housing to minorities—even if *Shelley* and Hurd arguably signaled that federal administrative action supporting segregated housing was unconstitutional. For example, when in 1952 Frank Horne forwarded "Recommendations… to Effect Actual Equality of Treatment of Racial Minorities in All Agency Programs" to the HHFA's general counsel, he assumed "that current housing legislation does not permit the Agency to withhold Federal funds, powers and credit from local public agencies or private developers who restrict occupancy on the basis of race...."[714] The race relations advisor did not call for a paradigm shift in the housing agencies' approach to racial segregation. Instead, Horne's memo called for moderate measures, such as more complete elimination of race from FHA underwriting requirements, stricter enforcement of racial "equity" in the provision of community facilities and public housing units, and non-segregation in all federally-owned housing.

Similarly, when the agency published a booklet on "Open Occupancy in Public Housing" in early 1953, the race relations officials who drafted it took a defensive tone. The pamphlet's very first sentence explained that the guide was not really a federal initiative but "offered primarily in response to requests of numerous local housing authorities." No one should be concerned that it represented an attempt at federal control: "Its purpose is not to say 'this is what you should do' and 'this is the way you should do it'; it rather is to say 'this is what others have done; and this is

[712] Id.
[713] Raymond M. Foley to Walter White (Nov. 26, 1952), II:A313, NAACP Papers.
[714] Frank Horne to B.T. Fitzpatrick (Jan. 17, 1952), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

the way they have done it.'" The information was being disseminated "in the same manner and to the same end that we share other types of technical information and experience in the field of housing."[715] Internally, the chief racial relations officer had emphasized the same themes, writing the PHA Commissioner, "You will note that the document is in no way controversial and does not anywhere suggest or imply that this is a policy or requirement of PHA."[716] Positioned between their NAACP allies and their bosses within the housing agencies, the Racial Relations advisors had only limited leeway to court controversy.

Pressing for reform from within

As the Eisenhower administration prepared to take office at the end of 1952, the NAACP wasted no time in lobbying them for executive action against housing discrimination.[717] The Republican victory had not boded well for housing reformers, particularly public housing supporters, and Eisenhower's choice for head of the housing agencies, Albert Cole, elicited distrust from housing advocates and civil rights groups.[718] Cole, a former member of Congress from Kansas, had prominently opposed public housing in the past, leading many to fear that he had "been appointed to liquidate the program."[719] Though Cole testified at his confirmation hearings that he personally opposed segregation, he did not commit to ending federal support for segregated housing.[720]

Yet the NAACP pressed its case. Clarence Mitchell met with both Attorney General Herbert *Brown*ell and the new head of the HHFA to make the organization's argument that executive officials had the power (and responsibility) to halt federal support for segregated housing.[721] After giving Cole the organization's January 1952 memo on executive authority to bar segregation in federal programs, Mitchell wrote, "He made the observation that he is opposed to using any Federal funds for creating segregation in Housing. We shall see when we meet with him [together] how much of this he is willing to make policy."[722]

Cole's early moves as HHFA Administrator amplified reformers' initial distrust. Cole shuffled the Racial Relations Service, removing the long-serving chief, Frank Horne, in favor of a

[715] PHA, Open Occupancy in Public Housing (ca. 1953), Box 3, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[716] Warren R, Cochrane, Note to the Commissioner, PHA (May 2, 1952), Box 3, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II. Cochrane had also noted the urgency of getting the publication approved that fiscal year—perhaps due to the impending presidential election, which would bring a change of administration.
[717] 4 The Papers of Clarence Mitchell, supra note 59, at 335.
[718] See generally Hearing before the Sen. Comm. on Banking and Currency on the Nomination of Albert M. Cole to be Administrator of the Housing and Home Finance Agency, 83rd Cong. (1953).
[719] Id. at 27-28 (statement of Clarence Mitchell) (quoting Cole as having stated that public housing "tends to destroy our Government" and leads "to a surrender of our own responsibilities").
[720] Id. at 7-8, 17 (statement of Albert M. Cole); see also id. at 29-30 (statement of Clarence Mitchell).
[721] 4 The Papers of Clarence Mitchell, supra note 59, at 335, 360.
[722] Clarence Mitchell to Walter White (Mar. 20, 1953), II:A309, NAACP Papers.

political appointee, a black Republican named Joseph Ray. When liberal organizations protested Horne's removal, Cole created a special post for him as head of an office of "minority studies."[723]

Cole's other initial actions suggested that he would continue the HHFA's "racial equity" approach of pursuing "separate but equal" housing for minorities, rather than trying to do away with segregation.[724] In April 1953, Cole solicited Frank Horne's views on two points: the recently issued "living space" procedures (aimed at maintaining the housing supply available to minorities) and its "equitable provision" requirement for low-income housing.[725] Two days later, Horne and the other race relations advisors replied with more far-reaching thoughts. They began by suggesting that the housing agencies contemplate an end to segregation—or as they put it, officially adopting "the principle that occupancy in dwellings constructed through Federal assistance ought to be available to families of all races."[726] Among their practical proposals toward that end were that segregation be halted entirely in defense housing, and that that localities be permitted to operate segregated public housing only where state or local law so required.[727]

Although nothing indicates that Administrator Cole acted on Horne and his staff's suggestions, race relations advisors continued to propose reforms to the new administration—and the administration initially appeared willing to entertain those proposals, at least in its rhetoric. In January 1954, chief race relations advisor Ray wrote Cole to urge that President Eisenhower use his housing message to Congress to specifically recognize the problems faced by racial minorities and to urge the federal housing agencies to use "every possible administrative resource and device" to assist.[728] Meanwhile, the NAACP's Clarence Mitchell lobbied to have the president announce that no federal aid would be given to segregated housing.[729]

In Eisenhower's message to Congress, the president adopted Ray's suggestions, while ignoring the NAACP's more radical proposals. Eisenhower said "the administrative policies governing the operations of the several housing agencies must be, and they will be, materially strengthened and augmented in order to assure equal opportunity for all of our citizens...."[730] Afterward, Ray enthusiastically sought his subordinates' help with a "bill of particulars" for

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[723] It is unclear whether Cole himself supported the ouster, though. According to Horne's deputy at the time, the Republican National Committee had wanted to dismantle the racial relations service entirely, but Cole resisted. McGraw Interview, supra note 512, at 3.

[724] Clarence Mitchell reported that Cole had expressed his support for the organization's proposals to end segregation in federal housing programs, but that he would have to seek the views of the FHA and PHA heads, as well as the highest levels of the Eisenhower administration. 4 The Papers of Clarence Mitchell, supra note 59, at 360.

[725] Albert M. Cole to Frank S. Horne (April 3, 1953), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[726] Policy Questions—Staff discussion of Staff Papers (Apr. 6, 1953), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[727] They also suggested that FHA and the urban renewal division be required to provide racial data comparable to that maintained by PHA. Id.

[728] Joseph R. Ray to Albert M. Cole (Jan. 13, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[729] 4 The Papers of Clarence Mitchell, supra note 59, at 409.

[730] Dwight D. Eisenhower, Special Message to the Congress on Housing, Jan. 25, 1954, http://www.presidency.ucsb.edu/ws/index.php?pid=9952; see also Joseph R. Ray to Messrs. Horne, Nesbitt, Sadler, and Snowden (Jan. 26, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

achieving equal opportunity.[731] Race relations officials from across the HHFA constituent agencies sent him proposals, suggesting measures like formal preferences for open occupancy developments, priority processing for sites outside of existing minority neighborhoods, better enforcement of relocation requirements for displaced families, and a formal non-discrimination requirement for all federally owned housing.[732] Most consistently, they wanted a more powerful role for themselves, so that their disapproval of a project had a better chance of halting it or forcing revisions.

In early 1954, then, race relations officials within the housing agencies still saw potential paths for reform. But outside the agency, civil rights advocates' efforts were stymied, both in Congress and the White House.

In spring 1954, the chair of the housing agencies' Senate oversight committee wrote the HHFA chief asking how the proposed Housing Act of 1954 would augment minority housing. Administrator Cole wrote back opposing proposals to assure minorities a proportionate share of FHA housing as "class legislation" which would "perpetuate rather than cure the un-American prejudices which disadvantage our minority families."[733] He argued that race-neutral programs expanding the reach of FHA housing to lower-income families would be most effective, and emphasized that the agency barred any racial distinctions in its applications.[734] The NAACP's Mitchell denounced Cole's implication "that there is no need for legislation to ensure fair treatment of minority groups."[735] The organization did not favor any "proportionate share" approach to minority housing, he wrote, but did maintain its demand that FHA halt its support for whites-only housing. And given the agency's past record, Mitchell told Senator Capehart that it was "unlikely that the present housing officials will depart from this policy unless they are clearly instructed to do so by your committee."[736]

Realizing that Congressional action was unlikely, NAACP leaders turned once again to the President. White telegrammed Eisenhower: "We again strongly urge that you order the housing agencies to cease giving assistance of any kind ... unless there is positive assurance that housing and facilities constructed with the help of the federal government… are available to all qualified lenders, buyers or users without regard to race."[737] Mitchell had urged White to ask only for executive action on the ground that these were "things which the President now has the power to do and that suggesting legislation might be seized upon as the excuse or not exercising the executive powers he now has."[738]

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[731] Joseph R. Ray to Messrs. Horne, Nesbitt, Sadler, and Snowden (Jan. 26, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[732] Frank S. Horne to Joseph R. Ray (Feb. 4, 1954); George B. Nesbitt to Joseph R. Ray (Feb. 4, 1954); Philip G. Sadler to Joseph R. Ray (Feb. 2, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[733] Albert M. Cole, Administrator, to Sen. Homer E. Capehart (April 6, 1954), II:A308, NAACP Papers.
[734] Id.
[735] Clarence Mitchell, Director, Washington Bureau, to Sen. Homer E. Capehart (April 15, 1954), II:A308, NAACP Papers.
[736] Id.
[737] Telegram, Walter White, Secretary, NAACP to President Dwight D. Eisenhower (April 22, 1954), II:A310, NAACP Papers.
[738] Walter White to Robert C. Weaver, April 22, 1954, II:A310, NAACP Papers.

In May 1954, as the nation waited for the Court to hand down its decision in *Brown*, Mitchell reflected on the NAACP's unsuccessful efforts to address federal housing programs. In a memo to Walter White, Mitchell argued for a meeting with the President, the Attorney General, and the Housing Administrator to request an official policy conditioning federal housing aid on open occupancy requirements.[739] Less visible means had failed: "We have repeatedly met with the top Housing officials in the previous Administration and in the present Administration"—to no avail. Attempts to enact non-segregation amendments in basic housing legislation had also been defeated. Mitchell attributed those failures to (1) "the strong belief among many liberal members of the Congress that passage of these amendments would defeat overall Housing legislation," and (2) "the intervention of the Housing Agencies in the form of assurances to Congress that the problem could be handled without legislation."[740] NAACP leaders understood the political dilemma that public housing faced, but they were unwilling to choose the program over constitutional principles.

Interpreting Brown *and* Banks

Ten days later, the Court decided *Brown v. Board of Education*, vindicating the NAACP's view of the Constitution. The Court ruled that "inherently unequal" segregated schools violated the Fourteenth Amendment, and in *Bolling v. Sharpe*, applied the same reasoning to hold that school segregation by federal authorities violated the Fifth Amendment's due process clause. A week later, the Court denied certiorari in *Housing Authority v. Banks*, a California state court decision ruling a local housing authority's enforcement of segregation unconstitutional.[741] Some observers read *Banks* as a signal that the Court intended *Brown* to apply to segregated public housing, not just schools.

Frank Horne spoke a few days after *Brown* to civil rights advocates, "with … a new pride in the Government of the United States." Yet he warned that the nation was at a critical juncture. If "governmental housing policies continue to lend federal sanction" to the racially exclusionary practices of real estate brokers, lenders, and builders, the danger was that "rigid patterns of economic and racial segregation [will] be crystallized in brick and mortar to haunt us for generations."[742] Horne remained optimistic, though, in part because President Eisenhower "has reiterated the principle that wherever the federal government is clearly involved, there is no place for distinctions or discriminations based solely upon race."

Southerners reacted differently to *Brown* and the Court's refusal to hear *Banks*. Senator Burnet Maybank, D-SC, until then a fervent supporter of public housing, declared his instant opposition—opposition that other members of Congress feared doomed further federal support for

[739] Clarence Mitchell to Walter White (May 7, 1954), II:A312, NAACP Papers.
[740] Id.
[741] Housing Authority v. Banks, 374 U.S. 974 (1954) (denying certiorari); see also Banks v. Housing Authority, 260 P.2d 668 (Cal. App. 1953).
[742] Frank S. Horne, After Fifteen Years: The Record and the Promise, Address to the New York State Committee on Discrimination in Housing and the National Committee Against Discrimination in Housing (May 20, 1954), Box 9, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

public housing, if not federal aid more broadly.[743] "[I]f you carry it to extremes, it might also mean voting against Federal aid to schools, hospitals, and other projects" an "important" (but anonymous) Southern congressman commented.[744] PHA officials expressed their concern but withheld further comment.[745] Maybank's action provided "an object lesson to any federal administrator contemplating action against segregation."[746]

Bearing out that conclusion, the public housing agency's lawyers quickly rejected the idea that *Brown* (or the Court's refusal to hear *Banks*) might require changes in public housing. Just two weeks after *Brown*, PHA attorney Joseph Burstein sent the general counsel a twelve-page memo on the effect of the Court's two decisions.[747] Burstein, who would eventually rise to become general counsel himself, had been at the agency for over a decade. Born in Eastern Europe, he had immigrated to the United States as a child and eventually put himself through law school while working as a government messenger in Washington, D.C.[748]

Burstein argued against interpreting the Court's decisions to require change in the agency's approach to segregation. He dismissed the idea that either *Brown* or *Banks* had broad implications for the constitutionality of segregation in public housing. *Brown* governed schools only, insofar as the Court's reasoning hinged on the "detrimental psychological effect" of segregation on black children's learning. The state court's ruling in *Banks* was limited to California, since the Court's denial of certiorari lacked substantive legal effect. Nor had the lower court in *Banks* directly questioned the validity of "separate but equal," so long as segregated accommodations were available to all. "Local housing authorities may continue to follow the laws and decisions of their own states," Burstein concluded.[749] That was particularly true in jurisdictions where courts previously had upheld segregation in public housing, he added.[750]

More sweepingly, the lawyer concluded that agency support for segregation could not end. "The PHA must continue its present policies in view of the Congressional directive stemming from the legislative history of the Housing Act of 1949 that the PHA not prohibit segregation, and in view of the absence of a decision holding this legislative directive unconstitutional."[751] (Burstein described the existing PHA policy as one of "neutrality" which he acknowledged led to "sanctioning of 'separate but equal.'").

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[743] President's Program Probably Is Doomed as Maybank Now Will Oppose It Due to Supreme Court Ruling, Wall St. Journal, May 26, 1954, at 3.
[744] Id.
[745] Id.
[746] McEntire, supra note 458, at 296.
[747] Joseph Burstein, Legal Division, PHA to John L. McIntire, General Counsel (June 2, 1954), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II. In 1954, Burstein had already served with the public housing agency for 11 years; he eventually became the general counsel in August 1961. Top Law Post in PHA Goes to Burstein, Wash. Post Times-Herald, Aug. 12, 1961, at D10. He had emigrated to the United States from Eastern Europe as a child, growing up in Massachusetts and eventually attending law school in Washington D.C. while working as a post office messenger. Burstein worked in the federal housing program for nearly forty years, retiring from HUD in 1980. Joseph Burstein, HUD Lawyer, Wash. Post, Aug. 15, 2003.
[748] Joseph Burstein, HUD Lawyer, Wash. Post, Aug. 15, 2003.
[749] Burstein, supra note 747, at 1.
[750] Id.
[751] Id.

Burstein treated Congress' rejection of earlier anti-segregation amendments as decisive legislative history, which resolved the question of whether to pursue federal social programs at the cost of civil rights. To Burstein, the legislative history standing alone deprived the agency of any potential authority to revisit that question. The debates over the Bricker Amendment in 1949 had grappled with "the tormenting issue which faces us now, that is, whether to proscribe segregation and almost certainly deprive the beneficiaries in the South, mostly Negroes, and the rest of the country, of low-rent housing for a good many years, or to continue a neutral policy and allow each locality to decide for itself and work out the problem locally…."[752]

When Congress rejected the proposed anti-segregation amendment to the 1949 Act, he argued "the issue was so clearly drawn that the legislative history amounts to a directive to the administering agency, the PHA, not to prohibit it." As a consequence, the agency "is not authorized to insist on non-segregation" in existing or future projects aided under the Act, unless and until the Supreme Court resolved the question.[753]

Even without the legislative history, Burstein argued that PHA lacked the power to bar segregation in places where judicial decisions or "prevailing custom and public policy" supported it, based on federalism principles implicit in the statutory framework. Because "the United States Housing Act clearly emphasizes local autonomy" and only one judicial decision had outlawed segregation in public housing, Burstein concluded "it would not be proper" for the agency to act.[754] It would not even be appropriate for the PHA to integrate federally-owned but locally-operated projects, because "[t]he basis for the Congressional decision not to endanger public housing by insisting on non-segregation contrary to local desires allows for no distinction based on Federal rather than local ownership of the projects…."[755] Adopting a different policy based on federal ownership "would be indulging in a mere technicality."[756]

Nor should PHA attempt to extend *Brown* on its own, because this would be "substituting its judicial wisdom for that of the Supreme Court" which, he argued, had manifested "a neutral position" by refusing to review either the New York case sanctioning government aid to private housing segregation, or the *Banks* case.[757]

Thus, the agency's legal staff took statutory silence—and Congressional refusal to adopt an anti-discrimination provision—as a "directive… [to] not prohibit segregation."[758] Against

[752] Id. at 8.
[753] Id.
[754] Id.
[755] Id. at 9-10.
[756] Id. at 10.
[757] Id. at 10-11.
[758] Id. at 1, 8. Burstein thought Congressional action imminent, citing Senator Maybank's newly declared opposition to public housing post-Brown, as well as the likelihood of review of Heyward. "It would not be wise for the PHA to attempt to influence or predetermine the decision by changing the status quo… upon which its nation-wide relationship with local communities has been based for so long a time." He also pointed out the possibility of work-arounds, by subsidizing private actors. PHA should not "prejudice the testing by local communities" of new approaches to public housing—for example, if they chose to license private companies to operate low-income housing as a means to avoid "state action" under the Fourteenth Amendment. "The Court might very feel constrained to take a conservative view

suggestions that the Constitution might require otherwise, they cited judicial silence. Without contrary directions from Congress or the courts, then, the agency would maintain the status quo—and continue to fund new racially segregated housing projects.

Like Burstein, white liberals outside the agency argued in favor of maintaining the status quo. Leading housing reformer and litigator Charles Abrams vehemently warned against overreading the Court's denial of certiorari in *Banks* in a speech to the National Housing Conference that same week: "Failure to review means nothing," he said.[759]

Abrams cautioned against rupturing the delicate alliance between liberals and Southern Democrats in support of public housing. In his eyes, segregation was a second-order problem. More pressing than that was "simple discrimination in housing" which involved "depriv[ation] of rights or privileges extended to others"—and was "the principal form of housing discrimination against which minority groups and social groups have been protesting and for which they have been attacking federal housing agencies."[760] For example, less than 1% of FHA-aided housing was available to African Americans. Maybank and other Southerners "would be the first to protest such discrimination," he argued. "[S]egregation as a form of discrimination" was "more complex."[761] That problem was if anything more acute in the North. In time, the Court might extend *Brown* to the housing context, he acknowledged. "But the Northerner and the Southerner who in public housing have always had a common bond … should realize that at the present juncture the issue of segregation in public housing is irrelevant and premature."[762]

Racial relations staff within the agency and NAACP leaders outside the agency saw the significance of *Brown* and *Banks* quite differently. In July 1954, race relations chief Ray sent Administrator Cole a proposal for a "first step in bringing HHFA administrative policies into line with the public policy underlying" *Brown*, backed by racial relations staff throughout HHFA and its constituents: that all multi-family residential developments receiving federal aid (including insurance and guarantees) be rented or sold "without regard to race, religion, national origin, or political affiliation."[763]

More salvos in favor of bringing the housing programs into accord with *Brown* followed, as the race relations advisors drew heart from the president's own statements. Asked at an August press conference, "[W]hat will be done to halt the practice of using Federal funds to assist in the promotion of housing from which racial minorities are excluded?"[764] Eisenhower said, "I would

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in this respect in regard to 'privately' operated housing subsidized directly by the Government because it would be only a minute step from there to privately operated housing indirectly subsidized by the Government, such as by the FHA." Burstein thought FHA should stay out of such determinations—"especially if… it is the only way in which low-income families in the locality can obtain low-rent housing." Id. at 11-12

[759] Address by Charles Abrams at the 23rd Annual Meeting of the National Housing Conference, Washington, D.C., at 2 (June 7, 1954), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.

[760] Id. at 5.

[761] Id. at 6.

[762] Id. at 7.

[763] Joseph R. Ray to Albert M. Cole (July 14, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[764] The President's News Conference—Dwight D. Eisenhower (Aug. 4, 1954), http://www.presidency.ucsb.edu/ws/index.php?pid=9966.

have to say I haven't any plan here I can expose to you." But he went on: "I have tried as hard as I know how to have accepted this idea, that where Federal funds and Federal authority are involved, there should be no discrimination based upon any reason that is not recognized by our Constitution. I shall continue to do that."

A week after Eisenhower stated his commitment to constitutional non-discrimination principles, Frank Horne sent Administrator Cole a memo posing a stark choice: between further "racial equity" policies, which attempted to achieve "separate but equal" housing a la *Plessy*—and a more absolute equality, which required open occupancy in all federally assisted housing a la *Brown*.[765] "The basic racial policy question involved in the administration of governmental housing programs is whether or not non-white families are to be afforded the same rights to the ownership and use of real property as white families."[766] If the answer was yes, "then there is neither justification nor necessity for 'minority group housing programs,' for 'equity' formulas nor for special planning, financing, production, or marketing devices to 'equalize' the housing opportunities for nonwhite families." All housing aided by the federal government, including privately constructed FHA-insured housing, would be open occupancy.

The alternative, as Horne described it, was to continue race-conscious attempts to ensure equal opportunity amidst segregation—in other words, continuing the *Plessy* approach. But he saw that strategy as unlikely to succeed: "Operating experience … through the last 15 years would establish the practical impossibility of attaining substantial equality of opportunity through these special devices." Moreover, judicial decisions increasingly rejected that approach, while President Eisenhower had stated recently that "where Federal funds and Federal authority were involved… there should be no discrimination…." Horne suggested that the agency need not rush into controversy; it could implement an open occupancy policy "in conformance generally with the tempo to be followed in the implementation of [*Brown* and *Bolling*]."[767] By starting in programs where federal authority and funds were directly involved, and in the North, the agency could gradually progress to more challenging areas.

The next day, Ray sent another memo to Cole calling for a shift to open occupancy.[768] "During the past 15 to 20 years, the housing agencies of the Federal Government have generally followed the lead of the U.S. Supreme Court in accepting, sanctioning, and refining the spurious and now outmoded concept of 'separate-but-equal.'" The racial relations chief framed the Court's shift as an "opportunity… for this Administration to prohibit any restriction based on race from the housing supplies and markets benefiting from Federal aids."

Ray pointed out that Justice Department briefs since at least *Shelley* and Hurd "leave little doubt that 'no agency of government should participate in any action which will result in depriving any person of essential rights because of race or color or creed…" He argued that it had been

[765] Frank S. Horne to Albert M. Cole (Aug. 12, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[766] An Approach to Racial Policy in the Housing and Home Finance Agency (Aug. 12, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[767] Id.
[768] Joseph R. Ray to Albert M. Cole (Aug. 13, 1954), Box 748, Program Files, Race Relations Program 1946-1958, RG 207, NARA II.

clear since 1948 that the government had no legal basis for permitting segregation of public housing. *Brown* itself dispelled "any vestige of a justification for a practice which the Court has never sanctioned in the field of real property." The lower court decisions invalidating public housing segregation clinched the matter, he wrote. Ray also argued out that the principle of an open, competitive private market for housing required open occupancy, and recent statements by President Eisenhower and Administrator Cole reinforced the urgency of updating the agency's policy.[769]

Agency lawyers, though, resisted the racial relations advisors' constitutional analysis. Soon another legal memo circulated among the heads of the constituent agencies and their racial relations advisors, opposing the proposals for open occupancy.[770] In the memo, an associate general counsel addressed Horne and Ray's "recommendation… that contractual requirements be imposed… providing that all housing provided through FHA aid or upon land assembled with DSCUR assistance be made available without regard to race."[771] The lawyer signaled his skepticism from the start, writing that he was not sure of the legal basis for the proposal but "I presume that the Governmental action involved in FHA's mortgage insurance activities and DSCUR's loans and grants constitutes the legal foundation for such recommendation." He then offered six numbered points in opposition (or "relevant factors," as he put it).

First, the associate general counsel argued that there was no basis in the Housing Act's text for such an action. It would not fit within the Act's catchall clause empowering the Administrator to impose conditions "necessary to carry out the purposes" of the Act.[772] Second, imposing such a requirement upon private developers would "involve[] a major extension of Federal authority," one that arguably should not be "impose[d] … administratively without authorization by Congress." Third, the HHFA should not act alone; rather all housing agencies (especially the VA) should act upon orders from the White House itself. Fourth, "the policy in question does not constitute an administrative implementation of a judicial determination of constitutional, or even statutory, rights." Fifth, in contrast to *Brown* or other recent segregation cases, "the Federal governmental action… is far more remote" in urban renewal projects. Finally, he argued that the federal assistance to private redevelopers in urban renewal projects did not constitute a federal subsidy or grant, and that the policy might "seriously impede the disposition of project land in certain localities."

The lawyers' positions as to public housing, FHA insurance, and urban renewal controlled subsequent legal analysis within the agencies, which took no steps to comply with *Brown*.[773] In fall 1954, the NAACP concluded, that amidst hopeful steps in other arenas, "The most prominent field in which a responsible Executive agency has resisted change relating to discrimination has

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[769] Id.

[770] J.W. Follin to Norman P. Mason and Charles E. Slusser (Sep. 13, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II (attaching legal memo).

[771] Joseph Guandolo to J.W. Follin (Aug. 24, 1954), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[772] Id.

[773] Cf. J.A. Weiseger to Philip Sadler (Apr. 14, 1955) Box 2 (Set 2), Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II (describing Burstein's views, as voiced the subsequent year, on prohibition of discrimination and segregation in public housing as "represent[ing] the Agency's policy").

been that of housing." They also charged that "no action has been taken by the Housing Agencies to implement the President's statement" from his January housing message to Congress, when he had committed to forceful administrative action to expand minority housing.[774]

Civil rights leaders hoped that the Justice Department might once again help them prevail against the housing agencies. In December, Mitchell drafted a letter to Attorney General Brownell on White's behalf, urging him "to halt government participation in the practice of extending racial segregation in housing."[775] He enclosed the NAACP's recommendations that "[a]ll public housing must be open to tenants without regard to race" and that urban renewal, FHA, and VA should contract to ensure that housing they supported "would be open to all renters, buyers or users without regard to race."[776] Soon after Mitchell wrote White that the Attorney General had said "he fully supports the NAACP's recommendations, and if necessary, will back them up before the President."[777] Before that, though, Brownell intended to speak to HHFA Administrator Cole. Yet nothing came of it.

While civil rights advocates continued to press their constitutional arguments, they expressed increasing pessimism that the agencies would shift course. In March 1955, the National Committee Against Discrimination in Housing (NCADH), representing a coalition of liberal groups, penned a letter to the president asking him to halt federal funding for segregated housing, but no response was forthcoming.[778] They also met with Administrator Albert Cole, where "it became apparent… that the period of negotiation with HHFA had been exhausted."[779]

Defanging Racial Relations

While the housing agencies remained immovable on the question of complying with *Brown*, the most forceful internal advocates of reform were soon forced out. Within a year of his memos calling for an end to segregation in federally assisted housing, Horne and his longtime colleague, Corienne Morrow, were gone. In early August 1955, the black press reported that Horne's position had been terminated, and that his staff, including Morrow would also be dismissed.[780] To many observers, their firings "confirmed the deterioration of HHFA racial relations policy."[781]

To the NAACP's Clarence Mitchell, it seemed that "these housing veterans have been terminated because they favor non-segregation clauses in government assisted housing." Horne said only, "those employees who were opposed to taking a strong stand on what I feel is a basic

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[774] 4 The Papers of Clarence Mitchell, supra note 59, at 440.
[775] See Walter White to Clarence Mitchell (Dec. 22, 1954), II:A312, NAACP Papers (attaching Mitchell's draft letter to Brownell, which White edited and sent).
[776] Id.
[777] Clarence Mitchell to Walter White (Dec. 31, 1954), II:A312, NAACP Papers.
[778] Nat'l Comm. Against Discrim. in Hous. (NCADH), Executive Director's Report (May 1956), III:A162, NAACP Papers.
[779] Id.
[780] Al Sweeney, Horne ouster hit, Afro-Amer., Aug. 6, 1955, at 1. The Washington Post picked up the story a week later. National Grapevine: Hurricane in Housing, Chi. Defender, Aug. 20, 1955, at 2.
[781] NCADH, supra note 778.

issue are still there." Other commentary suggested that "political pork barreling" accounted for the dismissal, given that "top man Cole personally admired Horne….[but] is said to have been under terrific pressure from politicians to fire Horne and Mrs. Morrow."[782] In subsequent weeks, civil rights groups charged that "the racial relations functions of the agency are now being handled on a basis[783] of what is good for Republican job seekers." Cole, they believed was under "a cross current of pressures" including from the housing industry.[784] Charles Abrams linked the firing of the vocal race relations advisors to the housing industry's lobbying. "[S]trong groups in Washington… felt that segregation in the expanding American neighborhoods was essential to the building boom and that the more liberal policy espoused by the Racial Relations Service was becoming a political liability…. It was also felt that dissident elements on the Southern fringe might be won over by a slow-down policy toward integration."[785] The initial attempt to dismiss Horne in 1953 indicated the shift, and after *Brown* "the power of those who favored a less progressive policy gained headway."[786] As for HHFA, its official comment was simply that Horne's "office has accomplished its purpose."[787]

At the end of her civil service appeals process in 1956, which she won, Morrow wrote a scathing resignation letter—free at last to voice her true sentiments about federal housing policy and its impact on African Americans' equal protection rights.[788] She condemned the agency's "promotion of [a] 'minority housing program,' conceived to counteract the effects of the United States Supreme Court's decision [in *Brown*] calling for public school integration" as well as a recent Administrator's letter officially opposing "the outlawing of racial discrimination in housing built with Federal aid."[789] Morrow concluded: "It is now clearly evident that the Housing and Home Finance Agency stands firmly as the last bastion of Governmentally sanctioned racism in the United States."[790]

Continuing the fight outside the agency

Congress in its 1954 revisions to the Housing Act had "ducked the issue of segregation."[791] Clarence Mitchell thus renewed the NAACP's call for discrimination bans in housing legislation during spring 1955, in testimony to both the Senate and the House.[792] Mitchell told the Senate's housing sub-committee that the housing agencies participated in "an iron-clad policy of building

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[782] Purpose Accomplished, Chi. Defender, Aug. 6, 1955, at 2.
[783] See Politics in Dr. Horne's Firing, Chi. Defender, Aug. 13, 1955, at 1.
[784] Reinstate Horne, Urban League asks, Wash. Post, Aug. 26, 1955, at 55 (quoting Lester Granger, the National Urban League executive director).
[785] Charles Abrams, To the Editors, N.Y. Times, Aug. 23, 1955, at 22.
[786] Id.
[787] Purpose, supra note 783.
[788] Corienne R. Morrow to Douglas E. Chaffin (July 6, 1956), III:A158, NAACP Papers.
[789] Id.
[790] Id.
[791] 4 The Papers of Clarence Mitchell, supra note 59, at 442.
[792] Press Release, NAACP Urges Anti-Bias Clause in Federal Housing Bill, June 16, 1955, II:A308, NAACP Papers; Press Release, Federal Government Expands Housing Bias, NAACP Tells Senate Committees, May 19, 1955, II:A308, NAACP Papers. The NAACP's proposed amendment read: "The aids and powers made available under the several titles of this Act are not to be conditioned or limited in any way on account of race, religion, or national origin of builders, lenders, buyers or families to be benefited." Id.

whole cities for whites only"—an approach that he called a "cruel and disgusting hoax."[793] Once again, Congress' white liberals worried that any such ban would kill the legislation.[794]

In response to civil rights' appeals for Congress to act, federal administrators became more direct in their efforts to maintain the status quo. They argued to Congress that barring segregation was not warranted and would undermine public housing, while threatening federal overreach. In spring 1956, Cole delineated the agency's stance on non-discrimination requirements in a letter to Senator Prescott Bush. Cole emphatically opposed barring segregation in federally aided housing. "[S]o drastic a step" was neither "possible or desirable," primarily because it "would set us back in the accomplishment of our goal of decent housing for all and produce a severe impact upon our economy…."[795] He argued that public housing authorities and developers would reject federal aid on such conditions, curtailing the housing supply.

More fundamentally, using federal power to bar segregation at the local level was inappropriate based on structural tenets of federalism, Cole opined:

> The role of the Federal government in the housing programs is to assist, to stimulate, to lead, and sometimes to prod, but never to dictate or coerce, and never to stifle the proper exercise of private and local responsibility….not only because housing needs and problems are peculiarly local but also because undue Federal intervention is incompatible with our ideas of political and economic freedom.

Because racial discrimination was "peculiarly local," "complex and deeply rooted in local traditions, institutions and emotions" Cole argued "we should rely heavily on local responsibility and local wisdom to work out solutions, with appropriate assistance, stimulation and leadership from the Federal government."[796] Eisenhower himself had expressed support for "moderation," Cole noted. Cole subsequently affirmed this position in testimony before the Senate Committee on Banking and Currency's housing subcommittee. As to public housing, he said, "This is the problem of the people in the locality. If they want integrated housing, they have it. If they don't want it, they don't have it."[797]

Civil rights advocates expressed incredulity at the agency's refusal to acknowledge any constitutional mandate against segregation. In "projects … directly subsidized by federal funds… [t]he notion that the locality may determine for itself whether to obey the law and Constitution is quite fantastic," Frances Levenson, head of NCADH, wrote.[798] She argued that the Supreme Court's recent decisions "require that the federal government refuse to support segregated housing" and that the government's own briefs "clearly affirmed the doctrine racial segregation imposed or supported by law or public powers is per se unconstitutional." Cole's position

[793] Id.
[794] NAACP Urges, supra note 792.
[795] Albert M. Cole to Sen. Prescott Bush (May 3, 1956), II:A162, NAACP Papers.
[796] Id.
[797] Frances Levenson to Sen. Prescott Bush (July 23, 1956), II:A162, NAACP Papers.
[798] Id.

supporting local power and "separate but equal" had been nullified by *Brown* and subsequent decisions.[799]

Yet growing legal clarity did not shift the housing agencies' policies. Rather, "[t]he movement to use residential containment to enforce school segregation is gaining momentum," Levenson warned in early 1956.[800] Southern cities were using urban renewal projects to bulldoze integrated neighborhoods and replace them with segregated housing, avoiding the prospect that such communities might produce integrated schools post-*Brown*.[801]

By mid-1957, NCADH's director bleakly evaluated the group's efforts to stop such trends. "There has been no progress toward the establishment of basic policy; the Federal Government continues to subsidize and underwrite racially-restricted housing…. State and federal courts have ruled segregation unconstitutional in public housing. But these decisions have not affected federal policy… In sum, continued activity on the federal and local level has had no effect on changing the policy of the Federal Government. It continues to bolster the restricted housing market."[802]

The group's assessment of their internal allies was similarly bleak: "The Racial Relations Service is no longer a constructive factor. Its practical demise is symbolic of the retrogression that has taken place in recent years."[803] Amidst all this, "residential segregation continues to increase."[804]

Despite the fraying of the racial relations service's status, the relationship between the race relations officials and its external allies remained intimate. Race relations officials regularly forwarded internal correspondence to the NAACP, sometimes with biting commentary; they exchanged warm notes, planning meetings and visits when they came to New York or DC; most often, they strategized together. For example, in spring 1957, the FHA's racial relations advisor sent a speech by the HHFA's top race relations official to Madison Jones, the NAACP's housing official, writing that the speech seemed to encourage segregation, and urging the NAACP to focus public attention on it. He emphasized "The time is ripe."[805]

A growing chorus on the need for constitutional compliance

By the late 1950s, more groups joined the NAACP and NCADH in publicly calling for the executive branch to implement *Shelley* and *Brown* in federal housing programs. A privately funded Commission on Race and Housing issued a series of studies, culminating in a final report

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[799] Id.
[800] Frances Levenson to Executive Board Members, 3/19/56, II:A162, NAACP Papers.
[801] Levenson, Recommendations to be Made to HHFA Administrator Norman P. Mason (March 25, 1959), II:A158, NAACP Papers (citing examples of Gadsden, Ala., Eufala, Ala., and Savannah, Ga.); Article, Prepared for Trends, 6/16/58, III:A157, NAACP Papers.
[802] NCADH, Progress Suggestions for Discussion at Executive Board Meeting, 5/8/57, II:A162, NAACP Papers.
[803] Id.
[804] Id.
[805] George Snowden, Handwritten note (attached to Joseph Ray speech from March 1957), II:A158, NAACP Papers.

in 1958.[806] The Commission was blunt: "[B]y endowing private business and local authorities with unprecedented power to determine the racial pattern in housing, and then taking to steps to control the use of this power, the Federal government indirectly gives major support to … racial segregation."[807]

Despite civil rights groups' longstanding calls to the President and federal housing agencies to bar discrimination in federally-assisted housing, "this step the Federal government has not been prepared to take"—an outcome that the Commission attributed squarely to "the power of the segregationist bloc in Congress."[808] While race relations advisors within the agencies pressed for greater supplies of minority housing and encouraged open occupancy, they "have had to proceed circumspectly because they must not infringe upon the agencies' basic policy of letting local authorities and private builders make the decisions concerning the racial patter"—lest they run into "bureaucratic trouble."[809]

The Commission argued that "equality of all citizens before the law" implied "equal access to and equal rights of participation in all facilities and benefits provided by public authority."[810] Federal policies allowing "racial distinctions in the distribution of federal housing benefits" violated the Constitution, as well as statutory commitments to providing decent housing for all. They proposed a presidential committee that would recommend a program and schedule for eradicating such discrimination, modeled upon previous committees addressing the armed services and government contracts.[811]

In 1959, a public entity followed up on the Commission on Race and Housing's efforts. The United States Commission on Civil Rights (USCCR), formed under the Civil Rights Act of 1957, had chosen housing as one of its first topics for investigation. Toward that end, the USCCR solicited information from the housing agencies and held hearings with federal officials. That spring, the HHFA Administrator asked his constituent agencies to give him a "careful review of your program operations and policy" in order "[t]o be sure we are providing equal treatment and opportunity to all Americans."[812] He expressly linked the request to the recent Commission on Race and Housing report as well as the USCCR investigation.

Public housing officials responded defensively, citing their longstanding "racial equity" policies. PHA Commissioner Charles Slusser quickly replied to the Administrator: "PHA feels

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[806] A later book-length volume, Residence and Race, was published in 1960 by UC Berkeley economist and professor of social welfare, Davis McEntire. While acknowledging the conflicting pressures upon the agencies, McEntire issued a stark conclusion: "[D]iscrimination continues to be the rule in most of the housing produced with the assistance of the government." McEntire, supra note 458, at 298. The USCCR later described the Commission as "business-oriented." U.S. Comm'n on Civil Rights, 1963 Report of the U.S. Comm'n on Civil Rights 98 (1963).

[807] Comm. on Race & Housing, Where Shall We Live? 49 (1958).

[808] Id.

[809] Id. at 51. The Commission noted also that the advisors lacked "line administrative or decisionmaking responsibilities"; that their jobs were "considered 'Negro jobs' …. [which] tends to identify racial matters as being of concern only to Negroes"; and that they had only "token" roles in urban renewal operations. Id.

[810] Id. at 59.

[811] Id.

[812] Norman P. Mason to Commissioners of all constituent agencies and units (Apr. 6, 1959), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

that it is doing all it can …."[813] Slusser forwarded the agency's formal racial policy as contained in the Low-Rent Housing Manual, noting that "racial considerations are pointed up in numerous other manual releases" and compiled in "a sizeable volume called References to Race in the Policies and Procedures of the PHA."

Slusser explained the PHA's "separate but equal" approach. The agency required "equitable treatment of all races," and "[w]here because of local laws or customs there is separation of the races" the agency required that housing of the same quality be provided to all. He cited the agency's "equitable employment" policy, noting that "this agency was the only one with established procedures and operations in this field" when the president's committee on government contracts was established. African Americans were also employed by local housing authorities as staff, and served as members of the authorities or advisory committees in some places.

On segregation, public housing officials would not budge. "As to open occupancy," the Commissioner wrote, "PHA takes no position. We leave such decisions to the localities…. If a locality decides on projects separated by race, we … interpose no objections but require that there be equity." As for the longstanding internal critics, Slusser acknowledged their advisory role, while also indicating their limited influence over actual decision-making. Race relations officers, he noted, helped "to see that racial considerations are not overlooked and try to protect the agency from criticisms along racial lines. We have not always felt it possible or wise to approve all their recommendations, but we respect their opinions."

The leadership of the federal housing agencies had shifted that year in ways that seemed to favor reform, but little action ensued. Norman Mason replaced Albert Cole as administrator of the Housing & Home Finance Agency, and civil rights activists expressed optimism about the change. The NAACP's housing aide called his first meeting with Mason in the new position "highly encouraging," noting that the administrator voiced opposition to segregation in federally funded housing and said the agency's racial policy "stinks."[814] Levenson, the head of the National Committee Against Discrimination in Housing, suggested to members of the board "for almost the first time there is real possibility of making substantial gains in the area of Federal housing policies."[815] Public rhetoric shifted, too. Whereas Administrator Cole had said bluntly "that the Federal Government 'had no responsibility to promote the ending of racial discrimination in residential accommodations,'" Mason told the Civil Rights Commission that the government "has inherent basic responsibilities in administering its programs equally to its citizens."[816]

But Mason was equally reluctant to take firm enforcement steps, favoring "a system of rewards" over "police actions."[817] At the USCCR hearings in 1959, he defended existing policies

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[813] Charles Slusser to Norman P. Mason (April 23, 1959), Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[814] J. Wood, Open Memorandum, 3/13/59, II:A158, NAACP Papers.
[815] Frances Levenson, Board Meeting Notice, 8/31/59, II:A158, NAACP Papers.
[816] U.S. Comm'n on Civil Rights, supra note 675, at 459, 460 (citing Washington Hearing, at p.8).
[817] U.S. Comm'n on Civil Rights, supra note 675, at 460 (citing Washington Hearing, at 11, 34). Mason did take several incremental steps. After meetings with civil rights advocates, Mason directed the FHA to eliminate racial quotas in its housing for those displaced under slum clearance programs and said race relations officials would be appointed in urban renewal field offices for the first time. Frances Levenson, Board Meeting Notice, 8/31/59, II:A158,

and pointed to signs of progress in producing "minority housing." Mason asserted that he planned to adopt "more positive" policies than his predecessor, but demurred on the question of barring segregation. "Until we have more fully caught up with the housing needs of America, it seems to me that we might do more harm than good by precipitant action." Mason argued that an executive order might be "a dangerous step to take" that would depress the housing supply.[818] Nor did Mason believe he needed any additional authority to assure equal opportunity in housing, though he did point out his limited authority as Administrator over PHA and FHA (describing them as independent agencies ""with definite authority going to them from the Congress").

Amidst battles for comprehensive housing legislation and civil rights bills that year, the question of barring federal aid to segregated housing arose again in Congress.[819] Fair housing advocates continued to argue that federal aid should be conditioned on non-segregation, and suggested that it could be done administratively if Congress lacked the will. Frances Levenson, the NCADH leader, made blunt constitutional claims, arguing that federal aid for segregated housing represented "an unconstitutional exercise of Federal powers and expenditure of Federal money."[820]

The housing agencies, she pointed out, were ignoring explicit judicial rulings. PHA's case was "most shocking" because the courts were in complete accord: segregation in public housing violated the Fourteenth Amendment.[821] And in FHA's case, though the legality of federal aid to private developers imposing segregation was in sharp dispute, the agency had done nothing in reaction to a California court's ruling finding segregation by FHA-insured developers unconstitutional.[822] Urban renewal did not even have race relations advisors assigned to reviewing communities' "workable programs." As a result, "[e]ntire Negro neighborhoods are being cleared to make room for housing restricted to whites only. Even some presently integrated areas are being 'renewed' on a segregated basis."[823]

The Senators, by then, were familiar with the arguments for the agencies' constitutional responsibility. Senator Joseph Clark (D-PA) prompted her in terms that echoed the long-time NAACP argument based on *Buchanan* and *Shelley*: "Your position would be that the executive

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NAACP Papers; Wood, Projected Conference, 7/25/60, III:A158, NAACP Papers; Zimmerman, Memo: Revision in FHA Manual with Regard to Section 221 Programming, 10/15/59, III:A157, NAACP Papers ("Transmitted is a revision… which eliminates all references to minority group reservations in the programming of Section 221 housing. The nonwhites set-aside… has led to serious difficulties and misunderstandings.").

[818] U.S. Comm'n on Civil Rights, supra note 675, at 461 (quoting Mason).

[819] Representative Adam Clayton Powell again proposed such a ban on federal aid to segregated housing. See H.R. 1053, 86th Cong. (1959).

[820] Housing Act of 1959, Hearings before the Senate Committee on Banking and Currency, 86th Cong. 808 (1959) (statement of Frances Levenson). She sketched once again the landscape of federal subsidies for segregation: "Urban renewal developments which include plans for new segregated housing continue to receive Federal approval and funds. In Federal public housing, the majority of the projects are segregated. FHA and VA continue to underwrite racially exclusive suburbs." Id. at 816.

[821] Id. at 811, 817.

[822] Id. at 818.

[823] Id. at 816-17.

arm and the legislative arm of the Federal government have the same obligation to enforce the 14th amendment as the judicial arm has?" Levenson agreed.[824]

That fall the USCCR's report similarly emphasized the Constitution, stating: "the fundamental legal principle is clear." Federal housing programs were subject to the constitutional prohibition on racial discrimination, and therefore, "Federal housing policies need to be better directed toward fulfilling the constitutional . . . objective of equal opportunity."[825] Tracking the NAACP's arguments based on *Shelley* and *Buchanan*, the Commission wrote: "In the field of housing the Supreme Court has ruled that any racial discrimination by public authorities…. is unconstitutional as a denial of the equal protection of the laws."[826] Though the Commission acknowledged that the Court had not yet applied the Fifth Amendment's mandates in the housing context, it relied on *Hurd v. Hodge* for the proposition that "non-discrimination is the public policy of the United States and is applicable to the action and policies of the Federal Government."[827] The Commission called for an executive order from the President directing federal agencies "to shape their policies and practices to make the maximum contribution to the achievement of" equal opportunity in housing.[828]

Race relations officials understood the import of the Commission's legal arguments, and echoed them within the agency. A race relations officer within the FHA summarized the USCCR's position eloquently in an internal memo: "At the heart of the Commission's comments … is an argument concerning the responsibility of the agencies in the field of the civil rights under the constitution …." He elaborated: "they say that although Congress has never enacted any anti-discrimination legislation pertaining to these agencies, the agencies are, nevertheless, clearly bound by the Constitutional requirements of equal protection of the laws and due process." Even if that were not the case, the argument ran, "it is within the policy powers of the Executive Branch to adopt the principle of non-discrimination in all federal housing programs."[829]

But executive branch policy did not budge, despite the constitutional principles at stake. As the NAACP housing liaison wrote in 1959, "Recommendations submitted by the NAACP, in conjunction with other minority housing leaders, that the President issue an Executive Order outlawing discrimination in all publicly assisted housing . . . have been ignored."[830] Housing agency leaders also continued to oppose legislation barring federal assistance to discriminatory housing developments. In April 1960, HHFA Administrator Mason argued in a letter to the chair of the agency's House oversight committee that such a ban was not "the most practical method of

[824] Id. at 809 (statements of Sen. Clark, and Frances Levenson).
[825] U.S. Comm'n on Civil Rights, supra note 675, at 537.
[826] Id. at. 331
[827] Id.; see also id. at 451-52.
[828] Id. at 538.
[829] John A. McDermott, An Analysis of the Report of the Civil Rights Commission as it Relates to the F.H.A. (undated ca. 1959), III:A157, NAACP Papers. The commission, he noted, also called out the FHA "for our policy of not collecting or developing any data or statistics which could show the actual facts about how extensively and adequately our program has served nonwhite citizens."
[830] Jack Wood, Memorandum (June 5, 1959), III:A157, NAACP Papers (apparently the agencies were resting on the ground that the administration had to wait for the results of the USCCR inquiry).

achieving progress." Imposing the necessary "detailed controls would undoubtedly have a serious adverse effect on the whole program" by scaring away lenders and builders.[831]

Thwarting change

The question of an executive order took on new life in the 1960 presidential campaign. Civil rights groups did their best to foreground executive power over civil rights that year. In September, the NAACP telegrammed President Eisenhower, reiterating the legal claim they had made throughout his administration: "An executive order could abolish racial discrimination in all federally-aided housing programs."[832] The Eisenhower White House took no such action, but Democratic presidential candidate John F. Kennedy did. Kennedy campaigned on promises to implement civil rights more forcefully than Eisenhower had. Echoing civil rights advocates' longstanding calls for an executive order, Kennedy vowed that if elected he would act with a "stroke of the pen."[833]

As calls for constitutional compliance grew, though, the public housing program was in increasingly sorry shape. Decades of political battle over public housing had taken their toll on the federal agency and its personnel.[834] By May 1960, Charles Abrams testified to Congress that the "tattered, perverted, and shrunk" public housing program had "become little more than an adjunct of … urban renewal programs."[835] The home builders' association claimed "a growing realization that public housing has failed" even among "its former proponents."[836] Within the PHA, by the 1960s the reformers of an earlier era had evolved. Having begun as "dedicated public servants who believed in the program, fought for the program but because of lack of public support grew defensive in their attitude"… they had become, in one insider's view, "a true bureaucracy.... spiritless, engrossed with process to the extent that it had almost forgotten what their objectives were…."[837]

Kennedy's 1960 presidential win seemed to augur major change in federal civil rights policy—perhaps even upheaval in housing programs, given his promise to bar discrimination in them by executive order. Kennedy's initial nomination of Robert Weaver to oversee the housing agencies also signaled a new emphasis on civil rights, given that Weaver would be the first African American head of the HHFA and had once been the architect of the public housing program's "racial equity" policies. However, Weaver found himself heavily constrained as chief. Southern legislators pressured him into committing to inaction on civil rights from the start. His closest staff included aides closely tied to the Southern-controlled oversight committees and holdovers from the prior Republican administration. To crown matters, Weaver's own leadership style did not favor dramatic change.

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[831] Norman Mason to Brett Spence (Apr. 22, 1960), Box 4, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[832] 1483-27-568, Roy Wilkins, Telegram to Hon. Dwight D. Eisenhower (Sep. 1, 1960).
[833] Weaver corresp Box 64, 59/260 (NCDH document citing statements of 8/9/60, 10/12/60); see also
[834] See Wolman, supra note 461, at 153 (describing public housing as a "debilitated program" by the early 1960s).
[835] (Gen Housing Legis 1960, at 363)
[836] Gen Housing Legis 1960, at 165
[837] Hummel interview, LBJ Library, p25

Nor did the constituent agencies wish to act on their own. Though the Civil Rights Commission and other groups were focusing increasing public attention on civil rights violations in federal programs, the housing agencies stated that they would not take action without a presidential or Congressional directive. As a consequence, the public housing program continued its *Plessy*-style "separate but equal" approach, allowing localities to develop segregated projects so as long as they programmed equitable numbers of units for whites and non-whites, based on their relative need.

When Kennedy finally issued the promised Executive Order, nearly two years into his term, it did not bring about the hoped-for revolution in policy. Rather, the Order was written to apply only to future housing developments—so that under the Order the PHA, having agreed to subsidize existing developments for forty or sixty-year terms, would continue to pay out annual subsidies to expressly segregated projects into the foreseeable future. Agency lawyers further narrowed the Order's impact. PHA General Counsel Joseph Burstein interpreted it to allow localities to continue to divide a single projects into separate sites in racially segregated neighborhoods, so long as they did not explicitly label the sites as open only to a single race, and formally offered all tenants "free choice" to request to move into any project. At the regional level, the status quo was even more clearly in place. Racial relations officials pointed out that PHA officials in the two Southern offices continued to process proposals as before, with separate programming by race on different sites.

In effect, then, the agency finally formally applied the principles of *Shelley* and *Brown* to its program at the president's express direction—but did so in a way that had minimal impact on existing segregation patterns and agency practices.

Robert Weaver's return

With Weaver at the top of the housing program and a Democrat in the White House, it would seem that minority rights could finally take priority. But Weaver's post as head of the housing agency came at a price. He quickly encountered Congressional resistance—and in the attempt to quiet Southern fears, bound his own hands as HHFA Administrator. At the 1961 confirmation hearings, conservatives interrogated Weaver not only over his fair housing beliefs but also his loyalty to the United States.[838] The chair of the Senate housing subcommittee, John Sparkman (D-AL), quickly extracted a commitment from Weaver that he would not act on his own to implement non-segregation requirements.

Weaver told Sparkman that if federal aid were to be conditioned on open occupancy requirements, "the only way it should be done" would be by Congressional legislation or a Presidential directive.[839] Milton Semer, a former lawyer for the committee, also reached out to Southerners on the White House's behalf to convince them that it wasn't in their interest to

[838] Nomination of Robert C. Weaver, Hearings before the S. Committee on Banking and Currency, 87th Cong., 1st Sess. 3-4, 16 (1961).
[839] Id. at 16.

filibuster Weaver, arguing that Weaver's past life demonstrated that he was "a rather mild mannered, uninvolved type of Negro leader."[840]

Once confirmed, Weaver took a low-key approach to the housing agencies. To many, the status quo seemed firmly ensconced, and Weaver a passive leader, quickly "entrapped" by the existing housing bureaucracy, as he retained much of the prior administration's staffing.[841] Semer, with his close Congressional ties, became HHFA's General Counsel, lead legislative liaison, and one of Weaver's two closest confidantes at the agency, along with deputy Administrator Jack Conway.[842] To get housing legislation enacted, Semer worked closely with Southerners, just as he had in the past. Semer recalled that he "operated almost as if I was still Sparkman's Chief Counsel which I'd been just a few months before."[843] In his words, "[w]e all cooperated," including the House's housing subcommittee chair, Rep. Albert Rains (D-AL) and his staff director.

Race relations officials critiqued Weaver's passivity, particularly his refusal to strengthen their role within the housing agencies. McGraw became head of the Intergroup Relations Service for HHFA, but found that Weaver continually postponed any move to increase the service's numbers. Weaver would say: "Wait till we get the Executive order [on housing] then we'll staff up… We never did staff up."[844] Others also faulted his gradualist approach. "I think Bob could have done a hell of a lot more than he did," said the FHA's race relations advisor, speaking in 1968. "For example, up until just here very recently there had been no real reorganization or

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[840] Semer Interview, supra note 513, at 26.

[841] Semer did not think "that Weaver . . . turned out to be a very good administrator." The economist was unwilling to butt heads with the bureaucracy. "Weaver took life as he found it. He didn't reorganize the staff." Id. at 93. And he chose to keep on high-level staff from the previous administration; he "kept Al Cole's secretary; he had all of his top administrators… your Assistant Secretary for Administration, his budget officer….". Interview by William M. McHugh of Hugh Mields, Washington, D.C. 22 (Oct. 21, 1968), John F. Kennedy Oral History Program. Hugh Mields, Weaver's first appointee as the department's Congressional liaison, thought he was quickly "entrapped" by the housing bureaucracy:

> Weaver... would be inclined to believe what a budget guy said about the impossibility of doing this thing or try[ing] this route because this guy would say, well, the legislative history is such, or in the past we haven't done it in that way … or because he'd say our involvement here should be minimal and we shouldn't do this; it may cost us too much money, or he would say Thomas [Rep. Albert Thomas, chair of the agency's appropriations subcommittee]... would never accept that…. And Weaver accepted many of these judgments very early in the game, to my horror.

Weaver's control of Congressional relations was also uneven. He never took over the appropriations oversight process from the career staff. Distracted by the 1961 housing legislation, he left the bureaucracy in charge of the budget process that first year, and "never got control of it . . . ." Semer Interview, supra note 513, at 40-41. But he did focus on the substantive legislative side; he "ran a very personalized administration on legislation. He'd been badly burnt on his confirmation. So far as the Banking and Currency Committee which authorized legislation it was very tightly controlled." Id. at 79.

[842] As Semer put it, Weaver "developed a format where he confided in [his deputy] Jack Conway and myself." Semer Interview, supra note 513, at 37.

[843] Semer Interview, supra note 513, at 48.

[844] McGraw Interview, supra note 512, at 12-13.

extension of the intergroup relations service…. [D]uring the first year and a half… he could and should have made it a much more viable and concerned service."[845]

For its part, the Kennedy White House decided to focus on passing major housing legislation in its first year, and Weaver made that his priority. One of the administration's worries concerning his appointment had been "could a Negro get housing legislation enacted"—and Weaver answered that concern by overseeing the passage of the biggest domestic legislation in JFK's inaugural year.[846] As a result, Weaver's reputation at the White House became "he got his work done, stayed out of trouble. There was no scandal. He got his legislation through."[847]

Though Weaver successfully stewarded the housing program in Congress, he soon found himself in the disheartening position of writing civil rights advocates to explain that he was committed to inaction on segregation. In September 1961, he wrote an Illinois state official to tell him that while he personally favored an open occupancy requirement, he had testified to Congress that, "I do not believe I could or should undertake to impose an open-occupancy requirement without… a policy directive from either the Congress or the Executive."[848] In the interim, his goal was to "provide maximum participation by all elements of the population"; he was "hopeful of being able, in due time, to move more directly" to address segregation.

Weaver and his PHA Commissioner periodically wrote such letters. In some, they acknowledged that the courts had ruled public housing segregation unconstitutional, but still argued that their hands were tied.[849] In response to a local NAACP president complaining of segregation in local public housing and asking him "to take whatever steps are necessary to correct this injustice," Weaver responded that "the PHA has felt precluded from imposing [an open occupancy] requirement administratively."[850] Top appointees felt, as Weaver did, they lacked authority to compel open occupancy using their own authority. William Slayton, the Urban Renewal Commissioner, later said, "It put us in a tough position, not having an Executive order. We didn't have any leverage in this field."[851]

The status quo as Gordian knot

At the request of a newly formed White House Subcommittee on Civil Rights, the housing agencies did begin reviewing their policies in 1961. But, just as they had responded to the Civil Rights Commission during the last years of the Eisenhower Administration, they argued that their

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[845] Hill Interview, supra note 516, at 42-43 (Feb. 29, 1968), John F. Kennedy Library Oral History Program.
[846] Semer Interview, supra note 513, at 43.
[847] Otherwise, Weaver's public relations staff recalled him as "a very modest and reticent man" who had to be coaxed into the limelight. Weaver, said White House lawyer Harry McPherson, was "up tight" in official contexts, unlike his "very loose and gutsy" personality in social settings. He was "more bureaucratic than almost any white bureaucrat…." and phrases loaded with "governmentese… came quickly to Weaver's tongue." Interview by T.H. Baker of Harry McPherson, Washington, DC 12-13 (Apr. 9, 1969), LBJ Library Oral History Collection.
[848] Robert C. Weaver to Dr. J.B. Stafford (Sep. 3, 1961), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[849] E.g. Robert C. Weaver to Dr. Lindley Burton (July 12, 1962), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[850] Robert C. Weaver to John A. Bennett (Aug. 17, 1962), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[851] Slayton Interview, supra note 514, at 16.

own authority was limited. In April 1961, a summary of HHFA nondiscrimination policies reported a status quo largely unchanged since the early 1950s: FHA refused to insure properties with racially restrictive covenants recorded after February 1950, and took some measures to enforce state and local anti-discrimination law. PHA continued to leave segregation decisions to local authorities, while enforcing a "racial equity" policy. Urban renewal authorities attempted to ensure that projects would not reduce the "livable space" open to minorities.

Internally, Deputy HHFA administrator Conway called on the constituent housing agencies to respond to President Kennedy's statement that: "Federal money should not be spent in any way that encourages discrimination," by reviewing their programs for discrimination. PHA Commissioner Marie McGuire responded bluntly. She reiterated that PHA officials believed "that, because the projects will be owned and operated locally, we do not have the right to dictate occupancy policies."[852] If local authorities chose public housing sites in a manner that would impose segregation in previously integrated areas, "PHA considers these local matters to be fought out and resolved on the local level."

The PHA chief also acknowledged, though, that lack of express statutory authority was not the impediment to the agency barring segregation. Instead, McGuire stated that the agency had created its own racial policies in the past, and could do so again, using the broad delegation of authority it enjoyed under the United States Housing Act: "

> PHA's [racial] equity policy was arrived at by administrative decision. It could be changed in the same manner; but because of the impact an open occupancy requirement would have on projects in the various sections of the country, we would be reluctant to institute such a policy unless by order of the Administrator or higher authority.

It was not legal barriers but worry about the "impact" of implementing updated equal protection principles that stopped the agency.[853]

Like McGuire, the FHA chief expressed similar unwillingness to act without a presidential order or a legislative enactment. In its 1961 report, the Civil Rights Commission noted, "FHA Commissioner Hardy is unwilling… to attempt any remedial measures [against racial discrimination] without an express directive from the President or Congress."[854]

Given housing officials' refusal to act on their own, civil rights advocates anxiously awaited the promised executive order on housing. In fall 1961, advocates could still believe that

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[852] Commissioner, PHA, to Jack T. Conway (June 28, 1961), Box 9, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.

[853] In October, the public housing commissioner's report again summarized its "General Racial Policy": "It is still, as always, PHA's policy that there be equitable provision by local housing authorities for all eligible in the local population. As to open occupancy policy being so widely demanded by outside groups, we await the orders of the President and the Administrator." The agency was reviewing its site selection policies, upon which both the Administrator and the Intergroup Relations Branch had remarked, and upon which it "continued to receive a great number of complaints."

[854] U.S. Comm'n on Civil Rights, 1961 Report of the U.S. Comm'n on Civil Rights 142 (1961).

they might see an executive order before the end of the year—asking themselves after a meeting with the Attorney General, "'if it will be a Thanksgiving present or a Christmas gift?'"[855] Weaver's deputy, Jack Conway, too felt that in fall 1961 "we were very close." But "then we got lost, something happened and things disappeared in the woodwork. It took us quite a while to get it back out again."[856]

The promised Executive Order did not materialize in 1961, nor in spring or summer 1962. A White House official expressed the key problem succinctly in fall 1961: "Reconciling [minority groups'] pressure with the need for Southern votes on major legislation is the Gordian knot."[857] White House aides noted that the powerful Southern chairs of the housing agencies' oversight committees, Sen. Sparkman and Rep. Rains were "strongly opposed."[858] Kennedy had delayed the order in part because of his attempt to create a new cabinet-level Department of Urban Affairs, with Robert Weaver as Secretary.[859] The White House feared that issuing the order would kill the initiative—but the attempt died even without it, at the hands of a conservative coalition of Republicans and Southern Democrats.[860]

Not only Southerners opposed the executive order. Business interests also felt threatened by the idea of attaching equal protection requirements to federal aid. In fall 1961, the Wall Street Journal's editorial page denounced "the [Civil Rights] Commission's plan to turn Federal power from established purposes to a radically different and arbitrary one."[861] The editors warned that "the Federal slum clearance program would be used to advance the Administration's view of civil rights" and that eventually "the Commission would attach that viewpoint to every agency and every aid outlay, even the seemingly unconnected Federal highway building program." Soon "similar pressure could be brought to bear on other areas of national life Washington deems unsatisfactory—education, for example. Sprawling Federal agencies and far-flung aid programs, touching almost every aspect of the citizen's 'private' activity, offer endless opportunity for 'social reform.'"[862]

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[855] Jack Wood to Roy Wilkins, 11/17/61, III:A157, NAACP Papers (quoting Charles Abrams).
[856] Conway Interview, supra note 515, at 65-66.
[857] Frederick Dutton to Louis G. Martin (July 8, 1961); Summary of Present Civil Rights Programs within the Executive Branch (July 8, 1961), at 5, https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHCSF-0358-012.aspx; see also Anthony Lewis, Kennedy Decides on Housing Edict, N.Y. Times, Oct. 22, 1962.
[858] Memorandum for the President, Civil Rights Program, Nov. 17, 1961, https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHCSF-0358-012.aspx.
[859] See Weaver box 64, 112/260, Chronology; Cong. Q. Almanac, Congress Blocks Urban Affairs (1962), https://library.cqpress.com/cqalmanac/document.php?id=cqal62-1326534.
[860] Chronology; Congress Blocks, supra note 859; see also Robert F. Kennedy, Robert Kennedy: In His Own Words: The Unpublished Recollections of the Kennedy Years 154-156, 369 (1988) (citing Northern Democrats' fear of issuing the order before the 1962 election, as well as administration's fear of impact on the South).
[861] Review and Outlook: The Roof Overhead, Wall St. J., Oct. 11, 1961, at 18.
[862] Id.

Executive Order 11063

Finally, in November 1962, Kennedy issued the long-awaited and controversial Executive Order 11063, barring discrimination in federally funded housing.[863] The Civil Rights Commission described it as "a logical extension of the [Court's] 1948 decisions" in *Shelley* and Hurd.[864]

After exhaustive deliberations on the scope, the White House chose to issue only a narrow prohibition on discrimination in federally subsidized low-income housing and in developments with FHA or VA backed mortgages. Critically, the order applied only to housing to be constructed in the future—existing housing was unaffected. The text expressly limited coverage of its mandatory prohibition on discrimination (found in Section 101) to housing provided with funds "hereafter agreed to be made."[865] Regarding existing housing, the president's order suggested persuasion in Section 102, directing federal officials "to use their good offices . . . to promote the abandonment of discriminatory practices."[866]

The order's prospective coverage meant that the federal government would continue to pay annual subsidies to all public housing projects, even if they were openly and intentionally segregated. Existing whites-only suburban developments backed by FHA guarantees would continue as usual, despite the NAACP's warning that any such order would "sidestep racial exclusion in suburbia," leaving "lily-white FHA suburban communities" untouched.[867] Racial relations staff termed Section 102's "good offices" provision "a snare and delusion." As McGraw said, "most people know that you got no real backup, no clout behind this thing."[868] It was a matter of "exhortation."[869]

A year after the Order's issuance, it had negligible impact on de jure segregation in public housing. Nearly 500,000 existing units were not covered by the Order. Of those still in construction, barely more than a third would be covered by the Order once finished. Most public housing remained segregated and nearly two thirds of black families were in projects that did not adhere to open occupancy.[870]

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[863] Exec. Order No. 11063, 27 Fed. Reg. 11,527 (Nov. 24, 1962); John F. Kennedy, The President's News Conference (Nov. 20, 1962), http://www.presidency.ucsb.edu/ws/index.php?pid=9020

[864] U.S. Comm'n on Civil Rights, 1963 Report of the U.S. Comm'n on Civil Rights 96 (1963).

[865] Kennedy's order stated: "I hereby direct all departments and agencies in the executive branch … to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin--(a) in the sale, leasing, rental, or other disposition of residential property and related facilities (including land to be developed for residential use), or in the use or occupancy thereof, if such property and related facilities are-… (ii) provided in whole or in part with the aid of loans, advances, grants, or contributions hereafter agreed to be made by the Federal Government…." (Exec. Order No. 1,1063, 27 Fed. Reg. 1152713 (Nov. 20, 1962) (emphasis added).

[866] Id. at §102.

[867] III:A158, NAACP Papers.

[868] McGraw Interview, supra note 512, at 19.

[869] Semer Interview, supra note 513, at 86.

[870] Steps Taken in Civil Rights Since January 1961 (Oct 1963), Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II. Even among 95,000 units under construction, only a little more than a third (33,000) were covered by the Order. 494,000 units in full operation were not covered at all. Overall, less than half of public housing units were in localities committed to open occupancy. Only 38% of African American families were in open occupancy projects.

Local NAACP chapters and concerned citizens wrote the federal housing agencies to ask how it was possible that local authorities still planned to build and maintain segregated public housing. Administrator Weaver and Public Housing Commissioner McGuire found themselves repeatedly writing to local NAACP groups and others to explain that in fact, localities continued to be free to segregate projects built or contracted-for prior to November 20, 1962—at least from the federal agencies' perspective, though they did not address the Constitution. In formalistic language, Weaver and McGuire pointed out that the projects in question were simply "not subject to the requirement" of non-discrimination under the Order.[871] Only contracts signed on 11/21/62 or afterward were covered. That, they suggested, was because the United States Housing Act vested "maximum responsibility" in local authorities. For example, in Campbellsville, Kentucky, the annual contract was signed the very day that Kennedy issued the order—hence no prohibitions on discrimination applied.[872]

Interpreting the order: freedom of choice

Exacerbating the Executive Order's failure to reach existing housing, the PHA General Counsel's office added further limitations through legal interpretation. The lawyers read the Executive Order to allow racial segregation in almost any form—including through the explicit selection of separate sites for housing in white and black neighborhoods—so long as some formal system of "free choice" was allowed.

Shortly after the Order's issuance, the PHA's lawyers adopted a "free choice" approach as the model for non-discrimination in housing. Joseph Burstein, now General Counsel, expressly cited Louisville, Kentucky's "Plan for Integration" as an example of compliance with the Executive Order.[873]

The Louisville "freedom of choice" plan was adopted following an NAACP suit against the Louisville housing authority challenging explicit segregation.[874] In 1958, when the district court approved the Louisville plan, the Louisville housing program presented a near-perfect mirror of the racial equity formula, based on the theory that no discrimination occurred so long as *Plessy*-type "separate but equal" housing was provided.[875]

To the Louisville authorities, the *Plessy* regime of "racial equity" had involved no discrimination at all.[876] "There never has been any discrimination between White and Negro applicants or White or Negro tenants," the housing authority wrote in 1958. "The projects were built in pairs and the facilities made available for White and Negro occupancy are exactly the same

[871] E.g., Marie McGuire to Dr. Lindley Burton (Mar. 14, 1963), Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[872] See Marie M. McGuire to Betty Lou Shipp (Mar. 7, 1963), Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[873] Joseph Burstein to Arthur R. Hanson, Dec. 17, 1962, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[874] Eleby v. City of Louisville Municipal Housing Commission, Civ. No. 3240, W.D. Ky. May 24, 1957, 2 Race Rel. L. Rep. 815 (1957)
[875] Plan of Integration, Eleby v. City of Louisville Municipal Housing Commission, Civ. No. 3240, W.D. Ky., Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[876] See Release (ca. 1958), Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.

and have been maintained that way."[877] Since public housing's inception in Louisville in 1937, four projects had been occupied by white families and four projects by black families. Somehow, the authority wrote, the segregated pattern "grew up without the adoption of any rule or regulation of any kind… but in practice there has been this separation. So far as the Commission is able to determine there has been no dissatisfaction with such practice."[878]

The 1958 integration plan, proposed by Louisville officials and adopted by the district court, allowed public housing applicants to request placement into any project.[879] But it explicitly stated that white and black tenants could refuse a placement in any project that was made up predominantly of the other race.[880] In other words, no integration need occur at all, if no one requested it and no one wished to be among the first to integrate a previously segregated project. A press release drafted by the Louisvillle Commission bluntly predicted that the plan would not significantly change public housing's segregation: "The Commission believes that the proposed plan will not materially change the present occupancy…"[881] Nonetheless, Burstein approved the plan as a model form of compliance with the new non-discrimination mandate.

As they protested the continuance of federal support for segregation after the Order, civil rights advocates continued to emphasize that public housing segregation was unlawful—and suggested that federal funding of it was too. NAACP cooperating attorney W. Hale Thompson wrote to Commissioner McGuire in December 1962, pointing out that a Virginia housing authority planned to put 70 units for non-white residents near an elementary school "which is presently for the exclusive use" of black children and 30 units for white residents near a white elementary school.[882] "To permit the Hampton Authority to use public money to build public housing in the above manner is, in our opinion, unlawful" he argued, emphasizing that it would give "governmental sanction to residential segregation and will further impede the progress of orderly desegregation of our public schools."[883] Thompson also drew attention to the PHA's complicity in the segregation: "We had thought in terms of enlisting the aid of the federal courts in this situation for we have been advised that federal agents in the housing administration have been working hand in glove with local authorities to perpetuate residential segregation with the use of public funds."[884]

In a memo to the regional office after the Hampton complaint, Burstein took the opportunity to publicize his more general reading of the executive order—which was a highly limited one.[885] Hampton itself, the PHA had already emphasized, was not even covered by the

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[877] Plan of Integration, supra note 874.
[878] Id.
[879] Id.
[880] Id. (Plan of Integration, Eleby) ("[T]he Commission will not compel a White applicant against his wishes to occupy a unit in a project which is occupied predominantly by Negro tenants nor compel a Negro applicant to occupy a unit in a project which is occupied predominantly by Negro tenants.")
[881] See Release, supra note 876.
[882] W. Hale Thompson to Marie McGuire, Dec. 8, 1962, Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[883] Id.
[884] Id.
[885] Joseph Burstein to Walter A. Simon, Dec. 21, 1962, Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.

executive order.[886] But even in localities that signed new contracts after the order's effective date, the provisions would rarely if ever reach site selection, Burstein indicated.[887] Citing the new contractual provision mandating that "the Local Authority shall not discriminate," Burstein interpreted it to mean "the test of whether compliance … has taken place … is whether or not the composition of the occupancy of the project results from the choice of eligible applicants."[888]

General Counsel Burstein stated that localities were free to divide a housing project into separate sites in white and black neighborhoods, so long as tenants were not formally excluded on the basis of race. Separation alone did not violate the nondiscrimination mandate, he wrote.

> [T]he mere fact that a project is divided into two or more separate sites in 'white' and 'non-white' neighborhoods would not of itself constitute a violation.... Neither would such a violation be established merely by reason of the fact that separation portions of the project were occupied exclusively by different races, creeds, or nationalities, providing such a situation came about through choice of eligible occupants….[889]

Further, Burstein noted that as a statutory baseline the Housing Act vested "maximum responsibility" for administration in local housing authorities. Given the infinitely changing world, "in ways that will not only change the type of applicants but their preferences as to where they choose to live, the conclusion seems inescapable that no one can foresee all the ultimate effects of the selection of a particular site." With that, Burstein concluded that it would be highly unlikely that a local authority's site selection could be "so arbitrary, capricious, or unreasonable … as to permit the PHA to substitute its judgment."[890]

Thus, the General Counsel interpreted the Order to permit nearly any formal "free choice" approach to satisfy the nondiscrimination requirement in tenant assignment. Moreover, the General Counsel interpreted the Order so that it essentially did not apply at all to the critical stage of site selection, deferring instead to local authorities' discretion.

An unsigned document among Weaver's files points to the key role of site selection in maintaining racial segregation in public housing. Anticipating reaction to a potential Executive Order, at a time when Kennedy had not yet acted, the memo's author predicted: "a non-discrimination executive order would not kill public housing in the South."[891] Instead, the writer argued, "sites susceptible to non-white occupancy would be chosen in the future as in the past."[892] Local housing authorities would continue to achieve segregation, by simultaneously selecting some "sites far removed from non-white concentrations and institutions" while developing "a larger volume of public housing in areas of, or adjacent to, non-white concentration."[893] All those

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[886] Walter A. Simon to E.C. Jones, Feb. 15, 1963, Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[887] Burstein, supra note 885, at 2-3.
[888] Id. at 1.
[889] Id. at 2.
[890] Id. at 2-3
[891] The Impact of a Non-Discrimination Housing Executive Order Upon Housing Starts 3 (ca. 1961), Box 64, Robert C. Weaver, Administrator, HFHA & HUD, 1961-1968, Subject Correspondence Files, RG 207, NARA II.
[892] Id. at 3.
[893] Id.

involved in public housing understood that site selection was critical to maintaining de facto segregation, even if formal nondiscrimination requirements were adopted.

At least one black official explicitly told Burstein that the integration plan he had endorsed violated the Equal Protection Clause. In September 1963, a young African American lawyer, Earle White, Jr., submitted a memo to Burstein arguing that the Louisville, or "open choice" plan was unconstitutional.[894] Though he acknowledged that a federal district court had approved the plan in 1957, White pointed out that subsequent appellate decisions rejected analogous "open choice" plans in the school desegregation context. Such a plan "would not be approved today as a valid method for eliminating racially segregated public housing."[895] He argued that even where the Executive Order did not formally apply, "state action which is not designed to carry out the purposes of such order should be denied Federal funds…." rather than simply relying on the Order's "good offices" provision. Anticipating an objection based on the United States Housing Act's vesting of "maximum responsibility" in local authorities, White argued that such statutory responsibility was necessarily constrained by constitutional requirements.[896]

It is unclear whether Burstein responded to the memo, and White's stint at the PHA was brief.[897] Having graduated at the top of his Howard Law School class, White was recruited to Nevada the following year, becoming one of the first two black lawyers admitted to the Nevada bar in 1964, and later a Nevada district court judge.[898] His constitutional arguments do not seem to have made much impact at the PHA. Several months later, the PHA reaffirmed Burstein's stance on both site selection and the legality of the Louisville "open choice" plan, forwarding both memos to Robert Weaver as part of a report on its implementation of the Executive Order.[899]

Looking back in1968, longtime racial relations official Booker McGraw commented that "freedom of choice" plans had largely undermined the impact of civil rights laws in the 1960s—it "means freedom of choice of whites to stay in all white projects and freedom of choice of Negroes to stay in all Negro projects…" Those administering it encouraged segregation: "suppose a Negro wants to select a white project: 'You don't want to live over there' …."[900]

Implementing the order

On the ground, implementation of Kennedy's order also proved limited. Initially, Weaver decided to divide the enforcement of the Executive Order from the racial relations service's role.[901] He argued that this would insulate it politically, as "if you put it all together it makes it easy for Congress to knock it out." But McGraw noted "he never went up for any budget to speak of [for

[894] Earle W. White, Jr. to Joseph Burstein (Sep. 19, 1963), 157/276; see also Rachel J. Anderson, African American Legal History in Nevada (1861-2011), Nev. Lawyer, Feb. 2012, at 8, 13.
[895] White, Jr., supra note 894, at 4.
[896] Id. at 4-5.
[897] The transmittal slip on the memo notes in pencil "Mr. White is no longer with agency." Id.
[898] See Anderson, supra note 894, at 13, 16; Thomas L. Berkley, On the Sidewalk, Oakland Post, Sep. 18, 1968, at 1.
[899] Actions and Results under Executive Order 11063 (Nov. 21, 1962-Nov. 30, 1963), Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[900] McGraw Interview, supra note 512, at 27.
[901] Id. at 16.

enforcing the Order]…"[902] For its part, the NAACP pointed out that by not giving race relation officials a role in the enforcement process, the constituent agencies were left to investigate themselves.[903] As for General Counsel Semer, he preferred to stay out of court and resolve complaints against local authorities administratively.[904] Though the president's order had also created a new presidential committee on fair housing, it proved ineffectual—"they just never had the muscle… it was more of a paper shuffling operation."[905]

Career staff in the constituent agencies did not openly oppose the order. But as McGraw, the race relations chief put it, "There's always a lot of confusion on the minds of program people… that somehow this is going to kill the program if you do anything on this [civil rights] front…."[906] When progressive officials within the FHA tried to push at the boundaries of the order, they found that "the attitude over there was: this is a business operation; you can't disturb the business operation too much, and all that sort of stuff. They were more concerned about the attitude of the mortgagees than they were about a lot of individuals."[907] The FHA, in fact, used its authority to narrow the order's coverage still further by exempting owner-occupied one and two-family homes.

In public housing, strikingly few complaints were filed. A few months after the order's issuance, the PHA reported that "No formal complaints have been filed under its provisions, and programming new units does not seem to be very much affected.[908] Throughout 1964, no more than fourteen formal complaints were ever pending at the public housing agency.[909]

Some thought the problem lay partly in advocates' inattention to housing, as NAACP lawyers shifted their focus to the grassroots civil rights movement. McGraw recalled that, "before all this stuff broke the NAACP was beginning systematically to develop some court cases in housing. They had to drop that to take care of King's people and these kids… to do legal work for them on public accommodation and all this other bit, so that during the whole Kennedy administration you never had the pressure on housing…" McGraw believed that was "one reason why we didn't do any more with the order, we didn't get any more complaints than we got… I would have gotten some staff. We would have had to move vigorously if they'd gotten around to this housing bit in my judgment."

At the regional level, PHA officials continued to encourage and accept segregated public housing plans despite the executive order. In spring 1964, Philip Sadler, the head racial relations advisor for the PHA, protested. He wrote the Commissioner, "we can no longer adhere to the believe that segregated planning is the only acceptable planning." Sadler condemned the "use of

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[902] Id. at 17.
[903] Open Memorandum on Executive Order 11063 (ca. April 1963), III:A160, NAACP Papers.
[904] Semer Interview, supra note 513, at 91.
[905] Hill Interview, supra note 516, at 51.
[906] McGraw Interview, supra note 512, at 15.
[907] Hill Interview, supra note 516, at 51.
[908] Commissioner, PHA, to Robert Weaver, Administrator, HHFA (Feb. 15, 1963), Box 9, Records of the Intergroup Relations Branch, 1936-1963, RG 196, NARA II.
[909] Report on Status of Complaints as of 10/31/64 (Dec. 10, 1964), Box 9, General Legal Opinions Files, 1936-70, RG 196, NARA II; see also Report on Status of Complaints as of 12/31/63, 2/20/64, 3/20/1964, 4/30/1964, 5/31/64, 6/30/64, 9/30/64, 11/30/64, 12/31/64, id.

two sites in planning public housing" in the Atlanta and Fort Worth regional offices, which he described as the "almost exclusive[]" practice in those regions.[910] The regional directors had informed Sadler that "unless this kind of planning is done there will be no low-rent public housing in the localities where sites for white and Negro projects have been selected." The agency's "free choice" requirements notwithstanding, "freedom of choice in the two regions is not expected to result in racially mixed projects."

The Executive Order apparently had not shifted the regional office's practices. Sadler wrote: "[T]he Atlanta Regional Office continues, almost without exception, to handle projects just as they did before November 20, 1962. Projects are still designated for specific racial use and units are proposed for the different races on separate sites." Sadler noted that of 217 projects then under annual contract that were covered by the Executive Order and originated from the Atlanta regional office, 215 were designated for white or black occupancy, 1 was integrated, and 1 was on an Indian reservation. At a PHA central office meeting that summer, regional officials acknowledged that "programs are still proposed mainly in terms of racial factors, and ... sites are still selected with racial occupancy in view."[911]

Sadler again protested the continued practice in fall 1964, writing that "our Regional representatives are putting themselves and us in the position of lending support to racially segregated housing." By encouraging separate sites, they "encourage[ed] the Local Authority to select sites in racially identified neighborhoods, whether or not they are labelled as white and Negro."[912] In some instances, local authorities believed the PHA staff had expressly instructed them to adopt segregated sites.[913]

An irrevocable subsidy

Thus agency lawyers and regional officials effectively narrowed the scope of the Executive Order so that it became almost irrelevant to segregation practices. The Order—and any other potential attempt to address segregation within the agency's programs—was further constrained by the PHA's reading of its payment obligations under its annual contracts with local housing authorities. According to PHA, it was legally impossible for the federal agency to halt its subsidies. The only remedy was for the agency itself to take possession and assume the operations of local housing projects found to have violated contractual obligations.

Under an Annual Contributions Contract, signed at the outset of a public housing project's development, the PHA agreed to cover the local authorities' operating costs at a level sufficient to repay the capital investment over forty years. After the 1949 Housing Act, that annual subsidy became, as one author put it, an "irrevocable federal subsidy." Prior to 1949, the federal government's annual subsidy (or "annual contribution") to local housing authorities could be

[910] Philip G. Sadler to Commissioner (Mar. 6, 1964), Box 3, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[911] Philip G. Sadler to Francis K. Servaites (Oct. 30, 1964), Box 4, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[912] Id.
[913] Id.

cancelled for failure to meet various conditions. In the 1949 Act, "Congress… authorized the Public Housing Administration to make the federal subsidy to local housing authorities irrevocable."[914] The amendments were designed to strengthen the security behind bonds issued by local public housing authorities, lowering the interest rates required to service the bonds, by ensuring "continuity of payment of federal cash contributions… despite local authority default."[915] Instead of cancelling the annual subsidy, the primary penalty for local authority noncompliance became the PHA's ability to take possession of or title to the housing projects in question.[916]

The PHA subsequently made clear its policy of continuing annual subsidies, no matter the violation, in several contexts. For example, the PHA denied any authority to withhold funding based on civil rights violations, in a response to a spring 1963 inquiry from Senators Jacob Javits (R-NY) and Phillip Hart (D-MI).[917] The senators had written multiple federal agencies requesting their positions as to whether they currently had the legal power to prevent federal aid from flowing to racially discriminatory programs. In August 1963, Weaver presented the PHA's reply, which rested on the language of the 1949 Act, the "Congressional policy" represented therein, and the PHA practice "continuously followed since then."[918] The agency "would regard it as contrary to [those authorities] …to contract with Local Authorities so as to permit withholding of annual contributions upon breach of a contract provision for equal opportunity in housing…." Such action "would substantially increase the cost of financing."

Not only did the PHA feel that it could not take such action without "specific statutory authority" it did not want Congress to give it that authority. Rather, the ultimate threat of taking possession of the local project would suffice, they felt, without raising the cost of financing in the way that withholding annual subsidies might.[919] Essentially, then, the decades-old statutory scheme for financing public housing at the lowest possible cost to the government meant that the PHA believed it could never stop paying local authorities, until the full contract had run.

The Civil Rights Act of 1964 finally overhauled the agency's approach to race—at least as a formal matter. Because Title VI barred discrimination in any program receiving federal funds, the agency interpreted the prohibition to apply even to existing public housing.[920] So long as federal money flowed to public housing, that housing could not be segregated.[921]

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[914] Charles L. Kades, An Irrevocable Federal Subsidy: A Study of Its Legal Aspects, 36 A.B.A. J. 97 (1950).
[915] Herman D. Hillman, Public Housing, Planning and Conservation, 1951 Ann. Surv. Am. L. 287, 293 (1951).
[916] Pub. L. No. 81-171, § 304, 63 Stat. 413 (1949) (authorizing the PHA to set up provisions allowing it to take title or possession from local public housing agencies in case of "substantial default").
[917] For inquiry, see 109 Cong. Rec. 12,089–12,115 (1963) (statement of Sen. Javits).
[918] Robert C. Weaver to Senator Philip A. Hart, Aug. 6, 1963, Box 2, General Legal Opinions Files, 1936-70, RG 196, NARA II.
[919] Id. at 5.
[920] PHA decided that it would "take the position that Title VI is applicable… to… the low-rent housing program regardless of the date of the execution of the contract so long as annual contributions remain to be made under the contract." Robert Weaver to Kermit Gordon (July 17, 1964), LBJ Library; Papers of Lyndon Baines Johnson, President, 1963–1969; Files of Lee White; Box 1.
[921] See Sauer, Free Choice in Housing, 10 N.Y.L.F. 525, 533 (1964). Sauer had been assistant general counsel at HHFA and was a high-level administrator. Id. at 525.

Yet the PHA announced that it would not, in fact, use the primary enforcement tool available under Title VI. Insofar as it understood its annual subsidies to public housing developments to be "irrevocable," the agency stated that it would not withhold those funds from localities that violated the Civil Rights Act.[922] Instead, for projects under annual contribution contracts before Kennedy's executive order—the overwhelming bulk of public housing—the agency's theoretical sanction was simply to refuse to approve future projects in the locality.[923] For projects with contracts signed after the order's issuance in November 1962, which expressly prohibited discrimination, the PHA stated that it could employ the contractual sanction of recovering title or possession to the projects, or refer the matter to the DOJ for legal enforcement.[924]

The PHA thereby tied its hands to a remarkable degree. By viewing itself as unable to override its contractual agreements to fund local public housing over forty years, the PHA left itself without any effective remedy against many local housing authorities—at least those who were willing to forgo building any public housing in the near term, since the sole sanction PHA claimed for most existing public housing was to reject future projects. Under that analysis, PHA's contractual obligations apparently overrode any Fifth Amendment obligations to refrain from funding de jure segregation. That was the state of the affairs as the Civil Rights Act came into effect.

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Congress affirmed that *Shelley* and *Brown* were the law of the land in the Civil Rights Act of 1964. Only then did the federal public housing agency—as a formal matter—turn away from its *Plessy*-based regime. Segregation had become a basic aspect of the public housing program—part of its political viability, its modus operandi, and its personnel's everyday practices. Long-term personnel like General Counsel Burstein had seen it woven into the agency's operating principles since its origin. Segregation formed part of the agency's original commitment to constitutional principles of racial equality under Weaver's "racial equity" policies, and was the political price paid to maintain a public housing program. Institutional inertia around that regime was powerful, as was the fear of backlash from the program's clientele and Congressional oversight committees. A change in leadership, even a change in the White House, proved insufficient to overcome those forces. Agency personnel used legal interpretation and on-the-ground implementation to defend the status quo, and the older Constitution it represented. As Burke Marshall commented in December 1964, "The housing order has not been very meaningful."[925]

By the time Congress approved the creation of a new Housing and Urban Affairs Department in 1965 and confirmed Weaver as its head in 1966, Robert Weaver had clearly

[922] The sanction of cutting off federal funds will not be used in the case of public housing violations." HHFA, Questions and Answers on the Effect on HHFA Programs of the Nondiscrimination Requirements of Title VI of the Civil Rights Act of 1964, at 4 (May 1965), Weaver Box 129, 16/179.
[923] Id.
[924] Id.
[925] Kennedy, supra note 860, at 156 (attributing the ineffectiveness to "the legal situation and the presidential power and the attitudes of the people").

succeeded in one aspect: he had resolved Congressional concerns that he would radicalize the housing agencies. Senator A. Willis Robertson (D-VA), chair of the Senate Banking and Currency Committee, praised Weaver's record as the committee considered Weaver's nomination to head the new department, telling Weaver that he had "watched him very closely and ... haven't found that he was prejudiced. This time I am going to vote for his confirmation."[926] As Weaver later recalled, his initial tenure in office showed that the earlier charges against him "were without foundation and therefore in contrast to the '61 experience, in 1966 I was unanimously confirmed and the hearings lasted about ten minutes."[927] Weaver thus became the first black Cabinet member, having allayed the fears of a racial revolution.[928]

As of the late 1960s, McGraw thought PHA and FHA had switched positions: "the one that led the parade is last today."[929] The FHA had improved its efforts to protect minority rights, thanks to the efforts of new Commissioners. "[I]t isn't easy to bring a structure like that along," he said, "It was a case of dragging them [top level staff] along … The old-line was very slow, very slow to change."[930] At the PHA, though, Commissioner McGuire had not prevailed over the career bureaucracy. "If you aren't careful, the structure will take over that person [at the top] and change that person… I think they succeeded in influencing her more than she was able to influence them."[931] Part of the problem was that the PHA bureaucracy was tightly linked to the National Association of Housing Redevelopment Officials as its primary clientele: "They've been in bed together so long; they look at it as their constituency…."[932]

The bureaucracy was hardcore, the long-time race relations advisor explained: "They always felt any change you want to make, no matter how committed you are, they see it as an effort you're going to kill public housing, you're an enemy of the program…. Issuing orders doesn't succeed; you've got to more than that if you're going to change the structure… any change they see as a threat, and you've got to do something about their view of the change threatening them."

The paradox of a liberal agency fighting to preserve segregation

Why did federal public housing officials come to represent regression and segregation, refusing to update their agency's policies to account for *Brown* and *Shelley* for so long? One might think that an agency designed to pursue progressive social goals, founded by leading reformers committed to economic and racial justice, would readily adopt new Constitutional principles around racial equality. Particularly so, since the agency's early leaders drew on their regulatory discretion to enact new policies aimed at "racial equity" in an attempt to make "separate but equal" actually equal, in a period when that was the relevant constitutional mandate. Further, the agency

[926] Nominations of Robert C. Weaver and Robert C. Wood, Hearing before the S. Comm. on Banking and Currency, 89th Cong. 2 (1966) (Sen. Robertson).
[927] Interview by James Mosby of Robert C. Weaver, The Civil Rights Documentation Project, Washington, DC, at 2(Mar. 12, 1969), Ralph J. Bunche Oral Histories Collection.
[928] Cf. Wolman, supra note 461, at 106 (stating that "by all accounts HUD was often politically more cautious than the Administration" during Weaver's tenure).
[929] McGraw Interview, supra note 512, at 9.
[930] Hill Interview, supra note 516, at 37 (Feb. 29, 1968).
[931] McGraw Interview, supra note 512, at 25.
[932] Id. at 27.

even had a dedicated set of personnel charged with overseeing and advocating for racial fairness in agency practices.

1. Path dependence: Early policies and organization

Aspects of the agency's design and early experiences would seem to predict that public housing officials might strive to comply with equal protection principles, updating their racial policies as the Supreme Court's interpretation of the Constitution changed. But though early policies and practices may be sticky, they do not ensure that the agency will keep pace with evolving legal norms. Other aspects of its design rendered the PHA highly politically vulnerable—and simultaneously legally insulated from constitutional challenges to its support for segregation.

Initially informed by the reforming impulses of its founders, the agency's approach to racial equality stagnated over time. While civil rights advocates inside and outside the agency pressured for change, political pressures opposing change proved too great. Agency lawyers, who were not civil rights proponents, backed the older understanding of the agency's obligations. The agency's design arguably favored a different outcome—but the agency's political vulnerability and legal insulation led its leaders to side with the status quo.

2. Political vulnerability: the cost of social reforms

The political explanation for the PHA's resistance is simple: The radicalism of public housing forced its proponents to make a choice—acquiescing in segregation or risking the program's survival. Conservative and business opposition to public housing was so great that the program was constantly at risk of being killed in Congress. Among the key political leaders who helped preserve it were Southern Democrats. Senator John Sparkman and Representative Albert Rains headed the respective oversight committees for the public housing agency for many years, staunchly supporting the program. But their support, and that of other Southern Democrats, required the agency to avoid opposing segregation.

Institutionally, the inertia of early policies meant that the agency effectively ignored the Supreme Court's new interpretations of equal protection. Though the agency institutionalized a liberal race policy and a set of personnel dedicated to racial fairness at its origins, the persistence of that policy and those personnel over time did not equate to continued progressivism. Rather, as the Supreme Court updated the meaning of equal protection in accord with the NAACP's arguments, the agency refused to follow suit. The agency's once-liberal policies, aimed at ensuring that "separate but equal" was equal in practice, became increasingly regressive. The "stickiness" of those institutions proved to be unhelpful to the civil rights cause.

3. Contractual commitments: The federal government's pledge

The political precarity of the public housing program had also forced allies to seek the least costly way of sustaining it. Thus in 1949 Congress had created a provision in the Housing Act aimed at luring lenders municipalities to provide the funds for constructing public housing at especially low rates, pledging the United States' good faith to the repayment of those bonds via

the federal government's contracted-for annual subsidies. The federal pledge acted as an implicit subsidy to the localities, insofar as it provided crucial security for their loans.

As outlined above, that aspect of program design became part of the agency's rationale for refusing to consider withholding of annual subsidies from localities that insisted on segregating their housing projects. Officials argued that threatening to cut off funding would conflict with the Housing Act as well as the agency's contractual commitments. Thus the flow of federal funds continued, and localities understood that any sort of federal pressure for integration was nearly toothless, backed only by the improbable threat of the agency actually suing for possession of the projects, taking them over, and integrating them. Even that unlikely penalty only could be pursued in instances where the contract required non-discrimination pursuant to Kennedy's 1962 executive order.

4. Lack of legal exposure

Inside the public housing agency, a split emerged between those who favored putting equal protection principles first, and those who prioritized the program's survival and expansion. The agency's racial relations officials represented the first view, and became increasingly strident. But the latter view was the dominant one, and perhaps most critically, the agency's lawyers adopted it as well. Thus, though civil rights advocates had a consistent ally within the agency, the racial relations service, that unit lacked the power to effectuate its goals.

Given the rarity of judicial review of the federal housing agencies' actions in funding segregation (at least, review on the merits), the agency's lawyers faced no significant checks in their constitutional analysis. That allowed them to make quite dubious arguments—for example, that a statute's legislative history could overcome the need to read constitutional constraints into the statute—as they defended the agency's preservation of the *Plessy* regime. The Supreme Court had already indicated the need to read federal statutes to account for equal protection constraints, and the agency's lawyers had previously anticipated the impact of such readings on their policies. But absent legal challenges or political enforcement, there was no way to bring the agency lawyers' analysis into line with that of the courts. This was true even as the racial relations officials not only accurately presented the constitutional arguments, but correctly anticipated the direction and rationales of future precedents.

PART IV: CONCLUSION

Chapter 9 Evaluating Agencies' Resistance to *Brown*

Modern constitutional scholarship largely embraces executive branch independence in interpreting and applying the Constitution.[933] That near-consensus provokes the question of how to assess the history documented here: i.e., federal education and housing administrators' decisions to reject *Brown*'s implications for their programs, which helped to preserve Jim Crow and produced an administrative approach to the Constitution that diverged significantly from the judicial one.

Because *Brown*'s interpretation of the Equal Protection Clause has become canonical, and de jure segregation is universally condemned,[934] administrators' willingness to countenance and financially support segregation after the Court condemned it raises difficult descriptive and normative questions for those who may generally favor independent executive interpretation. Were these administrators interpreting the Constitution in the autonomous manner that those scholars recommend? If so, are such instances simply a collateral cost of constitutional interpretation by the political branches? Or should they cause us to revisit our normative assessments of the executive branch role in constitutional interpretation?

Within a broader literature on "constitutionalism outside the courts," two overlapping sets of scholars praise the independent role of the executive branch in implementing constitutional norms, even when those officials diverge from judicial interpretations of the Constitution. Departmentalists focus on the constitutionally prescribed, co-equal role of each branch in governance, while proponents of administrative constitutionalism emphasize the practical effectiveness of the executive branch in elaborating and updating the nation's fundamental governance structures and substantive commitments.[935]

However, the cases of executive branch constitutionalism documented here do not line up very well with either theory. Federal education and housing officials' resistance to implementing *Brown* showcases aspects of agencies' constitutional practices that are missing or under-emphasized in scholars' descriptive accounts. And as a consequence, these cases present

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[933] See, e.g., Eskridge & Ferejohn, supra note 3; Larry Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (2d ed. 2008); Mark Tushnet, Taking the Constitution Away from the Courts (2000); Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905 (1990); Christopher L. Eisgruber, The Most Competent Branches: A Response to Professor Paulsen, 83 Geo L.J. 347 (1994); Aziz Z. Huq, Enforcing (but Not Defending) Unconstitutional Laws, 98 Va. L. Rev. 1001 (2012); Dawn E. Johnsen, Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning, 67 Law & Contemp. Probs. 105 (2004); Metzger, supra note 3; Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 262 (1994); Saikrishna Prakash & John Yoo, Against Interpretive Supremacy, 103 Mich. L. Rev. 1539 (2004); Bertrall L. Ross II, Embracing Administrative Constitutionalism, 95 B.U. L. Rev. 519 (2015); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978); but cf. Cornelia T. L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 Mich. L. Rev. 676 (2005).

[934] See J. M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963, 1017-18 (1998).

[935] See generally supra notes 3, 933 and sources cited therein.

challenges for the scholars' normative justifications for independent executive branch constitutionalism.

For constitutional theorists that advocate "departmentalism," executive branch constitutionalism is mandated by the Constitution itself.[936] Each branch is obligated to abide by the Constitution, based on its independent understandings of the document. That flows from the government's tripartite, co-equal structure as set out in the constitutional text.[937] But, as this project has shown, administrative constitutionalism in the real world may not resemble anything like the formal structure set forth in the Constitution. Agencies may diverge from judicial interpretations as a practical matter, without the warrant of presidential mandate or legislative enactment. It is difficult to find justification for such low-level administrative practices in the formal separation of powers, as laid out in the Constitution's text and structure.

In contrast to departmentalism, scholars of administrative constitutionalism do not depict a unitary executive branch under the direction of the President, acting as chief interpreter of the Constitution. Instead they point out the role that agencies have, as an empirical matter, played in implementing constitutional norms, while emphasize the deep relationship of agencies to both Congress and the presidency.[938] As they document, such administrators enjoy at least some autonomy in interpretation, both from the courts and from their political superiors—due to the practical difficulties and obstacles to litigation, as well as the limited attention and sanctions available to their political principals in the White House and Congress.

Several leading scholars go beyond descriptive accounts, and actively endorse administrative constitutionalism.[939] They emphasize the benefits that flow from the institutional character of agencies, as compared to courts: They are less politically insulated, and more open to dialogue and political input. They are not constrained to case-by-case adjudication, and have the ability to implement policy in a wholesale fashion, while tailoring it based on their specific subject matter and expertise.[940]

However, it is crucial to recognize that agencies' political exposure is not a generalized, value-neutral characteristic. The administrative state's relative political openness and practical tools may give it greater capacity than the courts to assimilate and implement pressures for constitutional change. But that same political openness is also a potential force retarding change, as occurred in the historical instances I detailed in Parts II and III. In the context of existing, long-term statutory frameworks, the design of those frameworks may bias the agencies toward retaining existing constitutional principles, rather than updating them to accord with evolving constitutional law. And just as agencies' statutory mandates predispose them toward prioritizing particular constitutional values, their design elevates the interests of some political players over others, by

[936] See, e.g., Steven G. Calabresi, Caesarism, Departmentalism, and Professor Paulsen, 83 Minn. L. Rev. 1421 (1999); Paulsen, supra note 933.
[937] See U.S. Const. art. I-III.
[938] See, e.g., Eskridge & Ferejohn; Lee, supra note 1716; Metzger, supra note 3; Bertrall L. Ross II, Administering Suspect Classes, 66 Duke L.J. 1807 (2017); Tani, Administrative, supra note 16.
[939] See Eskridge & Ferejohn, supra note 3; Metzger, supra note 3; Ross, supra note 933.
[940] Eskridge & Ferejohn, supra note 3, at 9, 13-21, 31-34; Metzger, supra note 3, at 1922-29; Ross, supra note 933, at 553-65.

rendering the agency answerable to particular political principals and constituencies and not others.[941]

In this concluding chapter, I briefly summarize the education and housing agencies' historical practices, and contrast those practices with existing, laudatory theories of executive branch constitutionalism. As I argue, such historical events force our attention to the scope and costs of administrative constitutionalism. Although agencies will inevitably interpret the constitution, recognizing potential risks provides opportunities to consider appropriate safeguards and checks. Agencies' power to engage and apply constitutional norms should be treated more cautiously, with an eye to considering the true scope of this power, the costs of particular forms of political exposure, the possibility of negative entrenchment, and the necessity of effective checks.

Agencies' independent constitutionalism in resisting *Brown*

During the mid-twentieth century, administrators in the Office of Education and the Public Housing Administration rejected the idea that they had an independent obligation to apply the Court's equal protection rulings to federal education and housing programs. In particular, they balked at the idea of denying federal funds to segregated school districts or housing projects. In a system of cooperative federalism premised on federal dollars, this meant that core national social programs embraced and extended segregation.

In many instances, officials framed their actions as simply following statutory commands, while arguing that they lacked any legal authority to independently implement the rule of *Brown*. In effect, administrators denied that they were acting as constitutional interpreters.

In response, civil rights advocates argued that agency officials in fact did have the obligation to obey the Constitution. That obligation overrode statutory mandates and existed even in the absence of direct judicial mandates. In presenting these arguments, NAACP leaders and their allies made a critical assumption: that the Constitution meant what the courts said it did. Thus leaders like Walter White, Clarence Mitchell, and Thurgood Marshall argued that the executive branch had a duty to apply the judicial Constitution, as represented in decisions like *Buchanan* v. Worley, *Shelley v. Kraemer*, and *Brown v. Board of Education*—along with their federal companion cases. On civil rights advocates' reading of those precedents, government support for segregation violated the Fourteenth and Fifth Amendments.

Though education and housing administrators described themselves as avoiding constitutional interpretation, in actuality they were continuing to effectuate an older Constitution that diverged dramatically from that of *Buchanan*, *Shelley*, and *Brown*. They were perpetuating an independent "administrative constitution"—one rooted in *Plessy v. Ferguson*. That was particularly evident in the case of the public housing agency, which had initially fleshed out a detailed regulatory regime that was openly based on *Plessy* in the 1930s. As calls for the PHA to shift its regime mounted, agency officials instead retained the *Plessy* "separate but equal" approach of requiring "equitable distribution" of public housing and public works jobs. While the Office of Education did not create such an elaborate and overt regulatory regime based on *Plessy*, like the

[941] See discussion at supra notes 49-55 and accompanying text, along with sources cited therein.

PHA it staunchly resisted petitions for it to halt its funding of segregated institutions, emphasizing that the Office had always respected local sovereignty—including on matters of race.

As federal officials made these choices, they often justified them based on their duty to defer to others' constitutional interpretations. Agency lawyers (or, in some instances, political appointees trained as lawyers) provided the core legal analysis arguing against any obligation to implement *Brown*. They cited a number of factors in concluding that no such duty or power existed. They argued that attempting to apply *Brown* to their programs on their own might undermine the federal judiciary's authority.[942] They emphasized Congress's rejection of statutory amendments that would have barred segregation, thus reading legislative history to trump constitutional concerns.[943] According to the lawyers, the agencies' long-term policy of approving segregation also weighed in the balance, as that administrative practice had induced reliance interests on the part of funding recipients.[944] Agency leaders similarly cited federalism norms requiring deference to local authorities.[945]

Back of that legal analysis, a political calculus driven by pressures from Congress and core constituencies also operated. For public housing officials from the post-WWII years through the 1960s, strong opposition to their program in Congress meant that they believed the segregation issue represented a direct threat to their agency's survival. For education officials who sought continuously to achieve a broader scope for their agency by extending general federal aid to primary and secondary schools through new Congressional legislation, any attempt to prohibit segregation would have posed a similar threat to their agency's ambitions.

Both agencies also identified most strongly with constituencies that were not allied with civil rights causes. The government officials that applied for and accepted funding from their federal programs were their primary clients. Those state and local officials formed organized lobbying associations that advocated for the agencies' programs in Congress and maintained close contact with agency officials.

Moreover, administrators' loyalties were first and foremost to the programs and social goals they pursued. Insofar as they understood opposition to segregation as presenting an existential threat to those goals, which included improving schools for all children, and offering decent housing to all families, it is unsurprising that they refused to prioritize the Court's reading of equal protection principles. Although the NAACP and its allies had decided that those trade-offs were no longer worth the long-term cost to racial equality, agency officials (at least, white officials) perceived the calculus differently.

Comparing agencies' practice with legal theory

How do such historical patterns of agency constitutional interpretation square with theorists' accounts of executive branch constitutionalism? Not very well. Instead, these cases

[942] See, e.g., supra notes 236-249, 747-758, 770- 773.
[943] See e.g., supra notes 253-265, 747-758, 693-695 and accompanying text.
[944] See e.g., notes 253-265 and accompanying text.
[945] See e.g., notes 203-206, 327-333 and accompanying text.

highlight gaps in scholars' descriptions and defenses of independent constitutional interpretation in the executive branch.

Departmentalism

For advocates of "departmentalism," the U.S. constitutional structure implies that each branch has the authority and obligation to independently interpret the Constitution in the course of carrying out its powers. Congress must judge for itself whether legislation it enacts complies with the Constitution. The President and his subordinates must assess whether they are acting in accord with the Constitution as they execute federal law. Past and present instances of independent or conflicting interpretation are not problematic, but examples of the constitutional structure at work.

Scholars in this tradition emphasize moments of clear, acute conflict with other branches.[946] In the executive branch context, they conceive of the President as the primary decision-maker, with support from his top legal advisors, such as the Attorney General.[947] As a consequence, they foreground the question of what the President must do when he believes that a Congressionally enacted statute violates the Constitution or a federal court's interpretation of the Constitution is wrong. Should he enforce the statute or obey the judicial ruling? In arguing that at least in some instances the President may choose to deviate from the other branches' interpretations, departmentalists emphasize the co-equal status of each branch of government under the Constitution's text and structure, as well as the oath that officials take to preserve and defend the Constitution.[948] Their analysis thus rests on a vision of the President acting as a single, unified interpreter for the executive branch, with the assistance of the Justice Department.

That idealized picture of presidential interpretation of the Constitution offers a relatively attractive vision of departmentalism for those who question judicial supremacy. As depicted, departmentalism promises coherence and principled application by the top national official elected by the country as a whole, in a way that will govern the entire executive branch. Though independent presidential interpretation may bring conflict with other branches, at least that discord will result from the explicit and reasoned decision-making of a democratically legitimate actor. Scholars also emphasize the specific competencies and powers of the President, arguing that he and his subordinates may bring superior knowledge and better institutional perspective to particular constitutional questions, as compared to the federal judiciary.[949]

In moments of acute, high-level constitutional conflict, the scenario they depict may be exactly what occurs, with the President himself directing a uniform constitutional interpretation based on principled analysis. But to the extent that executive branch constitutionalism does not occur at the direction of the President (or the Justice Department with his approval) during clear-cut disputes, theorists must consider other scenarios.

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[946] E.g., Easterbrook, supra note 933; Huq, supra note 933; Paulsen, supra note 933; Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable Statutes, 63 Law & Contemp. Probs. 7 (2000).

[947] E.g., Johnsen, supra note 933, at 114 & n.35 (citing Attorney General and DOJ Office of Legal Counsel opinions as reflecting "[t]he executive branch's legal views").

[948] See U.S. Const. art. II, § 1, cl. 8 (presidential oath); 5 U.S.C. § 3331 (oath for other executive officials). Scholars occupy a spectrum of views of when it is appropriate for the president to refuse to execute or defend federal statutes or reject federal court rulings. See generally note 933 and sources cited therein.

[949] E.g., Eisgruber, supra note 933; Johnsen, supra note 933.

If in practice different agencies engage constitutional questions and supply their own answers, without following a single principled interpretation sanctioned by the President and his top lawyers, then that looks much less like a co-equal branch exercising its prerogatives. It is difficult to ground such interpretation in the Constitution's textual division of powers among the branches and their co-equal status within the governmental structure. To the extent that the agencies are driven as much by Congressional preferences as those of the White House, then their constitutionalism does not fit the neat model of co-equal branches exercising their powers in parallel, according to their separate constitutional spheres of power and obligations. Moreover, it does not offer the same benefits of coherence and uniformity. Nor does it support efficient, cohesive presidential administration of the executive branch. One must look elsewhere for normative defenses of such autonomous interpretation.

Administrative constitutionalism

In recent years, legal scholars have foregrounded a specific form of executive branch constitutionalism that includes agencies as leading actors. Though these authors provide varying definitions of administrative constitutionalism, all center on agencies' active, semi-autonomous interpretation of constitutional principles as they go about implementing their statutory mandates.[950]

Authors who praise administrative constitutionalism emphasize that it provides a way to update constitutional norms in evolving factual contexts. Executive branch officials are more open to dialogue with stakeholders and the public at large than courts, and they bring to bear specialized expertise. Theoretically they enjoy the greater legitimacy derived from the electoral mandate of the President who oversees their work, and the representative process underlying Congress' enactment of the statutes they implement. History seems to support this idea. There are prominent, successful instances of such interpretation that resulted in the expansion of civil rights, achieved in dialogue with social movements: the EEOC's interpretation of civil rights statutes to bar pregnancy discrimination as a form of gender discrimination, and the EEOC's development of disparate impact principles to govern substantive liability in employment discrimination cases.[951]

While these authors acknowledge that agencies are imperfect institutions that may not live up to the normative ideal in constitutional interpretation, they do not dwell in any extended way on the potential risks. Whether it is communicated implicitly or explicitly, praising administrative constitutionalism rests on a calculus that agencies will more often serve constitutional principles than undermine them. To the extent scholars' praise rests on a comparison with the judiciary, the claim is that agencies will perform better along particular dimensions of constitutional interpretation than the courts will.

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[950] See Metzger, supra note 3, at 1910-11, 1912 (describing "instances of interpretation of the U.S. Constitution by agencies and agency officials" as "the core of administrative constitutionalism" and noting "agency officials' constitutional engagement and development necessarily occurs... as they seek to implement a statutory regime or presidential policy"); see also id. at 1900, 1903-15 (detailing a variety of definitions of the term).

[951] See Metzger, supra note 3, at 1923-4; Ross, supra note 938, at 1812-13, 1830-36.

However, one can easily question whether agencies will tend to protect minority rights in accord with constitutional guarantees, or even tend to reflect popular majorities' will, as democratic norms might require. Perhaps the political insulation found in courts prepares them better than agencies for the role of protecting subordinated minorities. There is even reason to believe that judicial insulation may sometimes allow for more majoritarian outcomes than the decision-making procedures of agencies produced and monitored in an imperfectly democratic system.[952] As for the broader question of whether agencies will help in the process of constitutional updating, is there any reason to expect agencies to embrace legal reform more often than they retard it—or more often than courts do? Bureaucracies are generally famed for their tendency toward stagnation, rather than innovation.[953]

As I argue below, those who laud the executive branch's role in constitutional interpretation should account more for the possibility of inertia, constitutional resistance, and bias towards the politically powerful. In fact, those factors may be designed into agencies' DNA: i.e., their mandates and structure.

Accounting for the impact of past design

Theorists of executive branch constitutionalism pay insufficient attention to the role of institutional design in shaping agency's goals and incentives—in ways that inevitably will affect constitutional interpretation, as with all other activities. Design can direct agencies' attention away from the President and his Attorney General, and toward other political actors—ones that do not share the constitutional legitimacy, coherent vision, and democratic mandate of those actors. Moreover, prior design may predispose agencies to resist constitutional evolution. It may force administrators to listen to powerful minorities, rather than to popular will or subordinated minorities.

Through the mechanism of institutional design, political actors can enact specific settlements of constitutional questions. Those institutions can persist and exert influences on future events. In the case of federal education and housing programs, controversy over federal involvement in such social initiatives led the agencies to be structured in ways that encouraged deference to local authority and close attention to Congressional preferences, while allowing the agencies to argue that they were not responsible for any constitutional violations.

During the New Deal period, the questions of whether the Constitution permitted the government to intervene in housing at all, and whether the federal government could use its enumerated powers to operate programs in education and housing were unresolved. Even before the Supreme Court settled on clear answers, the constitutional doubt overhanging federal involvement served to structure the form the programs took. A structure emerged in which the

[952] See Corinna Barrett Lain, Upside-down Judicial Review, 101 Geo. L.J. 113, 115-16 (2012) (stating "there are a number of forces that push democratic decision making away from majoritarian outcomes, just as there are a number of forces that push Supreme Court decision making the other way").

[953] See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2263 (2000) ("[B]ureaucracy ... has inherent vices (even pathologies), foremost among which are inertia and torpor.").

federal government provided funding, with certain conditions attached, to state and local governments that exercised choice in whether to accept the federal aid or not.

That program design represented a compromise, resolving the New Deal constitutional controversy over federal authority to operate in spheres traditionally thought to fall under the states' general police powers.[954] The design in turn had direct implications for federal officials' mode of operation, norms, and incentives. Operating within this cooperative federalism framework, the education and housing agencies formed close relationships with state and local officials. Though they disbursed funding to them, federal officials also relied on these officials to agree to participate in their programs and to serve as a base of political support. In communicating with Congress, the public, and those government entities, federal officials were at pains to emphasize their limited role and the dominant authority of state and local government in these spheres.

A constitutional settlement reflecting notions of limited federal power, and embodied in institutional design, thus shaped how agency officials understood and communicated their own role and authority vis-à-vis other governmental actors that received funding from them. That design also affected how those officials and others understood the agencies' constitutional responsibility with respect to constitutional equal protection norms. Because they operated at arms-length from the actual management of schools and housing, federal officials could frame themselves as uninvolved—at most "indirectly" contributing to discrimination.

Other aspects of design directed the agencies' attention to Congress rather than to the White House, limiting the agencies' incentives to adopt evolving equal protection norms.[955] Congress deliberately rejected attempts to place the agencies under more direct and firmer White House control by shifting statutory powers upward to a political appointee with the direct ear of the President, at least in part out of a sense that this might lead to greater social activism than legislators desired. Instead, both the education agency and the housing agency were given independent powers while housed within another, broader collection of agencies under the general supervision of an administrator. The Office of Education remained within HEW, while the PHA remained within the HFFA (and the latter was not even a Cabinet-level agency).

Keeping the agencies firmly under Congress' control reflected legislators' desire to check the activism of the agencies in social initiatives. At the same time, it reinforced the agencies' disinclination to innovate on questions of racial justice as long as their programs were under direct Congressional scrutiny. Meanwhile, due in part to this deliberately programmed insulation, the White House, its political appointees, and the Justice Department all met obstacles when they attempted to redirect agencies in more civil-rights-favoring directions.

By designing agencies to respond to particular political principals rather than others, such lines of political control predisposed the agencies to favor certain constitutional interests over others. In an era when key members of Congress and many state and local officials disagreed with the Supreme Court's revised interpretation of the Fourteenth Amendment, that placed a strong thumb on the scales in favor of administrators maintaining the prior regime. The agencies'

[954] See supra Chapters, 3, 4, 6.
[955] See supra Chapters 4, 6.

incentives, relationships, and historical practice pointed them toward deferring to state and local authority, while declining to engage the question of racial segregation. Agencies thus maintained the older *Plessy* system, even as the federal courts actively revised the prior equal protection framework around the principles of *Shelley* and *Brown*.

The role of legal insulation

Agencies are particularly likely to develop autonomous interpretations of the Constitution that diverge from judicial ones in instances where law is uncertain, and judicial scrutiny rare.[956] While judicial review is robust in many aspects of the administrative state, others may be difficult to challenge, due both to procedural obstacles like standing, and to the limited litigation resources of those affected. In those settings, the administrative constitution can become the effective constitution, supplanting the judicial one. Without legal checks—and when political incentives do not limit them—administrators can simply channel the version of the Constitution that is most compelling to them.

Such legal insulation tends to retard the process that Eskridge and Ferejohn praise as "entrenchment." To those scholars, deep entrenchment is the ideal outcome of administrative constitutionalism, achieved through public deliberation over a new norm, the collaboration of several political institutions in implementing the norm, and the long-term legitimation of the norm, including by former opponents who come to accept it.[957] To them, courts do occupy a place—though a lesser one than that of legislators and executive officials—in this dialogic process.

Where courts are excluded completely from such interpretive processes, the loss is significant. Without dialogue between courts and agencies, a major disciplining, publicity-generating, and legitimating force is lost.[958] Further, the ability of a politically insulated institution (the judiciary) to demand answers from a politically exposed one (the agency) offers at least some potential protection for unpopular groups, constituencies not prioritized in the agency's mission, and those who lack a voice within the agency's processes and oversight bodies.

Unfortunately, though, even if achieved, mechanisms that facilitate judicial review may have less disciplining effect than needed. Once one recognizes the reality of the immense reach of the federal administrative state—and that judicial scrutiny can be quite limited in practical terms—then the scope and impact of such effective constitutions becomes clear.[959] There is no a priori reason to think that such practical constitutional frameworks will be especially quick to evolve, or that they will favor marginalized groups, contra the hopes of some scholars.

[956] See also Metzger, supra note 3, at 1919 (noting that when constitutional questions are framed in statutory terms, then agencies may receive significant deference from the courts)
[957] Eskridge & Ferejohn, supra note 3, at 7-8, 12-18.
[958] See Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577 (1993).
[959] On the limits of judicial scrutiny, see, e.g., Kate Andrias, The President's Enforcement Power, 88 N.Y.U. L. Rev. 1031 (2013); Matthew Steilen, Collaborative Departmentalism, 61 Buff. L. Rev. 345 (2013).

Implications

Just as new legislative frameworks can set in motion large-scale revisions of constitutional principles, old legislative frameworks can ward off constitutional change. Agencies operating within those frameworks may practice forms of constitutionalism that do not resemble idealized notions of executive branch interpretation. As departmentalists suggest, agency interpretations may diverge from those of the federal judiciary. But they may not do so in response to a president and his top legal advisors' explicit, reasoned analyses. Agencies can be relatively insulated from White House control and exposed to other political principals. Congress may exercise its own influence.

An agency's legal interpretation that reflects Congressional and clientele preferences, as well as its own career staff's views, reflects a much messier version of "departmentalism," if it can still be termed that. That version is not as clear an instance of coordinate branches operating within their own spheres of special authority and capacity. It is questionable whether such an intermingled, refracted version of each branch's authority, operating outside of formal acts like legislation or presidential declarations of policy, can claim the same legitimacy arguments as a pure form of, say, "presidential review," as posited by theorists.[960] Certainly it is more difficult to identify based on the co-equal status of each branch, as set forth in Articles I-III of the Constitution.

Institutional competence arguments also become murkier in this intermingled, many-actor version of departmentalism. Perhaps agencies operating under a "web" of Congressional and presidential control benefit from both branches' competencies, and perhaps agencies have their own special competencies that—even if not directly grounded in the Constitution—give them a particular claim to authority over some constitutional questions. But that is not the stylized claim to special institutional competencies for each branch that past theorists of departmentalism have outlined.[961]

Further, to the degree that departmentalism finds its justification in popular constitutionalism and the democratic mandate of the political branches, this form is harder to rationalize in those terms.[962] Agencies that operate under political scrutiny by specific clientele groups or strategically situated members of Congress are not subject to traditional majoritarian pressures. If their actions are not rooted in explicit presidential directive or formal legislative act, then there is nothing to guarantee that those democratic actors support their interpretations or will be held to account for them.

To the extent the agency's political incentives and predispositions in constitutional interpretation reflect earlier design decisions, this also means that prior politics can apply a braking influence on change. It is true that administrative constitutionalism can drive constitutional updating in other contexts, particularly when political forces have coalesced behind dramatic statutory change. Once a social movement has achieved the enactment of a dramatic new statute

[960] See, e.g., Easterbrook, supra note 933; Paulsen, supra note 933.
[961] E.g., Eisgruber, supra note 933; Johnsen, supra note 933.
[962] See Robert Post & Reva Siegel, Popular Constitutionalism, Departmentalism, and Judicial Supremacy, 92 Cal. L. Rev. 1027 (2004) (discussing Larry Kramer's work on popular constitutionalism as an instance of this).

(or "superstatute"), then agencies are likely to play an important role in fleshing out the meaning of the legislative framework in practice.

But agencies designed around older principles—and subject to specific, not necessarily democratic pressures—may stave off constitutional change and do so in ways that are not majoritarian in any straightforward sense. Instead they may be responding to specific minorities that happen to be empowered by the particular institutional scheme at issue—client groups or well-situated legislators. There is little reason to think that they would tend to empower marginalized groups, absent some explicit embedding of that goal in their design, along with sufficient high-level political backing from the White House or Congress. Unless one is prepared to renounce any hope that the Constitution might in fact protect less powerful minorities, then this is a serious drawback associated with the administrative role.

A vision of agencies entrenching prior constitutional regimes—like *Plessy* and de jure segregation—seems far less normatively attractive than the picture of agencies serving in the vanguard of constitutional change, in response to social movements seeking new rights protections. In fact, older agencies seem particularly unlikely to embrace new rights claims, absent new statutory mandates, institutional reorganization around such claims, and/or new presidential directives to do so.

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Executive branch constitutionalism may be inherent in the American constitutional design and in the modern administrative state. For that very reason, it is crucial to recover historical and contemporary accounts that highlight its risks, to aid in understanding how our constitutional system works in practice and to imagine ways to improve it for the future. Doing so also helps us understand the present, where the effects of mid-twentieth century administrative constitutionalism are visible all around us. Those impacts live on in the persistence of institutions like the modern Department of Education, Federal Housing Administration, and even the small office of Public and Indian Housing—but also in the enduring racial segregation of our schools and cities.