

ARTICLES

SUBSIDIZING SEGREGATION

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*What drives administrative officials to enforce the Constitution in particular ways? This Article recovers a forgotten civil rights struggle that sheds light on that question. Long after *Brown v. Board of Education*, federal education officials continued to fund segregated schools, arguing that their agency bore no immediate responsibility for implementing the Equal Protection Clause. In the present, that position seems deeply surprising—even at odds with the rule of law. But the administrators did what their agency had been designed to do: extend the federal role in education without thereby extending federal constitutional rights. Congress engineered the federal Office of Education, predecessor to today’s Department of Education, with the goal of providing federal support for schools while avoiding federal enforcement of the Constitution’s equality principles. Legislators and their allies found support for that approach in a different constitutional goal: deference to states’ authority within the federal system. The resulting institutional framework of federal support without federal rights enforcement endured until the Civil Rights Act of 1964 transformed it.*

*Civil rights leaders’ battle to enforce *Brown*’s principle against the federal government illustrates a basic feature of administrative constitutionalism: agencies can be designed to serve, or disserve, a*

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broad range of constitutional goals. Any particular agency’s approach to the Constitution will reflect the enduring influence (and variability) of administrative mandate and structure. Those aspects of institutional design are shaped by Congress and the President, often in light of underlying divisions over the Constitution’s mandates regarding federal power, administrative authority, and substantive rights. As a result, an agency’s constitutional interpretations may reflect the outcomes of prior political struggles over constitutional principles, which become embedded in and transmitted through the agency’s specific institutional traits.

Understanding why agencies enforce the Constitution in specific ways thus requires understanding how political actors in Congress, the White House, and beyond have structured those agencies over time. That truth, encapsulated in the struggle over federal subsidies for segregation, also illuminates a key reason that racial segregation and inequality have been so difficult to uproot: much of the federal administrative state was initially designed to coexist with discrimination, not combat it.

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INTRODUCTION

FIFTY years ago, members of Congress were deeply concerned with executive officials' interpretation of the Constitution.¹ In July 1963, a House subcommittee upbraided federal officials for their approach to civil rights, federal power, and executive authority.² Legislators faulted the Office of Education's "fearful attitude" and its "hesitancy or reluctance" to implement the equal protection mandate.³ In particular, they wanted to know why, nearly a decade after *Brown v. Board of Education*, the agency was still spending federal taxpayers' dollars to build and maintain segregated schools throughout the South.⁴

Education officials responded with their own constitutional understandings, interpreting the Equal Protection Clause, federal power, and executive authority very narrowly. From their perspective, equal protection principles did not require them to stop funding segregated schools, and they lacked the legal authority to do so even if they wanted to.⁵

¹ See, e.g., Nondiscrimination in Federally Assisted Education Programs: Hearings Before the Select Subcomm. on Educ. of the H. Comm. on Educ. & Labor, 88th Cong. 60–61 (1963) [hereinafter Nondiscrimination]; 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].

² See Nondiscrimination, *supra* note 1, at 8–36 (statement of James M. Quigley, Assistant Sec'y, Dep't of Health, Educ., & Welfare ("HEW")).

³ *Id.* at 31 (statement of Rep. Hawkins, Member, H. Comm. on Educ. & Labor); see also *id.* at 18 (statement of Rep. Martin, Member, H. Comm. on Educ. & Labor) (describing HEW as "reticent to take any positive action").

⁴ E.g., *id.* at 20 (statement of Rep. Dent, Member, H. Comm. on Educ. & Labor) ("[T]he State of Alabama with 114 school districts has never desegregated a single district and receives approximately \$7 million under the impact legislation alone, not counting what they receive under public libraries or other educational facility bills."); *id.* at 24 (statement of Rep. Daniels, Member, H. Select Subcomm. Educ.) ("[Nine] years ago the Supreme Court . . . held that separate but equal public school facilities constituted a denial of equal protection of the law . . . What has the Commissioner done with respect to our land-grant colleges in view of that decision of the Supreme Court?").

⁵ See, e.g., *id.* at 13–21, 24, 31–34 (statement of James M. Quigley, Assistant Sec'y, HEW); Integration, *supra* note 1, at 14–22, 25–26, 31–32, 35–40, 58 (statement of Hon.

This Article probes why administrators took that view. Why did federal officials interpret their constitutional obligations so narrowly in those years—allowing them to continue to support segregated schools long after they were ruled unconstitutional?⁶ What leads administrators to read the Constitution in particular ways?

I argue that agency design plays an under-appreciated role in shaping administrators' interpretations of the Constitution.⁷ This argument addresses an undertheorized, but key, issue within the rapidly growing field of administrative constitutionalism. Leading works in the area have provided sophisticated, historically rich case studies of agencies' constitutional decision making. For example, in probing agencies' decision making about constitutional equality principles, scholars like Karen Tani, Sophia Lee, William Eskridge, and John Ferejohn have offered nuanced explanations for particular agencies' decisions, rooted in factors like the agencies' distinctive characters, social movement

Abraham Ribicoff, Sec'y, HEW); *id.* at 66–73 (statement of Sterling McMurrin, U.S. Comm'r of Educ., Office of Educ.); see generally *infra* Part II (documenting education officials' legal arguments).

⁶ Federal education officials' narrow approach to school segregation was especially striking, given that their sister agency within HEW explicitly sought to incorporate constitutional equality principles in federal welfare administration during the same period. Legal historian Karen Tani has shown that federal welfare officials relied on equal protection ideals as a basis for actively countering states' attempts to exclude racial minorities from benefits. See Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972*, at 103–109, 143, 174–76, 235–36, 238–39 (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, 855–59, 867–73, 878–81 (2015) [hereinafter Tani, *Administrative*]. However, in mandating equal treatment for benefits purposes, welfare officials did not have to directly confront segregation itself, an aspect which distinguished this context from schools. See Tani, *States*, *supra*, at 238–39.

⁷ Scholarship on “administrative constitutionalism” probes how administrative officials interpret and apply constitutional norms, in some cases offering preliminary normative assessments. See generally William N. Eskridge & John Ferejohn, *A Republic of Statutes: The New American Constitution* (2010); Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (2014) [hereinafter Lee, *The Workplace*]; Tani, *States*, *supra* note 6; Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *Stan. L. Rev.* 553 (2007); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 *Cal. L. Rev.* 1181 (2014); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 *Colum. L. Rev.* 1083 (2014); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 *Va. L. Rev.* 799 (2010) [hereinafter Lee, *Race*]; Gillian E. Metzger, *Administrative Constitutionalism*, 91 *Tex. L. Rev.* 1897 (2013); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 *B.U. L. Rev.* 519 (2015); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 *Harv. C.R.-C.L. L. Rev.* 289 (2015); Tani, *Administrative*, *supra* note 6, at 828–29.

claims, professional ideals, and political pressure from above, to name a few.⁸ But scholarship in the area has not generally sought to provide an overarching framework for understanding why agencies take particular approaches to the Constitution, or why those orientations might vary over time or across agencies. The next challenge is to build on the existing literature to construct systematic ways of explaining agencies' approach to interpreting constitutional meaning.

Agency design offers a natural place to begin.⁹ Design, as I use the term here, encompasses all the key aspects that are built into an agency from the start, such as the scope of its delegated mission and authority, as well as its organizational structure.¹⁰ Amidst a welter of historical

⁸ See Eskridge & Ferejohn, *supra* note 7, at 31–33; Lee, Race, *supra* note 7, at 883–84; Tani, *Administrative*, *supra* note 6, at 866–72, 878–82.

⁹ Social scientists studying the administrative state emphasize that agencies' early institutional configurations profoundly impact administrators' subsequent actions. Positive political theorists have argued that Congress and the President can constrain agencies' future behavior through their choices about initial design. See Jacob E. Gersen, *Designing Agencies*, in *Research Handbook on Public Choice and Public Law* 333, 336 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 *J. Pol.* 1095, 1096–97 (2002); see also Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 *Law & Contemp. Probs.* 1, 4 (1994) (“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 . . .”). Similarly, historically oriented social scientists argue that agencies develop institutional features that drive later outcomes. E.g., Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 *Pol. Sci. Q.* 255, 256–57 (1982); see also Paul Frymer, *Law and American Political Development*, 33 *Law & Soc. Inq.* 779, 784–85 (2008) (arguing that “preexisting government institutions and rules” constrain political change).

¹⁰“Institutional design” as used here would encompass the broad range of decisions that legislators and the President make in creating or revising an agency, such as the scope and nature of the agency's delegated tasks, its powers and budget, its procedures, the degree of oversight other branches wield over it, its relationship to constituents, and its location and degree of autonomy within the executive branch. As shorthand, I refer to such attributes as “institutional design,” or “mandate and structure.” Some might argue for a narrower definition that separates agency structure from aspects like agency mission. That approach would be preferable if my goal were to contrast the respective roles of agency structure and substantive mission, but here my goal is more holistic: to show how these hard-wired features operate in combination over time to influence administrators' constitutional decision-making. For examples of other scholars' treatment of agency design to encompass agency mandate, e.g., in considering whether an agency has conflicting mandates, whether its mission is “purpose-driven” or “client-centered,” or whether multiple agencies have overlapping mandates, see David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997*, at 4–5, 7–8

forces, focusing on design helps to clarify how those forces have impacted administrators within specific agencies, insofar as they are especially attuned to some pressures and relatively insulated from others. Such potential pressures include the demands of an agency's client groups, threats to its funding from Congress, top-down directives from the White House and its political appointees, social movements, judicial oversight, the agency career staff's own goals, and almost any other conceivable source of administrative incentives. An agency's independence and strength affects administrators' level of deference to other actors' constitutional interpretations by calibrating how much influence those actors wield over agency officials.¹¹ An agency's mission and delegated tasks will tend to influence officials' substantive priorities, constituents, knowledge, tools, and practices—most powerfully for the career personnel that serve the agency.¹²

(2003) (discussing the relationship of agency design and political appointments and highlighting the impact of organizational aspects on agency efficacy); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal. L. Rev. 1655, 1673–91, 1700–10, 1716–24 (2006) (discussing the trade-offs in decentralizing versus unifying administrative assignments, vis-a-vis proposals to centralize the national intelligence apparatus); Michael M. Ting, *A Theory of Jurisdictional Assignments in Bureaucracies*, 46 Am. J. Pol. Sci. 364, 365–74 (2002) (modeling legislators' choices to assign agencies specific tasks).

¹¹ See Lewis, *supra* note 10, at 16 (“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, and others Congress, while some will empower neither entity.); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 42–64 (2010) (discussing design features that may insulate agencies against excessive influence by organized interests); Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841, 878–81 (2014) (noting costs to political control and suggesting that some “boundary” organizations may give little control to either Congress or the President).

¹² See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. Econ. & Org. 93, 93–94 (1992) (arguing that when Congress directs an agency to regulate only one industry, the agency will likely cater to that sole interest, while an agency that oversees multiple industries is more likely to reflect the varied, competing interests of its multiple constituents); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. Legal St. 413, 427–30, 435–43 (1999) (reporting evidence that a statute shifting the Federal Energy Regulatory Commission's statutory mandate and agency clientele also shifted the agency's substantive orientation in its licensing decisions); see also Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 267, 302 (John E. Chubb & Paul E. Peterson eds., 1989) (noting that state involvement in a federal regulatory regime favors business interests that are well-represented in state-level politics).

Design features that shape agencies' institutional attributes in this way are also likely to endure.¹³ Once personnel, norms, and culture grow up around an agency's initial mission and delegated tasks, those institutional attributes tend to persist. Given such differing legacies—and their “stickiness” over time—we should expect that particular agencies will adopt particular approaches to interpreting constitutional meaning, rooted in their specific institutional incentives and context.¹⁴

The enduring quality of agencies' institutional “characters” also highlights a key aspect of design for constitutional interpretation. To the extent that agency mandate and structure are politically negotiated and persist, they offer 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.¹⁵ The battle to change agency structures thus may be a proxy fight over changing the Constitution. For example, the choice as to whether federal officials directly implement a national program—or instead oversee state and local officials as they make their own operational decisions—reflects a constitutionally tinged decision about the legitimate scope of federal power. Such initial structural decisions are likely to influence federal officials' perception of their own constitutional role into the foreseeable future.

¹³ 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 new legislation inherent in separation of powers, as well as by the political clout of the agency's supporters.” Moe, *supra* note 12, at 285. “Soft” attributes like culture may be especially long-lasting: “Over time the agency will develop a set of norms and a culture that is built on this set of norms.” Macey, *supra* note 12, at 104; see also James Q. Wilson, *Bureaucracy: What Government Agencies Do And Why They Do It* 91 (1989) (“Every organization has a culture . . . a persistent, patterned way of thinking about the central tasks of and human relationships within an organization. . . . [Culture] changes slowly, if at all.”).

¹⁴ For early recognition of this point about agencies' distinctive and long-lasting characters, see A. H. Feller, *Prospectus for the Further Study of Federal Administrative Law*, 47 *Yale L.J.* 647, 654 (1938) (“Agencies quickly develop definite characteristics of personnel, procedure, and policy. . . . Existing agencies have congenital characteristics which the most heroic efforts cannot change. Newly created agencies quickly develop their own.”).

¹⁵ This might occur directly through the substantive commands within organic statutes, but it also occurs through structural decisions about procedure, constituencies, and organization: for example, the choice of how federal authorities will interact with local authorities, including the relative balance of powers and the mandated procedures on each side, or the decision to create separate administrative units to address rights violations.

In the Article, I develop this design-based approach to understanding administrative constitutionalism via what social scientists call a “theory-generating” case study, one focused on agency interpretation of equal protection principles.¹⁶ I use the lens of agency design to shed light on the important, yet understudied, era after *Brown* but before the passage of the Civil Rights Act of 1964, when Federal education officials further reinforced segregation. Drawing on original archival research, I show that the Office of Education’s institutional design played a critical role in determining its officials’ constitutional positions in these years and their insistence on continuing to fund segregated schools.

Until 1964, the federal Office of Education had been designed *not* to claim any role in enforcing equal protection norms. The agency’s mandates and structure reflected the efforts of politically powerful Southerners and other conservatives to assure that national social programs would expand only under conditions that assured federal deference to state and local prerogatives—effectively preserving local systems of racial hierarchy.

Over many decades, political actors shaped the Office of Education in ways that led its officials to defer to state and local education authorities, to frame the federal role as one of providing resources for schools without “interference” and to steer clear of any involvement in racial justice questions.¹⁷ The Office’s structure and mandates left education officials heavily dependent on Congress and state and local educators, realms where Southerners held pivotal power. In contrast, its administrators were subject to relatively loose controls from the White House and the courts, the branches of government in which civil rights proponents actually had some hope of influence.¹⁸ That structural

¹⁶ See, e.g., John Gerring, *What Is a Case Study and What Is It Good For?*, 98 *Am. Pol. Sci. Rev.* 341, 349–50 (2004) (distinguishing exploratory, or theory-generating, research from confirmatory, or theory-testing, research). Even a single case study can be useful in generating theory, though it may be less helpful in testing prior theories.

¹⁷ See *infra* Part II, discussing the Office’s commitment to avoiding “Federal domination, control, or interference.” For quoted language, see *infra* note 55 (citing Annual Report of the Department of Health, Education and Welfare 172 (1954)).

¹⁸ On Southerners’ power in Congress, see, e.g., Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue: The Depression Decade 34–36* (2009); James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* 396, 400–01, 423, 471–73 (1968); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *Stud. Am. Pol. Dev.* 1, 1–2, 9 (2005); Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 *Pol. Sci. Q.* 283, 284–85 (1993).

context of asymmetric political vulnerability led education officials to view racial justice issues as imposing a potentially devastating political cost to their agency—and, indirectly, to their ability to achieve educational goals. Thus they framed policing racial discrimination as irrelevant to, or even in conflict with, the Office’s mission of providing aid to education, as well as the agency’s long-time policy of “non-interference” in segregation. That “non-interference” policy was grounded in the Tenth Amendment and a vision of a far more limited sphere of federal action.

Nonetheless, civil rights advocates aggressively challenged the Office of Education and its parent department, the Department of Health, Education, and Welfare (“HEW”), to stop funding segregation.¹⁹ Their battle was less newsworthy than the violent confrontations of the civil rights movement’s front lines, but it was a crucial one. As James Farmer, head of the Congress on Racial Equality, told Congress, “[w]hen you touch the source of funds for maintaining an institutional system such as segregation, you touch it at its most sensitive point.”²⁰ Advocates offered a range of legal arguments for withholding funds, suggesting everything from statutory reinterpretation to direct reliance on the Fifth Amendment’s prohibition on federal discrimination.²¹

Education officials staunchly resisted, arguing that they were legally compelled to continue funding segregated schools. They also suggested that any alternative approach would result in grave political repercussions, dooming their programs that depended on congressional funding, voluntary participation by state and local school officials, and broader political support. As pressure for action grew by the early 1960s, the Office of Education and HEW gave only slight ground, reinterpreting selected statutes while opposing any broader legislative changes.²²

Ultimately, when the congressional logjam around civil rights gave way with the passage of the Civil Rights Act of 1964, the Act’s drafters

¹⁹ See *infra* Parts I.B and II.

²⁰ Nondiscrimination, *supra* note 1, at 79 (statement of James Farmer, national dir., Congress of Racial Equality).

²¹ See *infra* Part II; see also U.S. Const. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (ruling that federally imposed segregation violates the Fifth Amendment’s Due Process clause).

²² See *infra* Part II.E.

responded to federal administrators' reluctance to enforce equal protection principles by revising all federal funding agencies' mandates, as well as the federal education agency's particular relationships to its state and local constituents. Title VI, which barred racial discrimination in federally funded programs, created an entirely new type of civil rights regulatory role for federal administrators—that of halting segregation and other forms of discrimination within the state and local programs they funded. Separately, the often overlooked Title IV provided crucial administrative structure and resources within the Office of Education to support the new regulatory role, by authorizing federal education officials to provide financial and technical support to state and local school officials as they began desegregating their schools.²³

A dedicated civil rights unit emerged within the Office to coordinate Title IV activities, using Title IV funds while also serving as the backbone for the Office's initial Title VI enforcement. That structure eventually gave rise to today's Office for Civil Rights (OCR) in the Department of Education. Thus, the Act opened up space for the Office of Education to play a significant role in school desegregation beginning in 1965 and paved the way for the more robust, though still politically constrained, role that OCR has played in constitutional struggles since then.²⁴

²³ On the statutory and organizational changes wrought by the Act, see Stephen C. Halpern, *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act* 33–41 (1995); Gary Orfield, *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act* 64–85, 102–48 (1969); Beryl A. Radin, *Implementation, Change, and the Federal Bureaucracy: School Desegregation Policy in H.E.W., 1964–1968*, at 55–60, 67–88 (1977); see also Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 *Yale L.J.* 248, 283–84 (2014) (noting HEW's use of its authority to cut off funds under Title VI to propel school desegregation in the latter half of the 1960s).

²⁴ A number of subsequent statutes extended Title VI's bar on race and national origin discrimination in federally funded programs to other protected classifications, providing an even broader basis for administrative implementation of equal protection norms. See, e.g., *Age Discrimination Act of 1975*, Pub. L. No. 94–135, Title III, § 303, 89 Stat. 728 (1975) (codified as amended at 42 U.S.C. § 6102) (barring age discrimination in federally funded programs); *Rehabilitation Act of 1973*, Pub. L. No. 93–112, Title V, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794) (barring disability discrimination in federally funded programs); *Education Amendments of 1972*, Pub. L. No. 92–318, Title IX, §§ 901–907, 86 Stat. 235, 373–375 (1972) (codified as amended at 20 U.S.C. § 1681) (barring sex discrimination in federally funded education programs).

From this perspective, the passage of the Civil Rights Act was not simply a victory over the forces of legislative resistance.²⁵ The statute also helped overcome *executive* resistance to enforcing *Brown* and did so by changing the agency's historical mandates and structures, introducing new civil rights roles and organizations within the executive branch. The struggles of the 1950s and early 1960s reflected both the power of past institutional design to entrench older constitutional frameworks and the key role that statutory and institutional revisions can play in bringing about constitutional change. The long-standing status quo of federal funding without federal rights enforcement gave way to a new regime.

* * *

The Office of Education presents an especially apt and important case for studying the factors that drive administrative constitutionalism. From the beginning, the Office and its parent department, HEW, existed in the epicenter of constitutional controversy over federal power, the administrative welfare state, and equality among citizens—as their successor agencies continue to do in the present. Legislative negotiations over the extension of the Office's programs explicitly hinged on disputes over whether the Office would illegitimately extend federal power by enforcing equal protection guarantees for African Americans and other racial minorities. Congress's concerns about administrative constitutionalism thus pervaded the Office's creation and subsequent revisions, constraining its mandates and design.

The Article thus offers dual contributions: it adds to civil rights history while proposing a systematic approach for theorizing administrative constitutionalism. The archival evidence it uncovers sheds new light on the ways in which key federal actors helped sustain segregation before the Civil Rights Act, why they did so, and how they understood and justified their actions. The history also serves a second, broader purpose: as a case study in administrative constitutionalism, which points toward a systemic framework for studying how agencies implement the Constitution.²⁶

²⁵ See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 199–200 (1997) (discussing the Senate filibuster of the Act).

²⁶ Past scholars have emphasized the ways in which agencies differ from courts and from Congress in their approaches to constitutional interpretation, rather than focusing on differences across agencies themselves. See generally Eskridge & Ferejohn, *supra* note 7

What broader implications result? As I discuss in Part IV.A, applying the lens of institutional design suggests that attempts to generalize about administrative constitutionalism should be undertaken with caution. Insofar as agencies vary widely in their institutional trajectories and characters, their orientations in interpreting the Constitution are likely to vary as well. That makes sweeping assessments tricky, if not ill-advised. But applying the lens of design does yield at least one larger insight about the democratic legitimacy of administrative constitutionalism. To the extent that Congress and the President shape agencies and their institutional frameworks, so too do they have the ability to shape administrative constitutionalism, sometimes in enduring ways. When, for example, political principals designate a particular set of constituents for an agency, that decision structures the agency's later incentives and decision-making in regard to the Constitution. Though administrative constitutionalism may not always be normatively attractive, it may well be rooted in earlier rounds of democratically legitimate decision-making.

Finally, because the battle to change agency mandates and structures may be a proxy fight over changing constitutional principles and their application, the Article also has forward-looking implications for those pursuing racial equality. In Part IV.B, I note that many parts of the administrative state initially reflected an explicit commitment to an older constitution, one that shielded local structures of racial subordination from federal oversight. I conclude by suggesting that efforts to implement equal protection in the present must necessarily address the enduring effects of those early design choices.

The remainder of this Article proceeds as follows. Part I examines the federal education bureaucracy's historical design and role. Part II draws on agency archival materials to reconstruct the Office of Education's constitutional interpretations and its stance toward school segregation in the period before the Civil Rights Act. Part III evaluates the evidence that the education agency's design shaped its officials' resistance to implementing the equal protection mandate. Part IV considers the implications of using institutional design as a framework for studying

(contrasting administrative constitutionalism with judicial constitutionalism); Lee, Race, *supra* note 7, at 801 (discussing the "relationship between administrative and court constitutionalism"); cf. Kevin M. Stack, Purposivism in the Executive Branch: How Agencies Interpret Statutes, 109 *Nw. U. L. Rev.* 871, 880–81 (2015) (acknowledging "the diversity of agencies and their occasions for interpretation" while justifying the need to generalize in comparing agency statutory interpretation to that performed by courts).

administrative constitutionalism, then situates this history within the larger relationship of the administrative state to racial inequality.

I. 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.”²⁷ His immediate predecessor had decried the hold that professional educators’ groups like the National Education Association had on the agency, complaining that his top deputy was “in their pocket.”²⁸ He said later, “[m]y 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.”²⁹ 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.”³⁰ Career staff fiercely protected their programs: high-level education officials would say, “[w]e have to hang on to such-and-such. It’s our bread and butter.”³¹ Education officials also shunned controversy, characterizing the Office as “non-political,” and focused solely on technical matters.³² Being non-

²⁷ Interview by John Singerhoff with Francis Keppel, former Comm’r of Educ., in New York, N.Y. 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 OEO Administrative History]).

²⁸ 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/> [permalink: <https://perma.cc/58VT-9AHP>]

²⁹ *Id.* at 271 (specifically describing a meeting with a committee of the American Association of School Administrators).

³⁰ Interview #2 by William W. Moss with Kathryn G. Heath, Assistant for Special Studies, Office of Educ., Dep’t of Health, Educ., & 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).

³¹ McMurrin & Newell, *supra* note 28, at 293–94; see also Pasachoff, *supra* note 23, at 262 (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).

³² 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 30, at 55 (stating that up to the

political meant staunchly avoiding issues of racial discrimination. As the Commissioner who arrived in 1962 put it, “[t]he Office of Education 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.”³³

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 Part 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.³⁴ 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.”³⁵ 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.

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”).

³³ Interview with Francis Keppel, *supra* note 27, at 8.

³⁴ 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).

³⁵ Donald R. Warren, *The U.S. Department of Education: A Reconstruction Promise to Black Americans*, 43 *J. Negro Educ.* 437, 448 (1974).

A. Programs, Powers, and Clientele

The Office of Education began 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.³⁶ The agency was charged simply with “collecting . . . statistics and facts” and “diffusing . . . information.”³⁷ 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 promote equal education for African Americans in the South.³⁸ Under these attacks, the agency lasted only a year as a stand-alone department, with Congress later folding it into the Department of Interior and slashing its budget.³⁹ It would take the Office’s leaders and allies over a century to reestablish a freestanding Department of Education.⁴⁰

³⁶ 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 35, at 438.

³⁷ An Act to Establish a Department of Education, Pub. L. No. 39–73, §§ 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.*

³⁸ Warren, *supra* note 35, 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 36, 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 Rep. George Hoar, who wrote, “[t]he 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)).

³⁹ 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 36, 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 1867–1868 to \$9,150 in 1870); Warren, *supra* note 34 at 118, 128–136, 142–43.

⁴⁰ An act creating the federal Department of Education was enacted in 1979. Department of Education Organization Act, Pub. L. No. 96–88, 93 Stat. 668 (1979).

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.⁴¹ Education groups repaid the Office’s deference to their prerogatives with staunch loyalty, resisting efforts to lodge education programs in any other agency.⁴² 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.⁴³ 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.⁴⁴

Even with education groups’ staunch backing, the Office of Education only gradually expanded its programs and powers. Initially, the Office’s small staff drafted reports, as the 1867 statute creating the Office mandated, but they lacked the resources to do independent

⁴¹ Frank J. Munger & Richard F. Fenno, Jr., *National Politics and Federal Aid to Education* 79 (1962).

⁴² *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).

⁴³ Educators wanted to restructure the Office as an independent agency or board. Munger & Fenno, *supra* note 41 at 79–80.

⁴⁴ 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. Interview by Ed Edwin with Dr. Samuel M. Brownell, in New Haven, CT 64 (June 6, 1967), Eisenhower Administration Project (transcript available in the Columbia Center for Oral History, Columbia University in the City of New York) [hereinafter “Brownell Interview”].

research, instead relying on data voluntarily supplied by the states.⁴⁵ 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.⁴⁶ During the New Deal years, the Office began to acquire greater responsibilities, taking over federal vocational education programs in 1933.⁴⁷ In 1941, the Office began overseeing the Lanham Act's wartime grants to assist areas burdened by educating defense workers' children.⁴⁸ Yet the Office remained small and meagerly funded in the post-war era.⁴⁹ "Understaffing, lack of funds, and fragmentation of programming" limited the Office's ambitions.⁵⁰

Since the nineteenth century, the Office of Education's leaders and allies had sought to expand its limited mandate by proposing broad federal funding, unrestricted by purpose, for all U.S. elementary and secondary schools—an elusive, longed-for goal that was often referred to as "general federal aid."⁵¹ But these attempts failed, often due to

⁴⁵ Warren, *supra* note 34, 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.").

⁴⁶ Lykes, *supra* note 39, at 20–21.

⁴⁷ 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 41, at 79 (noting that forty percent of the Office's staff was dedicated to vocational education afterward).

⁴⁸ Lanham Act, Pub. L. No. 76–849, 54 Stat. 1125 (1940); Pub. L. No. 77–137, 55 Stat. 361 (1941).

⁴⁹ 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 44, at 16. In 1945, the Office had less than 500 employees and an appropriation of less than \$1 million. Lykes, *supra* note 39, at 165 tbls.8 & 9.

⁵⁰ Lykes, *supra* note 39, 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.

⁵¹ The Commissioner of Education often served as a chief proponent of these bills. See, e.g., Munger & Fenno, *supra* note 41, 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); Sundquist, *supra* note 18, at 212 (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").

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.⁵² Opponents grounded their arguments in the Tenth Amendment, asserting 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.⁵³ 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 no desire to exert power over local schools.⁵⁴ The Office affirmed this commitment to "federal aid without federal control" as one of its guiding principles.⁵⁵

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 Senate Majority Leader Robert Taft made a dramatic conversion from opposing to supporting general federal aid.⁵⁶ 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."⁵⁷ Even with the agency's

⁵² Ward M. McAfee, *Religion, Race, and Reconstruction: The Public School in the Politics of the 1870s*, at 105 (1998); Warren, *supra* note 34, at 65–66, 78–79.

⁵³ See also Warren, *supra* note 35, 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).

⁵⁴ In 1950, Commissioner Earl McGrath did it 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 41, at 47.

⁵⁵ 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.").

⁵⁶ Diane Ravitch, *The Troubled Crusade: American Education, 1945–1980*, at 26 (1983).

⁵⁷ Munger & Fenno, *supra* note 41, at 84 (internal quotations omitted) (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

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.⁵⁸

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.”⁵⁹ 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.⁶⁰ To do so, Congress enacted two measures providing grants to school districts that educated large numbers of federal children, Public Laws 815 and 874.⁶¹

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.⁶² In 1960, more than \$63 million of those funds went to schools

fear of substantiating “the unfounded but recurrent charges of ‘federal dictation’ over a function historically locally controlled.” Key, *supra* note 44, at 177.

⁵⁸ 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).

⁵⁹ In 1945, the Office’s budget was less than \$1 million; by 1953, it was nearly \$3 million. Lykes, *supra* note 39, at 165 tbl.8.

⁶⁰ An Act to Provide for the Acquisition and Equipment of Public Works Made Necessary by the Defense Program Pub. L. No. 137, 55 Stat. 361, 361–63 (1941); Lanham Act, Pub. L. No. 76–862, 54 Stat. 1125, 1125–26 (1940).

⁶¹ 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). In referring to “federal children,” I follow the statutory definitions and use it to mean children residing on federal property, such as military bases; children with parents employed on federal property; and “children whose attendance [in local schools otherwise] results from activities of the United States.” See Pub. L. No. 81–815, § 202(a)-(c); Pub. L. No. 81–874, § 3(a)-(b).

⁶² See U.S. Comm. on Civil Rights, *Civil Rights ‘63* 198–99 nn.115–116 (1963) (noting that forty-six percent of military personnel were stationed in Southern and border states, and more than a third of impact-aid payments went to those states between 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*, *supra* note 1, at 71 (statement of Sterling McMurrin, U.S. Comm’r of Educ., Office of Educ.) (“The funds that go to federally impacted districts for operational purposes are not audited

in eleven Southern states—over \$500 million in current dollars.⁶³ 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.⁶⁴

B. 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.”⁶⁵ An 1872 aid proposal backed by the Commissioner of Education had to be amended to specifically permit aid to segregated schools, but still failed.⁶⁶

Early Commissioners of Education, reading the political winds, soon set a conservative precedent for the Office’s approach to racial

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.

⁶³ Roy Wilkins & Arnold Aronson, *Proposals for Executive Action to End Federally Supported Segregation and Other Forms of Racial Discrimination* 28 (Aug. 29, 1961) [hereinafter Wilkins & Aronson, *Proposals*] (on file with National Archives at College Park; Record Group 235: Records of the Department of Health, Education, and Welfare; Office of the Secretary; Secretary’s Subject Correspondence, 1956–1974; Box 133; 000.9 Civil Rights); Bureau of Labor Statistics, *CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm [permalink: <https://perma.cc/FL6C-E6AQ>] (calculating change between September 1960 and February 2018).

⁶⁴ Impact aid was made permanent in 1958. Act of Aug. 12, 1958, Pub. L. No. 85–620, 72 Stat. 548; see Miles, *supra* note 44, at 158 (noting that Eisenhower once could not find a single member of Congress to sponsor an amendment reducing the program’s funding); Heath, *supra* note 30, at 56–57 (calling the program a “boondoggle” that was impossible to kill).

⁶⁵ McAfee, *supra* note 52, at 115 (quoting 45 Cong. Globe, 42nd Cong., 2nd Sess. 8569 (1872) (statement of Rep. McIntyre)); see also *id.* at 112 (“[F]rom [1871] on, mixed schools and federal involvement in public education were inseparably 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).

⁶⁶ See 45 Cong. Globe, 42nd Cong., 2nd Sess. 882 (1872); McAfee, *supra* note 52, 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) (statement of Rep. Harris); see also McAfee, *supra* note 52, at 115–18; Lee, *supra* note 58, at 52.

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.⁶⁷ The second Commissioner of Education, John Eaton, had been involved in the predecessor to the Freedmen's Bureau in the South; he voiced support for the idea of non-segregated schools in the abstract, but expressly opposed using federal law to prohibit school segregation.⁶⁸ Eaton and others feared that Southern whites would abolish those states' nascent public school systems rather than see them integrated.⁶⁹

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 if states equitably divided the funds between the white and black land-grant colleges.⁷⁰ 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.⁷¹ When, however, the agency attempted to exercise this power by refusing to certify South Carolina's grant in 1892, Congress immediately overrode the decision.⁷² In fact, the statute had expressly provided for states' appeal of such decisions to Congress, reminding agency officials where true power resided.⁷³

⁶⁷ McAfee, *supra* note 52, at 21; Warren, *supra* note 34, at 119–20, 163.

⁶⁸ McAfee, *supra* note 52, 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, Jr. & John Eaton, Jr., *Radical Republican: Champion of the Negro and Federal Aid to Southern Education, 1869–1882*, 25 *Tenn. Hist. Q.* 239, 253 (1966).

⁶⁹ Frazer, *supra* note 68, 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 John Eaton, Jr., *Office of the Gen. Superintendent of Freedmen, Dep't of the Tenn. and State of Ark.*, Report, at 98 (1864).

⁷⁰ Second Morrill Act, ch. 841, § 1, 26 Stat. 417, 418, (1890).

⁷¹ Key, *supra* note 44, at 156. The Secretary of Interior was charged with certifying each state's entitlement to funds or reporting to Congress and withholding the certification if the conditions were not met; he delegated that responsibility to the Commissioner of Education. Lykes, *supra* note 39, at 21.

⁷² Key, *supra* note 44, at 161–62.

⁷³ Second Morrill Act, ch. 841, § 4, 26 Stat. 417, 419 (1890).

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.⁷⁴ In the 1920s and 1930s, federal aid proposals that barred aid to segregated schools failed.⁷⁵ 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 by Congress to authorize state-imposed segregation.⁷⁶

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 of the funds, requiring equitable allocation of benefits to whites and blacks.⁷⁷ 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.⁷⁸

Beginning in 1949, the NAACP took a more aggressive posture toward federal aid legislation, fighting not just for equal distribution of

⁷⁴ Lee, *supra* note 58, 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).

⁷⁵ Lee, *supra* note 58, at 52.

⁷⁶ Act of September 23, 1950, Pub. L. No. 81–815, § 205(b)(1)(F), 64 Stat. 967, 973 (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).

⁷⁷ 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).

⁷⁸ 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 41, 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).

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.⁷⁹ 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.⁸⁰ 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.⁸¹

After three important Supreme Court victories against segregation in 1950,⁸² the NAACP's leaders saw even less reason to support the flow of federal funds to segregated schools. They concluded that such funding would simply strengthen the dual system and prolong the fight against segregation.⁸³ 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.⁸⁴

Even as Mitchell worked unrelentingly toward this goal, a more provocative leader, Representative Adam Clayton Powell, became the public face of the crusade.⁸⁵ Powell, the minister of a historic Harlem congregation, was the first black representative to be elected to

⁷⁹ 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).

⁸⁰ Federal Aid to Education, *in* 3 The Papers of Clarence Mitchell, 1946–1950, at clxvii (Denton L. Watson ed., 2010).

⁸¹ Hamilton, *supra* note 77, at 225; Munger & Fenno, *supra* note 41, at 68–69.

⁸² 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).

⁸³ Federal Aid to Education, *supra* note 80, at clxvii.

⁸⁴ *Id.* at clxix–clxx.

⁸⁵ Hamilton, *supra* note 77, 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").

Congress from New York.⁸⁶ 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.”⁸⁷ After 1950, Powell consistently worked with the NAACP to propose amendments barring segregation in programs receiving federal funds.⁸⁸ In 1955, with *Brown* providing constitutional grounding for his position, Powell announced that he would attach his amendment to all new education legislation.⁸⁹ A legislative stalemate over federal aid and the “Powell Amendment” resulted.

In the face of the congressional impasse, civil rights advocates instead pressured the executive branch for action, focusing on the federal education officials who supervised the flow of federal funds to Southern schools.⁹⁰ 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.⁹¹

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 the defense of civil rights.⁹²

C. Structure, Oversight, and Staff

Although the Office of Education was an executive agency, Congress intentionally structured it in ways that made it difficult for the White

⁸⁶ Adam Clayton Powell, Jr., *Adam By Adam: The Autobiography of Adam Clayton Powell, Jr.* 46–54, 62–68 (1971).

⁸⁷ *Id.* at 128.

⁸⁸ Hamilton, *supra* note 77, at 227–35.

⁸⁹ Powell, Jr., *supra* note 86, at 120.

⁹⁰ For a detailed discussion of their campaign for executive branch action, see *infra* Part II.

⁹¹ E.g., Wilkins & Aronson, *Proposals*, *supra* note 63, 11–15.

⁹² Miles, *supra* note 44, 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 6, at 855–59, 867–73, 878–81.

House to control. Within its parent department, HEW, the Office was perceived as “both incompetent and separatist.”⁹³ 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.⁹⁴ 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.⁹⁵

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.”⁹⁶ 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.”⁹⁷ 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

⁹³ Keppel, *supra* note 27, at 33.

⁹⁴ Interview by Helen Hall with Ralph K. Huitt, former Assistant Sec. for Legislation and Cong. Relations, Health, Educ., & Welfare, Washington, D.C. at 4 (Sept. 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. Douglass Cater; Box 13B). Secretary Abraham Ribicoff called the department unmanageable at his final press conference upon resigning in 1962. Miles, *supra* note 44, at 43.

⁹⁵ 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 44, 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).

⁹⁶ Fred M. Hechinger, *Emphasis on Education: Gardner’s Appointment to Cabinet Puts School Problems into Agency’s Limelight*, *N.Y. Times*, July 28, 1965, at 18.

⁹⁷ *Id.*

organization handling education will some day be elevated to a Cabinet department.”⁹⁸ 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, rather than by Congress.⁹⁹

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 (“OGC”) provided legal advice to all the program agencies, with its staff attorneys specializing in particular areas and often staying for decades.¹⁰⁰ 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 echelons of the [organization].”¹⁰¹ 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.¹⁰²

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.¹⁰³ Under traditional standing doctrines, individual taxpayers could not challenge federal spending on the ground that it was

⁹⁸ Miles, *supra* note 44, 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.

⁹⁹ *Id.* at 28.

¹⁰⁰ By the end of the Johnson administration, the ten highest-ranking attorneys in the OGC, including General Counsel Willcox, had all served for at least twenty years in the office. Alanson W. Willcox, Gen. Counsel, Forward to 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).

¹⁰¹ Miles, *supra* note 44, at 68.

¹⁰² *Id.* at 69.

¹⁰³ 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]).

unconstitutional.¹⁰⁴ Moreover, the Administrative Procedure Act of 1946 specifically exempted grant-making from notice and comment rule-making.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

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

¹⁰⁴ 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, § 207(b), 64 Stat. 967

¹⁰⁵ Pub. L. 79–404, § 4, 60 Stat. 237, 238 (1946) (exempting “any matter relating to . . . public property, loans, grants, benefits, or contracts” from notice and comment requirements); see also Pasachoff, *supra* note 23, at 334.

¹⁰⁶ In the post–World War II 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 41, at 122; Wayne J. Urban, *More Than Science and Sputnik: The National Defense Education Act of 1958*, at 17–33 (2010); Interview by Donald Ritchie with Stewart E. McClure, Chief Clerk, S. Comm. on Labor, Educ., and Pub. Welfare (1949–1973), at 106, 108, 186–87 (January 28, 1983) (on file with the Senate Historical Office, Washington, D.C.).

¹⁰⁷ 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 23, at 334 (pointing out that “a large subset of grant statutes, unlike most other statutes, are subject to regularly scheduled reauthorizations and modification”).

of joint work.¹⁰⁸ As a result, Commissioners could not always exercise control over the various 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).”¹⁰⁹

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.¹¹⁰ Further, many worked with the education groups, either after serving in the Office or even as consultants outside of office hours.¹¹¹ The Office’s career employees’

¹⁰⁸ See Radin, *supra* note 23, at 41, 150. For example, Wayne Reed, Deputy Commissioner from 1957 to 1965, was a former state superintendent of education, principal, and teacher and 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 39, at 191–92; Rall Grigsby, Education Office Chief, *Wash. Post*, Sept. 1, 1975, at B11.

¹⁰⁹ Radin, *supra* note 23, at 186.

¹¹⁰ 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 28, 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; Marvin 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 23, at 31–32. The Office staff was also disproportionately from the South, Southwest, and Midwest. *Id.*

¹¹¹ 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 23, at 32.

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."¹¹²

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.¹¹³ Its long-time executive director, William Carr, advocated "gradualism and voluntarism" in school desegregation until he stepped down in 1966, viewing integration as a threat to his association.¹¹⁴ 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.¹¹⁵ Several attempts to pass a resolution endorsing *Brown* failed in the 1950s, and a mild statement of support did not emerge until 1961.¹¹⁶ 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.

* * *

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

¹¹² Id. at 31 (quoting a former Office of Education official).

¹¹³ 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, Jr., *The National Education Association and the Black Teacher: The Integration of a Professional Organization* 81 (1970).

¹¹⁴ Marjorie Murphy, *Blackboard Unions: the AFT and the NEA, 1900–1980*, 205–06 (1992).

¹¹⁵ Id. at 201, 205.

¹¹⁶ Schultz, *supra* note 113, 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.

structuring the Office to have limited powers, while continually refusing to expand its role, Congress predisposed the Office to avoid questions of racial justice. As a result, its officials prioritized distributing federal grants for education, while steering clear of any hint of federal control or social controversy.

II. SUBSIDIZING SEGREGATION

How then did the Office of Education understand equal protection mandates in the era of *Brown v. Board of Education*?¹¹⁷ How did the agency justify directing federal taxpayers' funds to segregated schools? In this Part, 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.

A. 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.¹¹⁸ 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.

¹¹⁷ 347 U.S. 483 (1954).

¹¹⁸ Exec. Order No. 9981, 13 Fed. Reg. 4,313 (July 28, 1948); Brief for the United States as Amicus Curiae at 17, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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.¹¹⁹ 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 white" schools and bused to off-base Jim Crow schools instead.¹²⁰ 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.¹²¹

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.¹²² 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.¹²³

¹¹⁹ James L. 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 28, 1948) (integrating the armed forces).

¹²⁰ Hicks, *supra* note 119, at 1; 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).

¹²¹ 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 120. 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.

¹²² 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, 1951–1954*, at 405 (Denton L. Watson ed., 2010).

¹²³ Letter from Anna M. Rosenberg, Assistant 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) [hereinafter Commissioner Office Files, Box 79]).

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].”¹²⁴ 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.”¹²⁵

After President Eisenhower took office, McGrath maintained this position. In a memo preparing the new HEW Secretary, Oveta Culp Hobby, for a meeting with Clarence Mitchell, McGrath advised her that the Office’s policy was “one of noninterference [with segregation], in keeping with the accepted principle of State and local control of education.”¹²⁶ 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.”¹²⁷ 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.

Facing the agency’s commitment to the principle of “non-interference” with local schools, civil rights leaders sought to involve

¹²⁴ 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, Box 79, *supra* note 123) [hereinafter Statement of Comm’r McGrath]. 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, Assistant Sec’y Def. (Jan. 15, 1953) (on file in Commissioner Office Files, Box 79, *supra* note 123).

¹²⁵ 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, Box 79, *supra* note 123); see also United Press (Segregation) (Jan. 15, 1953) (on file in Commissioner Office Files, Box 79, *supra* note 123).

¹²⁶ Memorandum from Earl J. McGrath to Oveta Culp Hobby, Administrator (Mar. 2, 1953) (on file in Commissioner Office Files, Box 79, *supra* note 123). 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.*

¹²⁷ 4 The Papers of Clarence Mitchell, 1951–1954, at 349 n.14 (Denton L. Watson ed., 2010) (quoting Letter from Secretary Oveta Hobby to Senator Hubert Humphrey (May 18, 1953), NAACP WB-171, Library of Congress).

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.¹²⁸

A week later, Eisenhower followed up by ordering on-base schools operated by federal authorities to be integrated.¹²⁹ On-base schools operated by local authorities required further study due to “complicating factors.”¹³⁰

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.¹³¹ 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.”¹³²

After civil rights leaders got wind of Hobby’s arguments, they again publicized the problem, eventually forcing the White House to

¹²⁸ The American Presidency Project, Dwight D. Eisenhower, The President’s News Conference (March 19, 1953), <http://www.presidency.ucsb.edu/ws/?pid=9798> [permalink: <https://perma.cc/RT6Y-PW7Y>].

¹²⁹ 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> [permalink: <https://perma.cc/XWB7-B5EF>].

¹³⁰ *Id.*

¹³¹ 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).

¹³² *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.

adjudicate between the competing principles of federalism and non-discrimination.¹³³ 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.”¹³⁴

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 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.”¹³⁵ 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.”¹³⁶ In November 1953, two new whites-only schools opened on federal bases in Texas.¹³⁷ 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.¹³⁸

¹³³ Powell, Jr., *supra* note 86, at 98–99.

¹³⁴ *Id.* at 100–01. Powell replied enthusiastically, calling the president’s letter “a second Emancipation Proclamation.” *Id.*

¹³⁵ 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, Box 79, *supra* note 123) (quoting an unnamed “White House representative” in conferences held on June 17 and 18, 1953).

¹³⁶ Clarence Mitchell, Jr., A Report From Washington (June 15, 1953), *in* 4 *The Papers of Clarence Mitchell*, *supra* note 127, at 362.

¹³⁷ 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.

¹³⁸ Military’s Racial Integration is Sabotaged, *supra* note 137. 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.

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.¹³⁹ 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.¹⁴⁰

Several months later, Secretary of Defense Charles Wilson circulated an unequivocal directive ordering on-base schools integrated.¹⁴¹ Grigsby again voiced concern: A new whites-only school was slated to open at Craig Air Force Base in Selma, Alabama, within days.¹⁴² 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 operated by local school authorities on a segregated basis.”¹⁴³ 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.¹⁴⁴

Meanwhile, HEW lawyers refused to interpret the impact-aid statutes’ reference to “suitable free public education” to exclude segregated

¹³⁹ Grigsby Letter, *supra* note 135, at 2.

¹⁴⁰ *Id.* at 4–5.

¹⁴¹ 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, Box 79, *supra* note 123).

¹⁴² 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, Box 79, *supra* note 123).

¹⁴³ *Id.*

¹⁴⁴ *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 127, at 428.

schools.¹⁴⁵ 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.”¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

In early 1955, only two on-base schools had been integrated, and two more closed; seventeen more schools remained segregated.¹⁴⁹ Though the Secretary of Defense had originally committed to integrating all base schools by fall 1955, the process was not completed until 1959.¹⁵⁰

¹⁴⁵ Letter from Parke M. Banta, Gen. Counsel, to the Sec’y & Under Sec’y (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]).

¹⁴⁶ *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).

¹⁴⁷ *Id.*

¹⁴⁸ Clarence Mitchell, Jr., Annual Report (Dec. 31, 1954), *in* 4 *The Papers of Clarence Mitchell*, supra note 127, at 462.

¹⁴⁹ United Press, Segregation (Jan. 3, 1955) (on file in Commissioner Office Files, Box 79, supra note 123). 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.*

¹⁵⁰ A number of segregated schools with long-term leases of federal land were allowed to persist, among other exceptions. See, e.g., Memorandum from Hugh M. Milton II, Assistant Sec’y Army, to Assistant 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, the Office otherwise 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.¹⁵¹

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.¹⁵² 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 segregation education was not, in fact, “suitable” education.¹⁵³

B. Reading, and Rereading, Brown v. Board of Education

The Office of Education also construed the equal protection mandate of *Brown* 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.”¹⁵⁴ In

Anderson, Memorandum to the Sec’y of Def. (June 7, 1955), in 12 Blacks in the United States Armed Forces: Basic Documents 358 (Morris J. MacGregor & Bernard C. Nalty eds., 1977); see also Robert Fredrick Burk, *The Eisenhower Administration and Black Civil Rights* 32 (1984) (describing the same exceptions).

¹⁵¹ Letter from Rall I. Grigsby, 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)).

¹⁵² See Letter from Parke M. Banta, supra note 145.

¹⁵³ See infra Part II.E.

¹⁵⁴ 347 U.S. 483, 495 (1954).

Bolling v. Sharpe, the Court confirmed that the Fifth Amendment applied the same principle to the federal government.¹⁵⁵

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.

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."¹⁵⁶ 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.¹⁵⁷ She also asked HEW General Counsel Parke M. Banta to explore possible actions by the department, preparing a draft submission to the Attorney General. In response, OGC offered a memo, entitled "Problems Arising in the Administration of Education Laws Because of Supreme Court Decisions Declaring Segregated Education Unconstitutional."¹⁵⁸

¹⁵⁵ 347 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.").

¹⁵⁶ United Press, Schools (May 20, 1954) (on file in Commissioner Office Files, Box 79, *supra* note 123).

¹⁵⁷ Letter from Parke M. Banta, Gen. Counsel, to the Secretary (June 22, 1954) (on file in OGC Opinion Files, *supra* note 145) (quoting minutes of the June 7, 1954, staff meeting).

¹⁵⁸ Letter from A.D. Smith, Assistant Gen. Counsel, Welfare & Educ. Div., to Parke M. Banta, Gen. Counsel (June 9, 1954) (on file in OGC Opinion Files, *supra* note 145).

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.”¹⁵⁹ 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.”¹⁶⁰ 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.”¹⁶¹ 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.¹⁶²

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 those cases.”¹⁶³ 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.”¹⁶⁴

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

¹⁵⁹ 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.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id. (citing the government's brief in *State of Arizona ex rel. v. Hobby*, No. 11,839, D.C. Cir.).

¹⁶³ Id.

¹⁶⁴ Id.

to “the course we have always taken” appeared “legally supportable.”¹⁶⁵ Banta argued that consulting with the Justice Department could have unfortunate consequences for the agency.¹⁶⁶ 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.”¹⁶⁷ 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.”¹⁶⁸

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.”¹⁶⁹ Banta evidently did not wish to open the question of the agency’s constitutional responsibilities to further debate and scrutiny, much less an override by the Justice Department.¹⁷⁰

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 other federal actors. In this case, the conflict apparently did not materialize, given the General

¹⁶⁵ Parke M. Banta, Gen. Counsel, to the Secretary 1 (June 22, 1954) (on file in OGC Opinion Files, *supra* note 145).

¹⁶⁶ *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.*

¹⁶⁷ *Id.* at 2.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* However, Banta suggested an administrative solution in the case of segregated hospitals receiving funding under the Hill-Burton Act.

¹⁷⁰ 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.” Brownell Interview, *supra* note 44, at 75–78.

Counsel's advice to avoid consulting with the Attorney General.¹⁷¹ 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.¹⁷² HEW also had a new leader, Arthur Flemming, who took an active interest in school desegregation.¹⁷³

That fall, Assistant HEW Secretary Elliot Richardson sent the new Secretary a memo on *Brown's* implications for the impact-aid program.¹⁷⁴ 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.¹⁷⁵ That the memo came from him rather than the OGC suggested that it was not simply a matter of

¹⁷¹ 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. On the other hand, Commissioner Brownell later recalled that he had "never discussed the matter" of *Brown* 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.

¹⁷² 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*, 82–86 (1979) (describing massive resistance).

¹⁷³ OCR, HEW Administrative History, *supra* note 172, at 85–86, 92.

¹⁷⁴ 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)).

¹⁷⁵ Miles, *supra* note 44, at 35, 71; Sundquist, *supra* note 18, 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, 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).

legal analysis, though Richardson was a highly credentialed lawyer.¹⁷⁶ In the memo, Richardson considered whether education officials should rely on the Constitution or statutory interpretation to halt funds for segregated schools.

Richardson read the substantive equal protection mandate narrowly.¹⁷⁷ He argued that the Court's remedial decree in *Brown II*¹⁷⁸ provided a "grace period," as he put it, for segregated schools to remain so.¹⁷⁹ 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."¹⁸⁰

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.¹⁸¹ 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."¹⁸² Thus, he believed resolution came down to policy considerations, which required "extended analysis" of a depth not possible in the memo.¹⁸³

¹⁷⁶ 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 172, at 88.

¹⁷⁷ Richardson, *supra* note 174, at 3.

¹⁷⁸ *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

¹⁷⁹ Richardson, *supra* note 174, at 2.

¹⁸⁰ *Id.* at 3.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 4.

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.¹⁸⁴ OGC 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.¹⁸⁵

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 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.¹⁸⁶

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.¹⁸⁷ The doctrine barring taxpayer standing to challenge unconstitutional federal expenditures impeded such suits.¹⁸⁸ Liberals in Congress would later cite

¹⁸⁴ 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 174, at 4.

¹⁸⁵ Richardson, *supra* note 174, at 4.

¹⁸⁶ See *infra* Part II.E.

¹⁸⁷ See A.D. Smith, *supra* note 158, at 3.

¹⁸⁸ See *Massachusetts v. Mellon*, 262 U.S. 447, 486–88 (1923) (ruling in the *Frothingham* case, which involved a taxpayer’s suit alleging that the federal Maternity Act violated the Tenth Amendment, 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”).

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.¹⁸⁹ 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.

C. 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 enforcing *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.¹⁹⁰ As part of those campaigns, the White House and the education agency's leaders uniformly opposed any attempt to attach anti-segregation 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

¹⁸⁹ 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, NAACP Legal Def. & Educ. Fund, regarding Racial Discrimination in Housing (ca. early 1953) (on file with author). 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.

¹⁹⁰ Munger & Fenno, *supra* note 41, at 104–05, 149.

their own mission of improving schools.¹⁹¹ 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.¹⁹² 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.¹⁹³ 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.”¹⁹⁴

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 in any case for the Commissioner of Education to implement a judicial decree like

¹⁹¹ Eisenhower called the anti-segregation provision “extraneous” while Kennedy’s HEW Secretary dismissed it as a “side issue[.]” Dwight D. Eisenhower, *The President’s News Conference* (June 8, 1955), <http://www.presidency.ucsb.edu/ws/index.php?pid=10253> [permalink: <https://perma.cc/4AV8-38XJ>]; *School-Aid Plan Stirs Race Issue*, *N.Y. Times*, Feb. 21, 1961, at 23.

¹⁹² See Ethel Payne, *Ike’s Anti-Bias Record All Talk, No Action*, *Chi. Defender*, Aug. 20, 1955, at 4.

¹⁹³ 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).

¹⁹⁴ *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).

Brown.¹⁹⁵ 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.”¹⁹⁶ Thurgood Marshall provided a legal memorandum rebutting the NEA’s arguments, but even liberals attacked the Powell Amendment as endangering the legislation, and it was rejected in committee.¹⁹⁷ That fall, at the White House Conference on Education, only a small minority of participants favored conditioning federal school aid on compliance with *Brown*.¹⁹⁸

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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ In fall 1956, the NEA again opposed anti-segregation provisions, arguing that attempts to

¹⁹⁵ See 1955 House School Construction Hearings, *supra* note 193, at 1062–64 (statement of Clarence Mitchell and legal memorandum by Thurgood Marshall).

¹⁹⁶ Emergency Federal Aid for School Construction, Hearings Before the S. Comm. on Labor & Pub. Welfare, 84th Cong. 232–34 (1955) (statement of Dr. Edgar Fuller); Ike’s School Aid Bill Stirs Jim Crow Furore, *Chi. Defender*, Feb. 19, 1955, at 3.

¹⁹⁷ 1955 House School Construction Hearings, *supra* note 193, at 1062–64; School Aid, *in* CQ Almanac 1955, at 265–70 (11th ed. 1956), <http://library.cqpress.com/cqalmanac/cqal55-1353260> [permalink <https://perma.cc/8HZZ-FCVG>].

¹⁹⁸ 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.

¹⁹⁹ See Sundquist, *supra* note 18, 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).

²⁰⁰ Munger & Fenno, *supra* note 41, at 14. However, the voting records suggest that race was not actually the causal factor in the bill’s defeat. *Id.* at 150–51.

²⁰¹ Schultz, *supra* note 113, at 80 (quoting the *NEA Journal*).

enforce such conditions would “contradict[] the principle of federal aid without federal control.”²⁰²

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.²⁰³ 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.²⁰⁴ 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,²⁰⁵ while Kennedy affirmed that “education must remain a matter of state and local control.”²⁰⁶

In opposing anti-segregation safeguards, both the Eisenhower and the Kennedy administrations thus rejected the argument of the NAACP and its allies that Congress had “a clear duty” to ensure that states receiving federal funds complied with the Constitution.²⁰⁷ 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

²⁰² Urban, *supra* note 106, at 113 (quoting the NEA Journal).

²⁰³ John D. Morris, President Warns Loans Could Kill School-Aid Plans, *N.Y. Times*, Mar. 9, 1961, at 1.

²⁰⁴ School-Aid Plan Stirs Race Issue, *supra* note 191.

²⁰⁵ Powell Is Left No Alternative, *Afro-Am.*, Mar. 4, 1961, at 4.

²⁰⁶ Erwin Knoll, Kennedy Submits Plan for \$5.6 Billion in Aid to Schools, Teachers, *Wash. Post*, Feb. 21, 1961, at A1.

²⁰⁷ 1955 House School Construction Hearings, *supra* note 193, at 1060 (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 (statement 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.”).

maintaining Southern Democrats as crucial members of their legislative coalitions.

D. 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.²⁰⁸ 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 Department justified its continued funding of segregated institutions, citing the various statutory mandates, educational needs, deference to the judiciary, and the limits of executive power.²⁰⁹

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.”²¹⁰ 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.²¹¹

²⁰⁸ Pub. L. 85–315, § 104(a)(3), (b), (c), 71 Stat. 634, 635 (1957).

²⁰⁹ Letter from the Secretary, Dep’t of Health, Educ., & Welfare to Gerald D. Morgan, Deputy Assistant 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).

²¹⁰ Report of the United States Commission on Civil Rights, *supra* note 209, at 329.

²¹¹ *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?"²¹² 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.²¹³

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.²¹⁴ 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."²¹⁵ That the Office of Education disagreed so sharply with the Commission highlighted the agencies' distinct institutional qualities—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.

²¹² U.S. Comm'n on Civil Rights, *Equal Protection of the Laws in Public Higher Education* 180 (1960).

²¹³ *Id.* at 180, 266–67.

²¹⁴ Letter from Wilbur J. Cohen, Assistant Sec'y-designate, to Ralph Flynt, Assistant 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 28, at 284.

²¹⁵ Flynt Memorandum, *supra* note 214, at 2.

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."²¹⁶ King condemned the federal government for its prior "self-nullifying" approach to civil rights, terming it "the nation's highest investor in segregation."²¹⁷ The *New York Times* previewed the constitutional arguments for withholding funds from segregated institutions on the President's first day in office.²¹⁸

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.²¹⁹ 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."²²⁰ And they suggested that the Fifth Amendment's prohibition of racial discrimination *required* the federal government to avoid supporting segregated institutions.²²¹

²¹⁶ Martin Luther King, Jr., *Equality Now: The President Has the Power*, *The Nation*, Feb. 4, 1961, at 91.

²¹⁷ *Id.* at 92.

²¹⁸ 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.").

²¹⁹ 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> [permalink: <https://perma.cc/55DB-R94B>]; Wilkins & Aronson, *Proposals*, *supra* note 63.

²²⁰ Wilkins & Aronson, *Proposals*, *supra* note 63, at 13.

²²¹ *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

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 all federally funded programs.²²² 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.”²²³ 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 inability on the part of the President to carry out his orders.”²²⁴ White concluded that the administration should offer a statement highlighting its commitment to ending discrimination,

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. S8067 (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. S8530 (1961) (statement of Sen. Keating).

²²² 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> [https://perma.cc/Z7RJ-CFWF]; 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> [permalink: <https://perma.cc/7DPL-XWPM>] (containing the finalized version of the 11/17/61 Memo, which appears in draft form but seems to have been filed and time-stamped after the 11/13/61 White Memo was completed) 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> [permalink: <https://perma.cc/P2UQ-EY3E>].

²²³ 11/13/61 Memo, *supra* note 222.

²²⁴ *Id.*

but simply tell HEW to study the possibility of more incremental reforms without publicity until some achievements were forthcoming.²²⁵

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* as well as federal officials' role in funding segregated Southern schools.²²⁶ 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.²²⁷

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.²²⁸ Commissioner of Education Sterling McMurrin justified the Office'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.²²⁹

²²⁵ White also recommended issuing Kennedy's long-awaited executive order on fair housing along with several more miscellaneous ones. *Id.*

²²⁶ See *Integration*, *supra* note 1, at 264 (statement of C. Sumner Stone, Jr., Editor, *Washington Afro-American*).

²²⁷ *Id.* at 13–82 (statements of Abraham Ribicoff, Secretary, Dep't of Health, Educ., & Welfare, and Comm'r McMurrin, U.S. Commissioner of Education, Office of Educ.); 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).

²²⁸ *Integration*, *supra* note 1, 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.”).

²²⁹ *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.

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."²³⁰ Under existing 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.²³¹ The Justice Department "agreed informally," Willcox recalled later.²³² The General Counsel's later memos indicated that he based his position both on principles of federalism and the pragmatic burdens that constitutional enforcement might place on HEW.²³³ 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.²³⁴

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

²³⁰ Memorandum from Alanson W. Willcox, Gen. Counsel, to the Secretary 1, 4 (April 25, 1962) (Frances White personal collection, on file with author).

²³¹ *Id.* at 1 n.1–2; cf. Pasachoff, *supra* note 23, at 315 (noting that Congress is especially likely to object to agency efforts to withhold funds from mandatory programs).

²³² Letter from Alanson W. Willcox, Gen. Counsel, to Professor Archibald Cox 1–2 (Sept. 10, 1968) (Frances White personal collection, on file with author).

²³³ Memorandum from Alanson W. Willcox, Gen. Counsel, to Sec'y Wilbur Cohen 2 (Sept. 13, 1968) (Frances White personal collection, on file with author) [hereinafter Willcox to Cohen]; see also Tani, *Administrative*, *supra* note 6, 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).

²³⁴ Willcox to Cohen, *supra* note 233, 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).

were duty bound to obey the Constitution, and that federal grants for segregated schools violated the Constitution.²³⁵ The Library of Congress's analysis also supported this proposition.²³⁶ Further support began to appear in the pages of law reviews.²³⁷ By 1963, Harvard Law School Dean Erwin Griswold testified to Congress that the executive had the constitutional power to withhold funds.²³⁸

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 authority to withhold funds from discriminatory programs under existing law.²³⁹ 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."²⁴⁰ 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.²⁴¹ To find otherwise would

²³⁵ *Integration*, supra note 1, at 203, 431.

²³⁶ 107 Cong. Rec. S8067 (1961).

²³⁷ See Kranz, supra note 188, 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).

²³⁸ *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) (statement of Dean Erwin Griswold).

²³⁹ 109 Cong. Rec. S12,089–115 (1963) (statement of Sen. Javits).

²⁴⁰ 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).

²⁴¹ *Id.* at 10, 12.

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.²⁴²

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.²⁴³ But the Office of Education remained steadfast.

E. Reinterpreting Federal Statutes, Grudgingly

In the 1960s, presidential pressure began to overcome the Office of Education's resistance to halting its support for segregated schools. Education officials hesitantly 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.²⁴⁴ 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.

In August 1960, the HEW task force produced a Staff Paper on Civil Rights, after “a very hard process.”²⁴⁵ The Staff Paper laid out a litany of

²⁴² 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).

²⁴³ Joseph D. Mathewson, Pressure Tactic: Government Readies Cutoff in Federal Aid to Force Integration, *Wall St. J.*, Aug. 6, 1963, at 1.

²⁴⁴ Memorandum from Jarold A. Kieffer, Assistant to the Sec'y, 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).

²⁴⁵ OCR, HEW Administrative History, *supra* note 172, at 105, 108 (quoting Dr. Joseph H. Douglass, a leader of the task force).

discrimination in the programs HEW funded, though the authors originally soft-pedaled their findings as “some inconsistencies and problems in civil rights matters.”²⁴⁶ 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.²⁴⁷ 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.²⁴⁸

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.²⁴⁹ 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.²⁵⁰

The Staff Paper “caused a great stir within the Department.”²⁵¹ 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:

²⁴⁶ 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).

²⁴⁷ 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).

²⁴⁸ *Id.* at 42, 53.

²⁴⁹ *Id.* at 35, 54.

²⁵⁰ *Id.* at 62–69.

²⁵¹ OCR, HEW Administrative History, *supra* note 172, at 113.

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: [i.e.,] 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?²⁵²

Rall Grigsby, head of the federal impact-aid program, forwarded more criticisms. Grigsby disagreed strongly with the idea that the 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.²⁵³ For his part, General Counsel Banta apparently disagreed with a basic legal premise in the paper: “[I]n the absence of enabling legislation, the grant-discrimination liaison could be related to Constitutional obligations.”²⁵⁴ To Banta, a later commentator wrote, “the only proper relationship for these questions, and in any case the governing one, was to statutory law and statutorily conferred obligations.”²⁵⁵

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.”²⁵⁶ Using what they acknowledged to be a deliberately conservative approach, the

²⁵² Memorandum from L.G. Derthick, Comm’r of Educ., to the Secretary, Dep’t of Health, Educ. & Welfare 1 (Sept. 7, 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)) (underlining in original).

²⁵³ Memorandum from Rall I. Grigsby, Dir., Sch. Assistance in Federally Affected Areas, to Lucille Anderson, Admin. Assistant to Comm’r, Office of Educ. 1–2 (Sept. 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)).

²⁵⁴ OCR, HEW Administrative History, *supra* note 172, at 113 (citing a review of the General Counsel files).

²⁵⁵ *Id.*

²⁵⁶ Memorandum from Jarold A. Kieffer, Assistant to the Secretary, Dep’t of Health, Educ. & 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).

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.”²⁵⁷ Statutes that contained clear endorsements of segregation (for example, the Second Morrill Act) or bars on federal interference with administrative matters (for example, 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.²⁵⁸

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 their various professional associations).²⁵⁹ As the task force’s leader recalled later, “We were few and our voices were feeble.”²⁶⁰

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

²⁵⁷ 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 23, 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).

²⁵⁸ Checklist, *supra* note 257.

²⁵⁹ 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).

²⁶⁰ OCR, HEW Administrative History, *supra* note 172, at 101.

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.²⁶¹ Behind the scenes, the White House encouraged those steps.²⁶²

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.²⁶³ 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.²⁶⁴ 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.²⁶⁵

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.²⁶⁶ Like Rall

²⁶¹ 11/13/61 White memo, *supra* note 222, at 2–3.

²⁶² See, e.g., Memorandum from Lee C. White, Assistant Special Counsel to the President, to Honorable Anthony J. Celebrezze, Sec’y, 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) (praising HEW for “significant progress” in other areas and encouraging further steps with respect to vocational education, public health grants, and land-grant colleges).

²⁶³ Integration, *supra* note 1, at 456.

²⁶⁴ *Id.* at 455–56.

²⁶⁵ See *supra* note 228 and accompanying text.

²⁶⁶ 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) [hereinafter Lillywhite Memo]. 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

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.”²⁶⁷ 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.”²⁶⁸ 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.²⁶⁹ 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.²⁷⁰ The actual effect of Ribicoff’s new interpretation was much narrower. Under the impact-aid statutes, the new interpretation authorized the Office of Education to fund and operate integrated schools on federal installations. Such an interpretation carried the potential of 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.²⁷¹

Carolina), and assistant director for federal grants and loans for public works at the Federal Works Administration. Obituaries, Wash. Post, Jan. 3, 1996, at D5; McClure, *supra* note 106, at 94; Powell, Jr., *supra* note 86, at 199–200; Barden, Graham Arthur, Biographical Dictionary of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=B000139> [permalink: <https://perma.cc/69KX-V3WE>].

²⁶⁷ Lillywhite Memo, *supra* note 266.

²⁶⁸ *Id.* at 3.

²⁶⁹ *Id.*

²⁷⁰ 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]).

²⁷¹ See Act of September 30, 1950, Pub. L. No. 81–874, § 6, 64 Stat. 1100, 1107 (1950) (requiring the Commissioner to make arrangements “as may be necessary to provide free

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,”²⁷² the Commissioner’s assistant assured the writer that “[n]o money is to be withheld.”²⁷³ He explained “local schools will be paid for every federally affected child in attendance”—though he acknowledged that fewer children might attend once integrated schools were offered as alternatives.²⁷⁴ 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,²⁷⁵ he responded that the action was grounded in the language of P.L. 815 and 874, hence it “does not establish a precedent which can be extended to other Federal programs.”²⁷⁶

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 who attended off-base schools in the 17 states with de jure segregation.²⁷⁷ Citing legal uncertainties, he concluded that arranging for

public education” for children residing on federal property, provided he has determined that “no local educational agency is able to provide suitable free public education”).

²⁷² 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).

²⁷³ 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).

²⁷⁴ *Id.*

²⁷⁵ Letter from Charles C. Diggs, Jr. to Abraham A. Ribicoff (May 16, 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).

²⁷⁶ 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).

²⁷⁷ 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

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.²⁷⁸ 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.²⁷⁹ In 1963, the administration determined that it would build eight new elementary schools on bases for the fall.²⁸⁰ Even with this limited application, though, the *New York Times* 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.²⁸¹

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).

²⁷⁸ *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.

²⁷⁹ Memorandum from 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.

²⁸⁰ 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).

²⁸¹ John Herbers, Now All States Have Some Integration, *N.Y. Times*, Sept. 6, 1964, at E8; U.S. Uses Courts, Funds to Push Desegregation, *Chi. Daily Defender*, Mar. 13, 1963, at 13.

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.²⁸² Rall Grigsby wrote in February 1962 that enforcement would present “grave difficulty” for the Office.²⁸³ 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.²⁸⁴ In March, Commissioner Sterling McMurrin reiterated Grigsby’s concerns to HEW leaders, writing that “it would be difficult to obtain compliance.”²⁸⁵ The OGC 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.²⁸⁶ 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.²⁸⁷

²⁸² The proposed directive would be issued the next year as Executive Order 11,114, 28 Fed. Reg. 6485 (June 25, 1963).

²⁸³ 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).

²⁸⁴ 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.*

²⁸⁵ 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).

²⁸⁶ See Letter from Norbert A. Schlei, Assistant Attorney Gen., Office of Legal Counsel, DOJ, to Alanson Willcox, Gen. Counsel, Dep’t of Health, Educ., & Welfare (Sept. 10, 1964) (on file with the Lyndon B. Johnson Library; DOJ Roll 8) (overriding the General Counsel’s objection from the prior year).

²⁸⁷ 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); Letter from Norbert A. Schlei to Alanson Willcox, *supra* note 286; Memorandum from Norbert A. Schlei, Assistant Attorney Gen., Office of Legal Counsel, DOJ, to Lee C. White, Assistant Special Counsel to the President (Sept. 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 11,114 to the impact-aid programs until after the passage of the Civil Rights Act. *Id.*

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.²⁸⁸ The staff's attitude seemed perfectly embodied in the notes from a March 1962 meeting on the Office's legislative program, which placed the "Recommendations Growing out of the Daniels Subcommittee on Problems of Desegregation" dead last among twenty-

²⁸⁸ In the spring of 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 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 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).

two areas of action, directly after the need to enact “Authority for Appointing Advisory Committees.”²⁸⁹

Nonetheless, the incremental steps taken during 1962 seemed significant given the Office of Education’s past. 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.”²⁹⁰ 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.”²⁹¹

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, Anthony Celebrezze, and a new Commissioner, Francis Keppel.²⁹² 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.²⁹³

²⁸⁹ 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)).

²⁹⁰ 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).

²⁹¹ 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)).

²⁹² Celebrezze was the former mayor of Cleveland, Ohio, while Keppel had been dean of the Harvard School of Education. Orfield, *supra* note 23, at 161, 165.

²⁹³ In the summer of 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

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.²⁹⁴

Over the next year, the agency revised its interpretation of the library services law to exclude segregated libraries from funding,²⁹⁵ applied a federal appellate ruling to read the "separate but equal" clause out of the land-grant colleges statute,²⁹⁶ and contemplated but did not act on

of Health, Education, and Welfare, 1935–1981; Subject Correspondence Files, 1956–1974; Box 133; 000.9 Civil Rights).

²⁹⁴ 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, Assistant Special Counsel to the President, to Anthony J. Celebrezze, Sec'y, 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).

²⁹⁵ 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. Memorandum from Office of Gen. Counsel, Library Services Desegregation [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, Assistant 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).

²⁹⁶ 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, *supra* note 1, at 24 (statement of James Quigley, Assistant Sec'y, HEW). 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

segregation in vocational education.²⁹⁷ 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.²⁹⁸ 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.²⁹⁹

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.³⁰⁰ 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

hospitals in November 1963. In *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 969 (4th 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.

²⁹⁷ The problem of vocational education lingered unresolved through 1964. The Office of Education had adopted an antidiscrimination regulation for the program in 1946, but it 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 (Sept. 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).

²⁹⁸ See *supra* notes 295–296 and sources cited therein.

²⁹⁹ 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]).

³⁰⁰ 109 Cong. Rec. S23,526 (1963) (statement of Sen. Javits).

administers, enforcing nondiscrimination under some but not under others.”³⁰¹ 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.”³⁰² 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”³⁰³

Thus, as the Civil Rights Act of 1964 came increasingly close to enactment, HEW appeared almost uniquely reluctant to exercise any responsibility over equal protection principles. The department had finally 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.

III. 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

³⁰¹ Id.

³⁰² Id.

³⁰³ 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”).

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.

A. 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.”³⁰⁴ 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. The

³⁰⁴ See supra note 202 and accompanying text.

Office was uniquely susceptible to these pressures: it was a grant-making agency dependent on continued program appropriations for its very existence, derived its political support primarily from state and local public education professionals, and was staffed by career officials with similar education backgrounds to those state and local education officials.³⁰⁵ 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.³⁰⁶ The Office relied on professional educators for information and political support, and its officials worked closely with them in their day-to-day work.³⁰⁷

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.³⁰⁸ 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.³⁰⁹

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

³⁰⁵ See Parts I.A and I.C.

³⁰⁶ See notes 41–44, 108–116 and accompanying text.

³⁰⁷ See *supra* notes 108–112 and accompanying text.

³⁰⁸ E.g., *Integration*, *supra* note 1, at 62 (statement of Sterling McMurrin, Comm'r of Educ., Office of Educ.); Statement of Comm'r McGrath, *supra* note 124.

³⁰⁹ See *supra* notes 74–76, 108–116 and accompanying text.

agency's delegated tasks, and in the rare instance that it did, equal protection was understood to mean only "separate but equal."³¹⁰ 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 parallel, as one Commissioner of Education put it.³¹¹ 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.³¹² 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.³¹³

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

³¹⁰ See Second Morrill Act, ch. 841, § 1, 26 Stat. 417 (1890).

³¹¹ See *Integration*, supra note 1, at 62, 65 (statement of Sterling McMurrin, Comm'r of Educ., Office of Educ.).

³¹² 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 247, at 62–69.

³¹³ 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.

problems, but it was not the task of the Office of Education to enforce the law.”³¹⁴

3. Lack of White House or Judicial Checks

The White House and the courts might have counteracted the influences of the Office’s constituencies and mission. 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.³¹⁵

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 from plaintiffs’ perspective, it likely appeared sufficient to seek relief only from the school districts in any case.³¹⁶

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

³¹⁴ McMurrin & Newell, *supra* note 28, at 284.

³¹⁵ See *supra* notes 128–146, 282–287 and accompanying text.

³¹⁶ See *supra* notes 188–189.

constitutional conditions on federal grants.³¹⁷ 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.³¹⁸ 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.³¹⁹ 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.³²⁰ While that position was certainly

³¹⁷ 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.”).

³¹⁸ See *supra* notes 58, 124–127 and accompanying text.

³¹⁹ 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).

³²⁰ 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 237, 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 n.1 (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*

arguable, agency leaders also 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.³²¹

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."³²² 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.³²³

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

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

³²¹ 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) and 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 A. Niskanen, Jr., *Bureaucracy and Representative Government* 38–39 (1971) (discussing agency budget maximization as an objective proxy for bureaucrats' utility).

³²² Second Morrill Act, ch. 841, § 1, 26 Stat. 417 (1890).

³²³ See, e.g., *Integration*, supra note 1, at 81 (statement of Sterling McMurrin, Comm'r of Educ., Office of Educ.) ("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.").

complications that such a principle might entail.³²⁴ 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.³²⁵

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.

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.³²⁶ While it is not surprising that such different entities would come to differing conclusions, some of the

³²⁴ See supra notes 230–242 and accompanying text.

³²⁵ See, e.g., *Integration*, supra note 1, at 67 (statement of Sterling McMurrin, Comm’r of Educ., Office of Educ.); 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, “[t]he 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”).

³²⁶ See supra Part II.

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 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.³²⁷ 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.”³²⁸

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).³²⁹ That claim does not contradict the idea that hard-wired design shapes an 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 qualified by the agency's status and pay), and who are sympathetic to or part of the constituencies

³²⁷ See *supra* text accompanying notes 292–298.

³²⁸ See Notes, *supra* note 299.

³²⁹ 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).

the agency serves.³³⁰ 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.

B. 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,"³³¹ the president changed his thinking once the nation saw Birmingham police turn fire hoses and dogs on peaceful civil rights protestors in May 1963.³³² The administration's June 1963 bill addressed voting, public accommodations, federal employment, and school desegregation.³³³

In Title VI of the bill, Kennedy proposed that Congress provide executive branch agencies with discretionary authority to enforce equal protection requirements.³³⁴ Separately, Title IV authorized the Office of Education to provide technical and financial assistance to school districts engaged in desegregation.³³⁵ Congressional liberals ultimately insisted that Title VI be made mandatory, explicitly barring racial

³³⁰ 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 Hecl, *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").

³³¹ Interview by Katherine Shannon of Joseph L. Rauh, Jr., Washington, D.C. 52 (Aug. 28, 1967), *The Civil Rights Documentation Project*.

³³² 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).

³³³ See H.R. 7152, 88th Cong. (as introduced June 20, 1963).

³³⁴ 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 1, at 8–62.

³³⁵ Civil Rights Act of 1964, Pub. L. 88–352, Title IV, §§ 403–406, 78 Stat. 241, 247–48.

discrimination in all federally funded programs and requiring agencies to enforce that mandate by cutting off funds if necessary.³³⁶

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.³³⁷

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.³³⁸ 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 that 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.³³⁹

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.³⁴⁰ 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

³³⁶ *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.

³³⁷ Radin, *supra* note 23, at 58–59.

³³⁸ Orfield, *supra* note 23, at 64.

³³⁹ 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 23, 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”).

³⁴⁰ Civil Rights Act of 1964, Pub. L. 88–352, Title VI, §§ 601, 602.

origin, not religion or gender, and exempted most employment.³⁴¹ Moreover, the law was laden 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.³⁴² 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."³⁴³ Congress explicitly anticipated that agencies would give flesh to the meaning of discrimination, applying their subject-area expertise and practical experience.³⁴⁴

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 their legal views.³⁴⁵ But the courts would also, at times, intervene to instruct the agency to enforce equal protection principles (as embodied in Title VI) differently.³⁴⁶ That had not occurred under the prior framework.

³⁴¹ Id. §§ 601, 604.

³⁴² 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. § 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.

³⁴³ Id. § 601.

³⁴⁴ 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).

³⁴⁵ Halpern, *supra* note 23, at 52–80.

³⁴⁶ Id. at 52–80, 91–105.

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."³⁴⁷ 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."³⁴⁸ For some in the Office, "civil rights problems . . . interfered with its major job of building quality schools, whatever the racial balance."³⁴⁹

In 1966, a firestorm ensued when the Office began imposing numerical goals for school desegregation outcomes on Southern school districts. One particularly vociferous stream of invective by a Southern legislator characterized the education commissioner as "the Commissar of Education."³⁵⁰ 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.³⁵¹ 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.³⁵²

Thus, the Office of Education's long resistance to exercising constitutional authority provoked a legislative overhaul—one that

³⁴⁷ 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, "[M]any people were seen as activists and fanatics who from most standards would be seen as pretty moderate people." Interview by Joshua Zatman with David Seeley, in Staten Island, NY, 36–37 (July 25, 1968) (on file with LBJ Library; Documentary Supplement to the OEO Administrative History; Volume I; Box 3A).

³⁴⁸ John Herbers, Congress Eroding Integration Law, *N.Y. Times*, Oct. 9, 1966, at 48.

³⁴⁹ *Id.*

³⁵⁰ 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").

³⁵¹ Orfield, *supra* note 23, at 320–24.

³⁵² *Id.*; Radin, *supra* note 23, at 67, 87–88.

immediately changed the agency's legal stance and opened up the door for education officials' more aggressive administrative constitutionalism over 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.³⁵³ 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.

IV. DESIGN AND THE ADMINISTRATIVE CONSTITUTION

What do these past struggles over the federal government's subsidies for segregation teach in the present? In highlighting the enduring influence of institutional design, this history contributes to our broader study of how agencies implement the Constitution, as well as our understanding of the administrative state's relationship to racial inequality.

A. Designing Administrative Constitutionalism

Approaching administrative constitutionalism through the lens of agency design offers two key lessons. First, agencies' approaches to the Constitution are likely to be highly variable, depending on each agency's particular institutional features. Second, democratic representatives' decisions can partially determine the forms that administrative constitutionalism will take.

That makes it difficult to generalize about the direction or substance of administrative constitutionalism. Agencies' construction of the Constitution will be deeply politically constrained by the choices that political principals in Congress and the White House make at their inception and throughout their subsequent life, in terms of both substantive mission and formal structure. Even the aspects of agency life that are sometimes viewed as "semi-autonomous"—in the sense that they acquire a path-dependent, persistent quality that resists later attempts at political control—are nonetheless shaped by early political

³⁵³ See James S. Murphy, *The Office for Civil Rights's Volatile Power*, *The Atlantic*, March 13, 2017, <https://www.theatlantic.com/education/archive/2017/03/the-office-for-civil-rights-volatile-power/519072/> [permalink: <https://perma.cc/JEL8-M8NN>] (discussing efforts of the newest political appointee, Education Secretary Betsy DeVos, to shift civil rights policy within OCR).

decision-making regarding particular agencies and occurring at specific moments in time.

Further, if political conflicts at the agency's creation reflect divisions over constitutional meaning, then choices about the agency's mandate and structure are likely to embed particular constitutional interpretations into the agency. As noted above, such constitutional interpretations may eventually acquire an "auto-pilot" or self-reproducing aspect, insofar as agency staff tend to take on those constitutional orientations as a natural result of carrying out their statutory tasks, interacting with their constituents in particular relationships, and working within the agency's particular structural incentives and culture.

Administrative constitutionalism therefore cannot be understood as a unified phenomenon, because agencies themselves may reflect such a wide-ranging set of political and historical circumstances, as well as the resilience of early choices. No clear approach to constitutional interpretation emerges from agencies writ large—other than to understand agency interpretation as the product of specific political compromises against the backdrop of particular historical contexts.

To the extent that agencies' constitutional interpretations flow in part from political actors' quite different ways of designing agencies' missions and structure, many intuitively appealing empirical generalizations become questionable. Normative assessments based on such generalizations—or premised on the lack of democratic control over agencies—are also risky.³⁵⁴ For example, assumptions about agencies' interest in claiming constitutional authority may be wrong. Leading scholars have pointed out the problems in "empire-building" assumptions.³⁵⁵ To the extent that courts or other legal commentators still presume that agencies will tend to self-aggrandize by claiming increasing amounts of constitutional power, or extending constitutional principles into ever-larger domains, this account draws that further into question.³⁵⁶ Particular agencies may be structured to be allergic to claiming particular types of authority—insofar as wielding those powers

³⁵⁴ See Metzger, *supra* note 7, at 1915–16 (noting that "the diverse character of the forms of constitutional interpretation placed within administrative constitutionalism's tent . . . may make global normative assessments seem of doubtful value").

³⁵⁵ See Levinson, *supra* note 321, at 932–34.

³⁵⁶ See, e.g., Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 Va. L. Rev. 1001, 1066, 1078–84 (2012) (citing concern with executive "self-dealing" to aggrandize power).

might undermine their relationships with key constituents or conflict with their primary mission.

This perspective also makes it problematic to treat evidence that an agency focuses on particular interests as proof of capture. One of the most widely cited historians of the civil rights era, Hugh Davis Graham, argued that after 1964 civil rights organizations “captured” key federal agencies, and caused the agencies’ unelected bureaucrats to distort the meaning of democratically enacted statutes.³⁵⁷ But Congress and the President deliberately allocate not just interpretive discretion but certain amounts of insulation to administrative actors, while structuring those actors to prioritize particular constitutional goals.³⁵⁸ In light of that reality, the fact that civil rights agencies often agreed with civil rights organizations might not reflect any form of capture, but rather their pursuit of goals originally laid out by democratic actors, via choices about institutional design.

To the extent that some praise administrative constitutionalism because it rests on expertise, or argue that this is one ground for deferring to agencies’ constitutional resolutions, it is important to qualify this point.³⁵⁹ Agencies may be designed to develop particular forms of expertise, but that does not imply that this substantive knowledge inevitably will help them resolve constitutional conflicts.³⁶⁰ When two principles collide, officials may just prioritize the constitutional goal that they better understand. Education officials’ expertise did not lead them to support the goal of racial integration in the era discussed here, apparently because they did not understand improving education and achieving integration as interwoven goals, but

³⁵⁷ See Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972*, at 469 (1990); 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). For a critique of similar theories of agency capture by advocacy organizations, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *Colum. L. Rev.* 1260, 1285–90 (2006) (challenging the idea that “ostensibly ‘public-serving’ groups prey on the sensibilities of warm-hearted but fuzzy-headed bureaucrats and congressmen”).

³⁵⁸ See *supra* notes 9–13 and accompanying text.

³⁵⁹ See, e.g., Eskridge & Ferejohn, *supra* note 7, at 277 (identifying agencies’ expertise as one element of their legitimacy); Metzger, *supra* note 7, at 1922–23 (arguing that agencies’ substantive expertise means that they will be better at integrating constitutional norms into their statutory framework and assessing the application of those norms to particular facts).

³⁶⁰ Cf. Metzger, *supra* note 7, at 1920 (“Administrative officials are not selected for their competency with constitutional doctrine or their awareness of constitutional principle.”).

rather as separate or even potentially in conflict; instead, the longstanding agency practice of embracing federalism norms led them to defer to state and local actors who supported segregation.³⁶¹ When it is necessary to balance multiple constitutional principles, one needs to know if the agency in question has expertise relevant to all the principles at stake.

Finally, forcing agencies to defend departures from consistency (on the assumption that this potentially reflects arbitrariness or procedural irregularity) might be unwise when a constitutional transition is underway.³⁶² If a longstanding agency with entrenched opposition to a particular constitutional principle finally changes its course, that may not indicate that something has gone wrong. Rather, the countervailing democratic pressures have forced change. In such cases, inconsistency is more democratically legitimate than consistency because the agency's shift reflects a great application of public will. In the case discussed here, for example, the Office of Education began changing its policies toward segregated schools in the early 1960s only after civil rights groups applied tremendous pressure.³⁶³ Such shifts should be viewed as legitimate ones if they are premised on principled constitutional interpretation and strong democratic demands.

B. The Administrative Constitution of Race

What does this history teach about the relationship of administrative constitutionalism and racial inequality? The Office of Education's past is not unique. Rather, it reflects a broader historical pattern. As the American administrative state expanded in the twentieth century, Southern legislators in Congress worked to ensure that national social programs would not address racial injustice. As a result, federal agencies and their far-reaching social programs directly contributed to the deepening of racial inequality in the United States. "[T]he wide array of

³⁶¹ See, e.g., Sterling M. McMurrin, *The Interest of the Office of Education in School Desegregation* 5–6 (May 3, 1962) (speech delivered at Fourth Annual Conference of the Commission on Civil Rights) (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)).

³⁶² Cf. Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 *Colum. L. Rev.* 1985, 2013 (2015) (suggesting that “an agency’s job is in part to provide as much coherence as possible between past commitments . . . and current policy preferences”).

³⁶³ See *supra* Parts II, III.B.

significant and far-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.”³⁶⁴

Congress used various tools to ensure that federal programs would not enforce equality principles, among them institutional design. Legislators constructed many New Deal social programs to be racially unequal through facially neutral mechanisms that redounded to the benefit of whites. They accomplished this both through substantive law, by formally excluding categories of workers that included large numbers of racial minorities, and through administrative structure by mandating local control over administration so that ground-level officials could discriminate against non-whites.³⁶⁵

Congress also relied on an additional strategy: delegation to 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.³⁶⁶ As the case of the Office of Education highlights, though, powerful political and institutional constraints worked to ensure that administrators would side with segregation.

Understanding the role that federal agencies and their programs played in deepening segregation and inequality sheds light on why those patterns have been so difficult to undo. One reason is clear: the agencies helped shape communities and institutions in ways that are tremendously resilient to change.³⁶⁷ In addition, though, the ongoing

³⁶⁴ Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* 17 (2005).

³⁶⁵ Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* 7–9 (2001); Katznelson et al., *supra* note 18, at 283, 297 & n.32. For example, the Social Security Act expressly excluded farm workers and domestics from old-age insurance. Jill S. Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* 20–21 (1996); see also Farhang & Katznelson, *supra* note 18, at 12–15 (discussing exclusion of agricultural and domestic workers in early national labor laws). What came to be known as “welfare,” or Aid to Families with Dependent Children, was governed largely through localized, discretionary administration. Lieberman, *supra*, at 118–40.

³⁶⁶ Cf. Lieberman, *supra* note 365, at 119–20 (stating that Congress’s refusal to enact a nondiscrimination requirement in the Social Security Act “opened the door . . . for administrative discrimination”).

³⁶⁷ Federal housing agencies’ work to extend residential segregation offers a glaring example, but there are many others. See Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 51–57 (1993); see also Joy

impact of administrative design bears interrogating. If many national agencies began their existence with structures that led them to defer to state and local governments and particular interest groups, while ignoring the wellbeing of racial minorities, then how far have those patterns been overhauled? If agencies understood their programmatic missions to override or conflict with constitutional principles of equal citizenship, then do those mandates continue to trump equality goals? As this Article shows, administrators in the past deliberately weighed competing goals and constitutional principles against one another, and equality often lost.

CONCLUSION

Revising an agency's mandates and structure can help bring about profound constitutional change. The Civil Rights Act of 1964 altered the Office of Education in fundamental ways, orienting the agency toward a new set of constitutional settlements. Title IV and Title VI expanded federal power over local schools, delegated to the executive branch specific authority to interpret and enforce equal protection principles, and confirmed that at least some constitutional obligations did attach to federal funds. For the Office of Education, the Act triggered the creation of a new dedicated civil rights unit, the writing of new regulations and guidelines, and new relationships with its constituents, as well as with the courts. But that revolution in design and substance was only partial.

Those fighting for racial equality in the present should ask themselves to what degree such institutional interventions have changed past patterns of federal deference to state and local actors rather than prioritizing the Constitution's equality mandates. Because institutional design becomes entrenched and tends to disappear from our consciousness as we take it for granted over time, simply opening up the institutional possibilities for debate is worthwhile. Revisiting the struggles that helped give rise to the current framework for enforcing equal protection thus reminds us: institutional design may matter as much as substantive law—and it is worth fighting for.