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Plessy Preserved: Agencies and the Effective Constitution

ABSTRACT. Sometimes the judicial Constitution is not the one that matters. The administrative state is capable of creating divergent legal frameworks that powerfully shape public life. But to the extent that they reside outside of judicial precedent, such administrative regimes may go unrecognized.

In this Article, I chart the history of an alternative “administrative Constitution” that remains etched in U.S. cities. Drawing on original archival research, I show that throughout the twentieth century, the federal administrators who oversaw the nation’s public-housing program implemented and defended a legal regime based on *Plessy v. Ferguson*’s “separate but equal” principle—even after the judiciary announced the opposing mandate of *Brown v. Board of Education* and after the political branches adopted formal civil-rights reforms in the 1960s. Why did an agency led by liberal reformers and dedicated to serving the poor do this? Administrators believed the public-housing program was politically unsustainable without racial segregation, while agency lawyers argued for preserving the older framework, which had once been understood as a progressive triumph in its commitment to “racial equity.” Procedural barriers shielded the agency from defending that entrenched framework in the courts.

Uncovering public housing’s racial Constitution challenges conventional legal narratives around civil rights by foregrounding the role of federal administrators in thwarting *Brown*. Simultaneously, *Plessy*’s resilience in the administrative realm underscores the ongoing need to unearth such regimes to better assess agencies’ role in establishing the constitutional principles that actually govern us—that is, in determining the effective Constitution.

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INTRODUCTION

For generations, African American families lived in the picturesque “Old Fort” area of Savannah, Georgia, a church-filled district near downtown that overlooked the Savannah River.¹ In 1952, Savannah officials, with federal administrators’ approval and financial backing, began evicting black families to raze their homes and build low-income public housing for whites only.² Represented by Thurgood Marshall and Constance Baker Motley of the NAACP, the families challenged the federal government’s involvement in this “effort to rob [them] of their riverfront section on the bluff of the beautiful Savannah.”³

By 1956, the Justice Department (DOJ) found itself defending the federal housing agency before the Fifth Circuit. In *Heyward v. Public Housing Administration*, DOJ lawyers did not attempt to justify the agency’s approach to segregation.⁴ After *Brown v. Board of Education*, federal judges had quickly made clear that it was just as unconstitutional to segregate public housing as it was to segregate public schools.⁵

Instead, the executive branch denied any legal responsibility for segregation in the projects it approved, supervised, and funded. The federal housing agency simply acted like “a bank which lends money to finance a business enterprise”

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1. *NAACP Files Suit Against FHA to Stymie Biased Ga. Housing Project*, CHI. DEFENDER, Sept. 27, 1952, at 5 [hereinafter *NAACP Files*]; *Our Opinions: Public Housing Snafu*, CHI. DEFENDER, Jan. 12, 1952, at 10 [hereinafter *Our Opinions*].
 2. *Our Opinions*, *supra* note 1; *Suit to Stop JC Ga. Housing Filed*, BALT. AFRO-AM., Sept. 20, 1952, at 14.
 3. See *Our Opinions*, *supra* note 1; see also *Heyward v. Pub. Hous. Admin.*, 214 F.2d 222, 224 (D.C. Cir. 1954) (affirming dismissal of the 1952 complaint on the ground that the Savannah Housing Authority was a conditionally necessary party); *NAACP Files*, *supra* note 1.
 4. See Brief for Appellees Public Housing Administration & Arthur R. Hanson, *Heyward v. Pub. Hous. Admin.*, No. 16040 (5th Cir. June 18, 1956).
 5. See *Detroit Hous. Comm’n v. Lewis*, 226 F.2d 180, 183-84 (6th Cir. 1955); *Askew v. Benton Harbor Hous. Comm’n*, 2 Race Rel. L. Rep. (Vand. U. Sch. L.) 593, 611, 617-18 (W.D. Mich. 1956); *Davis v. St. Louis Hous. Auth.*, 1 Race Rel. L. Rep. (Vand. U. Sch. L.) 299, 353 (E.D. Mo. 1955); *Vann v. Toledo Metro. Hous. Auth.*, 113 F. Supp. 210, 211-12 (N.D. Ohio 1953); *Woodbridge v. Evansville Hous. Auth.*, No. 618 (S.D. Ind. 1953); Note, *Discrimination Against Minorities in the Federal Housing Programs*, 31 IND. L.J. 501, 503-04 (1956) (discussing *Woodbridge*); see also Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515, 518 (1959) (“Since the school segregation cases, every final state and lower federal court decision on the merits of the question has denied the existence of state power to provide ‘separate but equal’ housing facilities.” (footnotes omitted)).

and could hardly be expected to answer for “the torts which that enterprise commits.”⁶ The Fifth Circuit disagreed. As the *Howard Law Journal* reported, its decision “placed upon the [agency] the Constitutional responsibility of striking . . . segregation from their public-housing policy.”⁷ Yet the Fifth Circuit’s *Heyward* ruling dissipated with little trace.⁸ The case ultimately died on procedural grounds, the Savannah projects remained segregated, and the federal agency continued to approve and fund Jim Crow housing throughout the North and South.⁹

Eight years later, shortly after the passage of the 1964 Civil Rights Act, the town of Huntingdon, Tennessee, moved forward with its plans to build and operate two sets of public housing, one for whites and one for blacks.¹⁰ After complaints were filed, the head of the Public Housing Administration (PHA) wrote a memo explaining why the federal agency felt compelled to fund such de jure

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6. Brief for Appellees, *supra* note 4, at 19. An earlier debate had taken place within the federal government over the agency’s position in the litigation. The Justice Department (DOJ) had proposed filing an affidavit aligning the agency against segregation, while the Public Housing Administration wished to say only “we . . . will follow the law.” Memorandum from John L. McIntire, Gen. Counsel, PHA, to Comm’r (May 4, 1955) (on file with the National Archives and Records Administration [hereinafter “NARA II”], Box 9, General Legal Opinions Files, 1936-70, RG 196). In a memo to the agency head, the PHA’s general counsel argued that the legislative framework required the agency to accept segregation. *Id.* According to a handwritten note on the memo, the “PHA position prevailed [over the DOJ stance] and no policy statement was made in Heyward pleading.” *Id.*
 7. G.E.S., *Recent Developments: Discrimination in Public Housing Brought Within Purview of the Fifth Amendment*, 3 HOW. L.J. 307, 311 (1957); *id.* at 309-10 (“[I]t seems that the [C]ourt deliberately brought the case within the purview of *Bolling v. Sharp* [sic], thereby charging PHA with the Fifth Amendment duty of preventing discrimination and segregation in the leasing of units in public-housing projects.”); *see also* *Heyward v. Pub. Hous. Admin.*, 238 F.2d 689, 696-97 (5th Cir. 1956) (noting that allegations against the PHA, if proven, “would constitute a violation of plaintiffs’ rights to due process under the Fifth Amendment”).
 8. Modern legal scholars have largely bypassed *Heyward*, but legal historian Tomiko Brown-Nagin briefly probes the litigation in her monumental history of civil-rights activism in Atlanta, Georgia. *See* TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 71-79 (2011) (concluding that *Heyward* likely led Atlanta leadership to conclude that “courts offered little hope of relief from the burdens of residential segregation”).
 9. *See* *Cohen v. Pub. Hous. Admin.*, 257 F.2d 73, 78 (5th Cir. 1958) (affirming the district court’s dismissal for lack of standing after the single remaining plaintiff failed to show that she applied and was denied admission to a whites-only public-housing project).
 10. Memorandum from Francis X. Servaites, Acting Comm’r, PHA, to Robert C. Weaver, Adm’r, HHFA 1 (Nov. 3, 1964) (on file with NARA II, Box 4, General Legal Opinion Files, 1936-70, RG 196) (“[T]he Local Authority was free to provide for white and Negro families either in a single development or on separate sites. The Huntingdon Housing Authority chose to select separate sites.”).

segregated housing.¹¹ The PHA's General Counsel signed off.¹² Despite decisions like *Brown* and the passage of the Civil Rights Act itself, the officials could identify no governing legal authority that would allow them to refuse to disburse the funds that had already been promised; their only option was to employ their "good offices" to persuade the town to change course.¹³

For decades, the federal agency overseeing public housing operated under an alternative constitutional framework.¹⁴ Even after both its own Justice Department and the Supreme Court renounced de jure segregation, the PHA explicitly encouraged, approved, and paid for segregated housing.¹⁵ Administrators did not simply ignore the Constitution, as interpreted in groundbreaking decisions such as *Shelley v. Kraemer* and *Brown v. Board of Education*.¹⁶ Rather, they considered and rejected the new judicial understanding of equal protection in favor of maintaining their own preexisting administrative regime, itself premised on an early, expansionist reading of *Plessy v. Ferguson*.¹⁷ When the agency formally adopted antisegregation requirements after 1964, its actual practices still conformed to *Plessy*—not *Brown*.¹⁸

Why? And why does it matter now?

The judicial Constitution is not always the one that governs. The effective Constitution may consist of the principles that agencies choose to implement,

11. *Id.*

12. General Counsel Joseph Burstein provided edits before signing off on the final version of the memorandum cited above. Note from Joseph Burstein, Gen. Counsel, PHA, to Marie C. McGuire, Comm'r, PHA (Oct. 30, 1964) (on file with NARA II, Box 4, General Legal Opinions Files, 1936-70, RG 196).

13. *Id.* at 2. President Kennedy's 1962 Executive Order 11,063 expressly barred racial discrimination in federally funded public housing, but the order governed only housing to be contracted for and built after its issuance. Exec. Order No. 11,063, 27 Fed. Reg. 11,523, 11,528 (Nov. 20, 1962). Because Huntingdon had signed its original contract with the PHA in 1961, its planned housing fell under the order's exhortatory directive to administrators to use their "good offices" to attempt to stop discrimination in housing outside the order's scope. *See id.*; Note from Joseph Burstein to Marie C. McGuire, *supra* note 12, at 2; *see also infra* Section IV.B (describing the order's limited coverage). While Title VI of the 1964 Civil Rights Act had already been enacted, barring racial discrimination in federally funded programs, the agency had not yet issued implementing regulations and apparently did not feel able to enforce the Act. *See* Note from Joseph Burstein to Marie C. McGuire, *supra* note 12.

14. *See infra* Parts II-IV.

15. *See infra* Section II.B & Part III.

16. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

17. 163 U.S. 537 (1896).

18. *See infra* Part IV.

rather than those courts articulate.¹⁹ Such “administrative constitutions” may be far-reaching and nearly indelible in their impact.²⁰ At some times, they may trigger needed reforms; at others, they may cause irreparable harms.

In theory, the administrative state’s decisive impact on many aspects of national life is well recognized. Scholars have also mapped some agencies’ “selective” or “resistant interpretation” of the Constitution, showing that officials may deliberately deviate from judicial doctrine.²¹ Yet legal theorists and practitioners still underrecognize administrative agencies’ power to construct divergent legal frameworks that can become, for all intents and purposes, the governing Constitution in particular areas – sometimes over long periods of time. Even when

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19. In differentiating the “judicial Constitution” from the “effective Constitution,” I build upon a long line of scholarship distinguishing the Constitution in its various form, which include the document itself, the legal framework immanent in judicial interpretations of the text, the broader political practices that construct a set of constitutional traditions over time, and even the major legislative frameworks that rework the nation’s basic structural and political commitments. See, e.g., William N. Eskridge, Jr., *America’s Statutory “Constitution,”* 41 U.C. DAVIS L. REV. 1, 5 (2007) (arguing that “legislation and its regulations are, and long have been, the primary source of constitutional structures, rules, and rights in our polity”); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 121 (2010) (characterizing “constitutional construction” as the practice of “mak[ing] normative appeals about what the Constitution should be, melding what is known about the Constitution with what is desired”). I also speak to a tradition within socio-legal scholarship of distinguishing the “law on the books” from the “law in action,” though my concept of the “effective Constitution” differs in important ways. For further discussion, see *infra* Section V.A.
 20. “Administrative constitutionalism” encompasses a broad set of practices in which agencies interpret and implement the Constitution. See Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 168 U. PA. L. REV. 1699, 1704-06 (2019) (discussing her original use of the term and its various meanings). Some scholars extend the term to include enactment and implementation of important statutory regimes, or “super-statutes.” E.g., WILLIAM N. ESKRIDGE, JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 5-9, 16-19 (2010) [hereinafter ESKRIDGE & FERREJOHN, *REPUBLIC*]; see also William N. Eskridge, Jr. & John Ferrejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001) (describing super-statutes as those that “successfully penetrate public normative and institutional culture in a deep way”). Others argue that it also includes practices by which agencies “constitute” or structure the administrative state itself. See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1910 (2013).
 21. Sophia Lee coined these categories as part of a typology of administrative constitutionalism in her groundbreaking early article. See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801-02 (2010) [hereinafter Lee, *Race*]; see also SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 4 (2014) [hereinafter LEE, *WORKPLACE*] (arguing that administrative agencies are “an overlooked but omnipresent constitutional force in the modern American state”).

administrators' constitutional interpretations operate as the "effective" Constitution, they tend to stay submerged—except insofar as they surface in legal historians' accounts or during litigation challenging agencies' practices.²²

Instead, lawyers and scholars continue to focus on the work product of the federal courts as a means to understand our constitutional system. Our collective inattention leads us to misunderstand the present and the past, as well as the dynamics of the administrative state. We fail to recognize the legal regime that actually governs us. We also fail to examine how and why administrators adopt and maintain divergent readings of the Constitution.²³

In this Article, I present a glaring and historically important example of an administrative Constitution that became the effective Constitution over many decades, with effects persisting into the present. Drawing on original archival research, I show that throughout the twentieth century, federal officials con-

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22. See Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 168 U. PA. L. REV. 1603, 1604 (2019) [hereinafter Tani, *Administrative Constitutionalism*] (noting that administrative constitutionalism is "hard to see because much of what administrators do is hard to see"). Legal historians have generated much of the existing scholarship on administrative constitutionalism, while others have also relied on historical case studies. *Id.*; see, e.g., ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 20; LEE, *WORKPLACE*, *supra* note 21; KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016); 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 CALIF. L. REV. 1181 (2014); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083 (2014); Bertrall L. Ross II, *Administrative Constitutionalism as Popular Constitutionalism*, 168 U. PA. L. REV. 1783 (2019); Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223 [hereinafter Ross, *Denying Deference*]; Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1 (2000); Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289 (2015); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) [hereinafter Tani, *Administrative Equal Protection*]. Though earlier work may not have employed the term, prior historical scholarship also offers rich instances of the phenomenon. See Tani, *Administrative Constitutionalism*, *supra*, at 1607-27 (highlighting historians' research tracing individuals' interactions with agencies); see, e.g., PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 138-40* (2009) (describing administrative enforcement of bars on interracial sex and marriage).
23. On the question of why administrators pursue particular interpretations, see Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 850-54 (2018), which argues that agency design is an important factor shaping administrators' approaches to interpreting and implementing the Constitution.

structed, implemented, and defended a “separate but equal” regime in housing.²⁴ They developed that approach at the federal housing program’s origin in the 1930s and continued it long after the Court had abandoned that view of equal protection.²⁵ Officials were able to maintain a divergent construction of the

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24. The origins, formality, scope, and continuity over time of the PHA’s *Plessy*-based regime have largely evaded notice, though scholars have examined particular aspects of the framework. For example, several employment discrimination scholars have noted Robert Weaver and the Public Works Administration (PWA)’s early use of race-conscious goals for public works employment, connecting them to later affirmative action requirements for federal contractors. See, e.g., PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933-1972*, at 55-65 (1997); Marc W. Kruman, *Quotas for Blacks: The Public Works Administration and the Black Construction Worker*, 16 *LAB. HIST.* 37, 40 (1975). Historian Arnold Hirsch did the most thorough job of tracing federal housing officials’ reactions to *Brown*, but his careful work remains underappreciated; it also does not interrogate the long-term development of administrators’ legal thinking or how it remained insulated from judicial scrutiny. See Arnold R. Hirsch, “Containment” on the Home Front: Race and Federal Housing Policy from the New Deal to the Cold War, 26 *J. URB. HIST.* 158 (2000); Arnold R. Hirsch, *Searching for a “Sound Negro Policy”: A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 *HOUSING POL’Y DEBATE* 393 (2000). Beginning in the late 1960s, judicial decisions discussed the PHA’s refusal to discontinue its support for segregation after the 1960s, sometimes linking its later practices to its earlier formal rules countenancing segregation. See, e.g., *Gautreaux v. Romney*, 448 F.2d 731, 739-40 (7th Cir. 1971); *Young v. Pierce*, 628 F. Supp. 1037, 1057 (E.D. Tex. 1985); *Hicks v. Weaver*, 302 F. Supp. 619, 623 (E.D. La. 1969). Recent popular works by Ta-Nehisi Coates and Richard Rothstein highlight the FHA and the PHA’s support for segregation, thereby increasing public recognition of the general phenomenon, but without closely querying the legal reasoning that supported it, or liberal leaders’ early role in creating it within the PHA. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 54-55 (1993) (observing that discriminatory FHA loan policies contributed to segregation); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Ta-Nehisi Coates, *The Case for Reparations*, *ATLANTIC* (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/9MDY-SXXU>] (chronicling discriminatory federal housing policy).
25. See *infra* Part II. Public housing thus resembled other New Deal social programs like Social Security, in which Northern liberals allied with Southern segregationists to enact statutory frameworks that explicitly or implicitly permitted race discrimination. See, e.g., ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 7-9 (1998); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 20-21 (1994); Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *STUD. AM. POL. DEV.* 1, 12-15 (2005); Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 *POL. SCI. Q.* 283, 283, 297 & n.32 (1993).

Constitution because legal doctrine and the agency's institutional structure shielded them from courts' oversight.²⁶

Understanding that effective Constitution helps explain the past and present more accurately. The public increasingly recognizes that the federal government played a lead role in creating racially segregated cities and suburbs, but a relatively simple question lingers: How and why did this occur?²⁷ In lawyers' terms, how did public officials reconcile their support for segregation with conflicting principles from the Fifth and Fourteenth Amendments?²⁸ Existing accounts of federal involvement in segregation rarely answer that question – though it is one of great interest to lawyers and other students of the administrative state.²⁹

Until the 1950s, it was at least arguably permissible under the Supreme Court's precedent to segregate government-backed housing.³⁰ But by the mid-

26. See *infra* Section I.D. Some might dispute whether closer judicial oversight could have affected the agency's policies. Courts can and do use procedural doctrines as a means to avoid controversial decisions and therefore might not have forced integration even had they undertaken to review the PHA policies on the merits. Cf. ANDERS WALKER, *THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL THE CIVIL RIGHTS MOVEMENT* 119–20 (2009) (noting practical constraints on the federal judiciary's ability to enforce integration); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40–41 (1961) (describing tools used by the Supreme Court to “withhold[] ultimate constitutional adjudication”). However, it seems likely that federal judges would have mandated at least “paper” agreement between their interpretation of the Constitution and the agency's approach. For later examples of such judicial scrutiny, see, for example, *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (en banc). See also *infra* notes 399–401 and cases cited therein.
27. Robert Weaver and Charles Abrams documented this in painstaking detail in the mid-twentieth century. See CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* (1955); ROBERT C. WEAVER, *THE NEGRO GHETTO* (1948). More recently, authors like Douglas Massey and Nancy Denton, Ta-Nehisi Coates, and Richard Rothstein have made the point anew. See MASSEY & DENTON, *supra* note 24; ROTHSTEIN, *supra* note 24; Coates, *supra* note 24. Yet administrators' motivations and legal thinking remain opaque in these recent works.
28. Given the pervasive legalism of the administrative state, this question is an acute one. For background, see DANIEL R. ERNST, *TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940* (2014).
29. One of the most exhaustive studies is DESMOND KING, *SEPARATE AND UNEQUAL: AFRICAN AMERICANS AND THE US FEDERAL GOVERNMENT* (rev. ed. 2007). See also *supra* notes 25, 27.
30. Before *Brown*, lower federal and state courts were divided over the legality of segregation in public housing. Compare *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941) (rejecting a challenge to segregation in public housing), *Denard v. Hous. Auth.*, 203 Ark. 1050 (1942) (same), *Miers v. Hous. Auth.*, 266 S.W.2d 487 (Tex. Civ. App. 1954) (same), and *Hous. Auth. v. Higginbotham*, 143 S.W.2d 95 (Tex. Civ. App. 1940) (same), with *Vann v. Toledo Metro. Hous. Auth.*, 113 F. Supp. 210 (N.D. Ohio 1953) (holding segregation by public housing authorities

1950s, it became obvious that the Constitution, as construed in the courts, barred de jure segregation, and that *Brown I* and *II* required government officials to remedy the segregation produced by prior practices.³¹ From then on, formal judicial rulings and the Justice Department's official legal positions cannot explain why other federal agencies pursued approaches at odds with the new equal-protection regime. What drove those actors?

The agency was not lawless, in the sense that its officials did not simply ignore the judicial Constitution. Nor did they lack the authority to shape agency policy regarding racial questions. Rather, officials had constructed another constitutional regime, which—for reasons deeply embedded in the agency's institutional structure and political environment—they preferred to maintain. In particular, they believed that public housing was not politically viable without racial segregation.

The *Plessy* framework originated in the agency's progressive, reformist roots. In the 1930s, leading liberals crafted "racial equity" policies for the nascent public-housing program.³² Those policies echoed *Plessy*'s principle permitting state-sponsored segregation, so long as the resources provided to each group were "separate but equal."³³ By comparison to rampant inequality in other government programs, administrative policies requiring "racial equity" seemed markedly better.³⁴

In fact, racial equity, as enshrined in PHA policy, represented an early instance of creative and ambitious administrative constitutionalism. African American leaders within the agency initially crafted the rules to assure equal resources

unconstitutional), *Banks v. Hous. Auth.*, 260 P.2d 668 (Cal. Dist. Ct. App. 1953) (same), and *Seawell v. MacWithey*, 63 A.2d 542 (N.J. Super. Ct. Ch. Div. 1949) (same).

31. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954). Subsequent memoranda and per curiam Supreme Court decisions extended *Brown* beyond schools. See, e.g., *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) (mem.) (per curiam) (public park facilities); *Gayle v. Browder*, 352 U.S. 903 (1956) (mem.) (per curiam) (public buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (mem.) (per curiam) (public golf courses and parks); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (mem.) (per curiam) (public beaches and bathhouses).
32. See *infra* Section II.A.
33. See Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 393-94 (1954) (discussing the inconsistent application of *Plessy*'s "separate but equal" mandate to require "substantial equality" in segregated schools).
34. For contemporaneous critiques of discrimination in other New Deal programs, see, for example, Ralph J. Bunche, *A Critique of New Deal Social Planning as It Affects Negroes*, 5 J. NEGRO EDUC. 59 (1936); John P. Davis, *A Survey of the Problems of the Negro Under the New Deal*, 5 J. NEGRO EDUC. 3 (1936); and W.E.B. Du Bois, *Social Planning for the Negro, Past and Present*, 5 J. NEGRO EDUC. 110 (1936).

for black communities. Yet the same policies explicitly countenanced segregation.³⁵ And, as black leaders saw, there was no viable path to creating materially equal housing options for African Americans within the context of mid-twentieth-century segregation.³⁶

Defending the *Plessy* framework eventually put the agency at odds not only with the Court, but also with its own Justice Department.³⁷ Federal administrators clearly understood the constitutional dilemmas, as civil-rights advocates repeatedly challenged the agency's support for de jure segregation. In fact, NAACP leaders and fair-housing activists constantly lobbied the White House and agency leaders to change course. Thurgood Marshall and his staff sent legal

35. See *infra* Section II.B. For an example of the ambivalence produced among African American leaders by the PHA's commitments to racial equity amid segregation, see *General Housing Act of 1945: Hearing on S. 1592 Before the S. Comm. on Banking & Currency*, 79th Cong. 764 (1945) (statement of William H. Hastie, NAACP) (praising racial minorities' "much more fortunate experience with the public-housing program" but critiquing instances when PHA and prior agencies "have given way to local and other pressures and created . . . segregated housing facilities").

36. As prominent intellectuals like W.E.B. Du Bois and Derrick Bell have argued in the past, material equality for African Americans might well be prioritized over any attempt to share space with whites, given the many costs and uncertain benefits of integration itself. See, e.g., Derrick A. Bell, *Bell, J., Dissenting*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* 185 (Jack M. Balkin ed., 2002); W. E. Burghardt Du Bois, *Does the Negro Need Separate Schools?*, 4 *J. NEGRO EDUC.* 328 (1935). Had it been feasible to achieve actual material equality within "separate but equal" housing, that debate might have become critical in evaluating federal housing programs. But material equality in a segregated approach to land use was not feasible, as African American leaders and agency insiders soon concluded. Given white majoritarian politics, existing patterns of land ownership, the lack of legal restrictions on private housing discrimination, and limited federal authority in this arena, material equality could not be achieved for black individuals or communities within a system of segregated housing. This was obvious simply from the continual problem of finding sufficient black housing (or land on which to construct it), which resistance from white owners, community members, and local officials blocked. See, e.g., Draft Memorandum from Adm'r [Albert M. Cole] to President (Jan. 15, 1954) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196) (describing "too little living space" available to black families and the "difficulty of obtaining adequate open land" for new building due to opposition of white families and neighborhood organizations); see also *infra* notes 272-276 and accompanying text (describing the "practical impossibility of attaining substantial equality of opportunity" via "separate but equal" housing).

37. See *infra* Sections II.B, III.B; see also *supra* note 6.

memos to Presidents Roosevelt, Truman, Eisenhower, and Kennedy on the constitutional implications of federal backing for segregation.³⁸ Internal racial-justice advocates at the agency reinforced and amplified the NAACP's constitutional arguments.³⁹

Yet lawyers and other officials at the agency considered and rejected those arguments in favor of alternative legal positions.⁴⁰ Federal administrators' support for racial segregation was thus rooted in liberal reformers' choices and in legal interpretation—indeed, interpretation of the Constitution itself—rather than simple racial bigotry and lawlessness.

From this account of a federal agency's preservation of the *Plessy* regime, I build two larger points. First, I highlight that Northern liberals, including administrative officials, played a key role in designing and implementing federal programs like public housing to support, extend, and preserve segregation. Legislators expressly understood that overcoming political hostility to national social programs associated with a “welfare state” and increased federal authority meant sacrificing Fourteenth Amendment ideals.⁴¹ The constitutional trade-offs they made became embedded in statutory frameworks and legislative history—as well as in agency structure, norms, and legal interpretations.⁴² Administrators themselves took those constitutional bargains to be legally and practically binding, spelling out the basic conditions for their programs' continued existence.⁴³ The consequences persist today, both in the institutional survival of federal public housing despite its extreme political vulnerability, and in the segregated cities the program helped create.

Acknowledging that reality provides a more complex and accurate understanding of the roots of current racial inequality. Prior patterns of segregation and discrimination cannot be explained as part of a radically different era, due

38. See Memoranda cited at *infra* notes 166, 177 & 220; see also Memorandum from Roy Wilkins, Chairman, Leadership Conference on Civil Rights, and Arnold Aronson, Sec'y, Leadership Conference on Civil Rights, to the White House 13 (Aug. 29, 1961) (on file with NARA II, Box 133, Secretary's Correspondence, RG 235).

39. See *infra* Section III.B.

40. See *infra* Sections II.B, III.B-C.

41. See *infra* Sections II.C, III.B-D.

42. See, e.g., *infra* notes 136-145, 195-202 and accompanying text.

43. Administrators' self-interest in the continuance of their agencies and programs is widely recognized as a source of bureaucratic motivation. See, e.g., James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 374-78 (James Q. Wilson ed., 1982). Here, PHA officials' dedication to serving their agency's mission (housing the poor) overlapped with their self-interest in maintaining their jobs and authority. Given the empirical difficulty of distinguishing the two motivations, I emphasize PHA administrators' mission-orientation, while recognizing its possible instrumental underpinnings.

only to longstanding structures of white supremacy in the South and institutional rules that enabled Southerners to dominate Congress.⁴⁴ The Jim Crow system is not traceable merely to a prior constitutional understanding that reigned for a time and was then discarded once national enforcement overcame state-level resistance. Rather, federal executive-branch officials themselves resisted the new constitutional regime, and preserved the prior one, out of a commitment to other liberal goals. These uncomfortable facts may cause us to revisit the conclusions that we draw from that era, as well as how we understand the construction of the American administrative state.⁴⁵

The second, related lesson of this Article's historical case study is that we should seek out the failures of administrative constitutionalism, along with its successes. Leading scholars have focused on agencies' role in fleshing out the meaning of new statutory frameworks.⁴⁶ Key works have also shown that agencies are sometimes willing to extend statutory meaning well beyond where courts have and often do so in dialogue with political actors and movements seeking social reform.⁴⁷ Because so many of the progressive accomplishments of the twentieth century manifested in new national legislation (for instance, creating social safety net programs or enacting civil rights and environmental protections), agencies' willingness to innovate around those statutes often carried a distinctly progressive cast. But it is by no means clear that progressive goals or

44. On Southern dominance, see Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283, 284-85 (1993); and Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WIS. MAG. HIST. 30, 35 (1970).

Historians have richly charted the North's regimes of racial segregation and discrimination, as well as federal involvement across all regions. See, e.g., MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003); PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS* (2013); DAVISON DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954* (2005); THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* (2008). Nonetheless, the Southern-focused narrative remains dominant in both legal discussion and popular imagination.

45. See *infra* Section V.A.

46. See ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 20; see also Metzger, *supra* note 20, at 1905-06 (describing Eskridge and Ferejohn's account of administrators as "norm entrepreneurs" in this process).

47. See ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 20, at 29-33, 75-79; Lee, *Race*, *supra* note 21, at 810-44; Ross, *Denying Deference*, *supra* note 22, at 254-66; Tani, *Administrative Equal Protection*, *supra* note 22, at 844-59.

rights expansion represent the dominant tendency of the American administrative state, viewed over its entire lifespan.⁴⁸

Public housing's adherence to *Plessy*, long after the Court decided *Shelley* and *Brown*, highlights distinct aspects of administrative constitutionalism. Agencies also play a role in maintaining and entrenching older statutory and constitutional frameworks, not simply in innovating around new ones.⁴⁹ Agencies may not always be more open to reformist pressure or arguments for rights expansion than other institutions like courts. Public housing's history presented here is one counterexample to weigh against the instances in which agencies outpaced the courts in embracing legal reforms. Collecting such histories helps us to see the administrative Constitution more accurately. While the history I present here cannot on its own settle the nature and desirability of administrative constitutionalism, it sharpens the questions we should ask and the kinds of additional evidence we should seek.

Accurately evaluating the administrative state is particularly pressing today. The sharp about-face in executive-branch policies after President Trump took office in January 2017 offers direct evidence of the multiple ends that administrative authority may serve. At a minimum, witnessing the ability of agency leaders to interpret the law in polar-opposite ways, within a very short period of time, reminds us of the need to distinguish between patterns rooted in institutional tendencies and those merely reflecting who occupies a particular branch of government. If we wish to assess institutions and their capacity for principled constitutional interpretation objectively, we should use all such examples, from

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48. One can acknowledge that state power has been used at various times to preserve or exacerbate inequality, even while recognizing that the overall *intent* of those extending the administrative state has been to combat inequality through regulation and social investment. On the latter point, see Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 359-60, 364-69 (2019); and K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1674-76 (2018). In fact, this Article's case study showcases both realities at work.
49. Legal scholars have long considered how constitutional reform can trigger "preservation through transformation," whereby an older legal regime that produced subordination reemerges in a more facially legitimate form with similar oppressive effects. See, e.g., Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1996). Constitutional change also may shift struggles to enforce the underlying norms into other domains, in what Melissa Murray terms "regulatory displacement." See, e.g., Melissa Murray, *Loving's Legacy: Decriminalization and the Regulation of Sex and Sexuality*, 86 FORDHAM L. REV. 2671, 2696-2700 (2018); see also Melissa Murray, *Consequential Sex: #MeToo, Masterpiece Cakeshop, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 876-82 (2018). Evading reform may be far less subtle, though. Administrative actors may simply choose to maintain an older regime, with no need to transform or transmute it, to the extent they are able to avoid legal scrutiny or mandates for reform. The PHA largely took the latter path.

the present as well as the past, to discipline our thinking. Agencies retrench on rights and expand them, entrench old regimes and innovate around new ones.

The rest of the Article is organized as follows. In Part I, I show how the public-housing agency's early history, design, and political environment gave its officials the ability and incentives to fashion independent constitutional frameworks. In Part II, I examine the agency's initial creative constitutionalism, as its New Deal leaders shaped a "racial equity" framework that required equal distribution of jobs and housing to African Americans – but within the context of segregation. Part II also highlights the NAACP's early, unsuccessful challenges to the agency's adherence to *Plessy*. Part III traces the agency's resistance to change in the years immediately leading up to and following *Brown*. Part IV probes how, even as Democratic Presidents formally embraced civil rights and appointed reform-minded leaders in the 1960s, agency officials minimized the practical impact of those reforms. Finally, in Part V, I consider how uncovering this long administrative adherence to *Plessy* might cause us to shift our understanding of civil-rights history and to question the broader phenomenon of administrative constitutionalism.

I. CONSTRUCTING FEDERAL HOUSING

How and why did federal officials create and defend a constitutional framework rooted in *Plessy*? Answering this question requires first understanding the public-housing program's origins, initial constitutional dubiousness, and political precarity. The program's resulting vulnerability left the agency reliant on Congress and local housing officials for crucial political support. At the same time, housing administrators enjoyed considerable legal discretion over constitutional questions, thanks to substantive legal ambiguity and procedural doctrines that insulated them from judicial scrutiny.

A. Origins

Two basic forms of federal housing aid emerged during the New Deal, with each taking on a distinct institutional character within its own agency. "Public housing" provided low-rent, government-owned housing to poor and working-class families. The agency that would become the Public Housing Administration (PHA) originated as a temporary public works program to create jobs during the Depression, which then became permanent in 1937.⁵⁰ In contrast, federal

50. United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888. To avoid confusion, in the remainder of the Article I refer to the public-housing agency, which began as the United

mortgage insurance benefited the middle class and private real estate interests. At the height of the Depression, the National Housing Act of 1934 created the new mortgage insurance program and housed it within the Federal Housing Administration (FHA).⁵¹ FHA insurance helped to stabilize the housing market and expand home ownership to a broader swath of the middle class by offering federal guarantees to lenders for mortgages.

Together, the creation of the PHA and FHA set up a long-term “two-tier” pattern in housing policy, consisting of “well-legitimized, relatively generous state support for the middle and upper segments of the population and poorly regarded, poorly funded programs for the least affluent.”⁵² Low-rent public housing for the poor operated as the lower tier, while FHA mortgage insurance for privately owned housing formed the top.

In both settings, the federal approach was framed as one of assistance to local governments and private industry, avoiding any form of “federal control.”⁵³ As the National Association of Housing Officials explained in 1939, “The central principle . . . is that the responsibility for planning, designing, building, and managing public housing rests directly upon the shoulders of the local housing authorities.”⁵⁴ Promising a maximum of local “responsibility” was integral to public housing’s political viability.⁵⁵

States Housing Agency (USHA), then became the Federal Public Housing Authority (FPHA), and subsequently the Public Housing Administration (PHA), simply as the “PHA.”

51. National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934); *see also* Kenneth A. Snowden, *Mortgage Banking in the United States, 1870-1940*, MORTGAGE BANKERS ASS’N 84 (Sept. 10, 2014, 11:58 AM), https://www.mba.org/assets/Documents/Research/RIHA/86099_13129_RIHA_History_Paper.pdf [<https://perma.cc/N8SU-GRTN>].
52. GAIL RADFORD, *MODERN HOUSING FOR AMERICA: POLICY STRUGGLES IN THE NEW DEAL ERA 197-98* (1996). As Radford notes, that “two-tier” framework has been a persistent feature of U.S. social welfare policy, which tends to establish more generous universal programs aimed at the working and middle class and stingier, stigmatized means-tested programs for the poor. *Id.*; *see also* Barbara Nelson, *The Origins of the Two-Channel Welfare State: Workmen’s Compensation and Mothers’ Aid*, in *WOMEN, THE STATE AND WELFARE* 123 (Linda Gordon ed., 1990) (tracing how gender and race shaped the two-tier structure).
53. DAVIS McENTIRE, *RESIDENCE AND RACE: FINAL AND COMPREHENSIVE REPORT TO THE COMMISSION ON RACE AND HOUSING 294-95* (1960). *But cf. id.* at 317 (“[T]he federal government works closely with local authorities in the planning of [public-housing] projects and exercises extensive supervisory authority.”).
54. NAT’L ASS’N HOUS. OFFICIALS, *PUB. NO. N107, LOCAL HOUSING AUTHORITY ADMINISTRATION: A MANUAL FROM EARLY EXPERIENCE V-1* (1939).
55. For example, a political pamphlet in the NAACP’s files listed “decentralized operations” among the 1936 Housing Act’s favorable features, noting, “Local housing authorities . . . will assume the fullest possible responsibility for initiation, construction, and management. Federal supervision will merely guarantee low-rentals and physical safeguards.” Pamphlet, “I am for it!” (1936) (on file with the Records of the National Association for the Advancement of

The federal government's indirect approach to housing programs resulted not simply from political concerns but also from serious doubts regarding the federal government's constitutional authority to intervene in housing.⁵⁶ In the early 1930s, federal policymakers, frustrated with the failure of private developers and localities to take on public-housing creation, authorized federal agencies to build and manage federal public housing.⁵⁷ But the courts invalidated these federal actions in several early challenges.⁵⁸ Leaders ultimately decided not to

Colored People, Manuscript Division [hereinafter NAACP Papers], Library of Congress, Box I:C257), hv.proquest.com/pdfs/001521/001521_001_0283/001521_001_0283_From_1_to_117.pdf#page=94 [<https://perma.cc/ELT3-GPTM>].

56. Not just the propriety of federal involvement was questioned but also the legitimacy of any government role in providing housing at all. Some nineteenth-century courts struck down government intervention in housing markets as beyond the power of the state. *See, e.g.,* *Lowell v. City of Boston*, 111 Mass. 454, 473 (1873); *see also* Joseph Lesser & Vigdor D. Bernstein, *The Evolution of Public Purpose, General Welfare, and American Federalism*, 19 URB. LAW. 603 (1987). The primary legal controversy was over whether assisting in the construction of housing qualified as a “public use” – thus justifying the use of public funds and/or the eminent domain power – or was instead an illegitimate use of public resources on behalf of select classes of taxpayers. *See* Breck P. McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 241 (1930); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615 (1940). The uncertainty had largely dissipated by the 1940s. *See* Myres S. McDougal & Addison A. Mueller, *Public Purpose in Public Housing: An Anachronism Reburied*, 52 YALE L.J. 42, 43-55 (1942). Separately, some also attacked the legitimacy of federal (as opposed to state) involvement, asking whether the federal power to spend for the “general welfare” extended to housing and whether the federal eminent domain power could be used for such purposes. *See generally* Edward S. Corwin, *Constitutional Aspects of Federal Housing*, 84 U. PA. L. REV. 131 (1935).
57. The Public Works Administration (PWA) began by offering loans for public-housing developments. *See* Leon Keyserling, *Legal Aspects of Public Housing*, in 1 HORACE RUSSELL & LEON H. KEYSERLING, *LEGAL PROBLEMS IN THE HOUSING FIELD* 31 (1939); *see also* TIMOTHY L. McDONNELL, *THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS* 29-36 (1957) (describing the legislative history of the housing program). When lending funds to others proved inadequate, PWA began constructing federal low-income housing itself in 1934. McDONNELL, *supra*, at 36-38. Most states lacked legal structures with the requisite authority to develop and finance such projects themselves, which led federal officials to do it on their own once they lost confidence in private actors' ability to do so. When the Reconstruction Finance Corporation was authorized in 1932 to offer loans to develop low-income housing, only the New York State Board of Housing was equipped to meet the law's conditions. McDONNELL, *supra*, at 27.
58. By 1936, several federal courts had ruled that federal housing programs exceeded constitutional limits, on the ground that Congress lacked the power to acquire private land for use in directly constructing housing. *Franklin Twp. v. Tugwell*, 85 F.2d 208, 220-22 (D.C. Cir. 1936); *United States v. Certain Lands in Louisville*, 78 F.2d 684, 686-88 (6th Cir. 1935); *United States v. Certain Lands in Detroit*, 12 F. Supp. 345, 347-48 (E.D. Mich. 1935).

continue litigating the question of federal power to build and operate subsidized housing.⁵⁹

Instead, federal actors helped create a new set of local governing institutions to administer public housing, creating a presumption of “local control” even where no such historical tradition existed.⁶⁰ The United States Housing Act of 1937 affirmed this approach by setting forth a structure of local operational control, backed by deep federal subsidies. The national public-housing agency that it created was designed “to act in the capacity of a banker, providing advice, technical assistance, and funds” to local authorities.⁶¹

B. Political Context

Despite public housing’s promise of local control, the new federal agency and its programs drew fiery political attacks from the start. The first dozen years of the program were “marked by . . . repulsing attacks on [its] very existence.”⁶² Many members of Congress opposed the “[g]overnment [a]s [l]andlord,” both

59. In 1936, just hours before the Supreme Court was to hear arguments in the leading challenge, the Justice Department asked the Court to dismiss the case. William Ebenstein, *The Law of Public Housing*, 23 MINN. L. REV. 879, 893 (1939). As a result, federal authority to directly provide low-income housing remained unsettled. MCDONNELL, *supra* note 57, at 48; *see also* *Oklahoma City v. Sanders*, 94 F.2d 323 (10th Cir. 1938) (upholding federal power in the housing context).

60. Eventually, President Roosevelt himself, along with his Secretary of Interior, Harold Ickes, directly lobbied states to set up the legal structures for localities to create, fund, and operate public housing—leading to the birth of the local housing authority. *See* Gilbert A. Cam, *United States Government Activity in Low-Cost Housing, 1932-38*, 47 J. POL. ECON. 357 (1939); Ebenstein, *supra* note 59, at 885-86. President Roosevelt himself wrote all the nation’s governors urging them to enact enabling legislation for local housing authorities; Secretary Ickes followed up by sending the PWA lawyers’ model bills. MCDONNELL, *supra* note 57, at 41-42; *see also id.* at 42 (noting that it was “necessary for the Federal Government, which was primarily interested in public works to relieve unemployment, to bring pressure to bear upon the state legislatures to get some action”). National housing reformers themselves advocated localized control for their own substantive reasons, based on critiques of the early federal housing projects’ high costs and federal authorities’ failure to cooperate with local officials. Ebenstein, *supra* note 59, at 885-88; *see also* D. Bradford Hunt, *Was the 1937 U.S. Housing Act a Pyrrhic Victory?*, 4 J. PLAN. HIST. 195, 197-200 (2005) (describing lobbying efforts against the 1937 U.S. Housing Act).

61. Cam, *supra* note 60, at 374. The federal agency was authorized to provide initial loans and annual subsidies to local housing authorities for the capital costs of constructing low-income housing. United States Housing Act, Pub. L. No. 75-412, §§ 1-2, 9-11, 50 Stat. 888, 891-94 (1937).

62. Harold Robinson & John I. Robinson, *A New Era in Public Housing*, 1949 WIS. L. REV. 695, 695.

because they associated the program with socialism and because they feared its impact on the powerful private-housing industry.⁶³ Private-housing interests themselves were “unflagging” in their attempts to kill it.⁶⁴ The real-estate groups opposing public housing included the National Association of Real Estate Board, the National Association of Home Builders, and the United States Savings and Loan League.⁶⁵ They claimed public housing would lead to the death of private enterprise. Later, they circulated ads asking, “Can you afford to pay somebody else’s rent?”⁶⁶

Public housing never attracted a forceful permanent constituency to stave off these attacks. Housing reformers did not reflect a national grassroots movement for public housing but rather a limited coalition of labor unions, reformers, and local officials.⁶⁷ Initial enactment of the federal public-housing program in 1937 resulted from a “conjuncture of unemployment, labo[r] organizing, homelessness, the harsh conditions of tenement housing . . . and compromises made with the building, real-estate and banking industries.”⁶⁸ A “massive Democratic majority” in Congress eased the way.⁶⁹ Housing reformers lacked a well-organized lobbying organization with the staying power to defend the program over the long run.⁷⁰ The only such group, the National Public Housing Conference, was limited by its “shaky finances, small membership, limited purpose, and inability

63. Jo Ann E. Argersinger, *Contested Visions of American Democracy: Citizenship, Public Housing, and the International Arena*, 36 J. URB. HIST. 792, 798 (2010).

64. McENTIRE, *supra* note 53, at 316.

65. NATHANIEL S. KEITH, *POLITICS AND THE HOUSING CRISIS SINCE 1930*, at 29, 37, 54-55 (1973); see DAVID L. MASON, *FROM BUILDINGS AND LOANS TO BAIL-OUTS: A HISTORY OF THE AMERICAN SAVINGS AND LOAN INDUSTRY, 1831-1995*, at 153-54 (2004).

66. D. Bradford Hunt, *How Did Public Housing Survive the 1950s?*, 17 J. POL’Y HIST. 193, 193 (2005).

67. See McDONNELL, *supra* note 57, at 42 (arguing that the groups in support “could not be said to constitute a mass or grass-roots movement in favor of public housing” and noting that the federal government had to pressure states to establish local housing authorities); *id.* at 53 (describing a lack of coordination among groups); *id.* at 54-59, 67 (describing the formation of the National Public Housing Conference in 1931, National Association of Housing Officials in 1933, and Labor Housing Conference in 1934, as well as the enlistment of American Federation of Labor (AFL) support).

68. James Fraser, Deirdre Oakley & Joshua Bazuin, *Public Ownership and Private Profit in Housing*, 5 CAMBRIDGE J. REGIONS ECON. & SOC’Y 397, 399 (2012).

69. Hunt, *supra* note 66, at 195.

70. One scholar argues, however, that public-housing reformers initially enjoyed “good leadership, gained wide public support, and possessed considerable political influence.” RICHARD O. DAVIES, *HOUSING REFORM DURING THE TRUMAN ADMINISTRATION* 15 (1966).

to develop grass-roots support.”⁷¹ After enactment, the program’s political support remained geographically concentrated in the South and in large cities.⁷² Local housing officials, organized as the National Association of Housing and Redevelopment Officials (NAHRO), became the program’s most entrenched clientele.⁷³

In contrast to the politically embattled and resource-starved PHA, the FHA quickly became politically popular and financially independent, acting as “basically . . . an insurance company with middle-class housing its prime concern.”⁷⁴ The FHA’s market-friendly mission endeared it to the real-estate industry.⁷⁵ By 1954, the FHA congratulated itself on having helped “three of every five American families to own their homes.”⁷⁶

C. Oversight

Congressional control of both federal housing agencies had a pronounced Southern tilt. The oversight committee in the Senate, the Committee on Banking and Currency, was chaired by Southerners from 1949 through 1975, except for a

71. *Id.*

72. Hunt, *supra* note 66, at 196.

73. HAROLD WOLMAN, *POLITICS OF FEDERAL HOUSING* 153 (1971) (describing the organization as the public-housing agency’s “main clientele group”). It had a “vested interest in the continuance of the large public-housing projects they ha[d] constructed and managed since the 1930[s].” *Id.* at 35. Initially named the National Association of Housing Officials (NAHO), the group was later renamed National Association of Housing and Redevelopment Officials (NAHRO). See KEITH, *supra* note 65, at 31.

74. Charles L. Edson, *Affordable Housing—An Intimate History*, in *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT* 3, 4 (Tim Iglesias, Rochelle E. Lento & American Bar Ass’n eds., 2d ed. 2013); see also WOLMAN, *supra* note 73, at 113 (attributing FHA’s popularity on the Hill to its “wide beneficial impact on large numbers of middle-income constituents”); Joshua L. Farrell, *The FHA’s Origins: How Its Valuation Method Fostered Racial Segregation and Suburban Sprawl*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 374, 376 (2002) (writing that the FHA’s mortgage insurance program “was, and still is, an enormously popular program”); Snowden, *supra* note 51, at 89 (describing FHA business as “the lifeblood of the mortgage banking industry” by the midcentury).

75. KAREN M. HULT, *AGENCY MERGER AND BUREAUCRATIC REDESIGN* 90 (1987). The agency was also self-sustaining: by 1954 it repaid the Treasury all the funds initially advanced to it (with interest), and by 1959 it had almost \$700 million in cash reserves. FED. HOUS. ADMIN. (FHA), *THE FHA STORY IN SUMMARY, 1934-1959*, at 14, 19, 21 (1959).

76. FED. HOUS. ADMIN. (FHA), *supra* note 75, at 21; see also Richard Harris, *The Birth of the Housing Consumer in the United States, 1918-1960*, 33 INT’L J. CONSUMER STUD. 525, 529 (2009) (“[F]ederal housing policy, from the 1930s onwards, focused on helping people to buy.”).

two-year Republican chairmanship in 1953-1954.⁷⁷ Two long-serving Alabamans wielded special power over housing: Senator John Sparkman of Alabama headed the housing subcommittee from 1949 onward, except for the two-year Republican stint in 1953-1954.⁷⁸ In the House, Representative Albert Rains (D-AL) chaired the housing subcommittees in the House until his retirement in 1964.⁷⁹

Legislators designed the federal housing agencies to preserve legislative control, while diminishing the President's power over them. Multiple Presidents tried to centralize their authority over housing in a single agency with top-down control over the various programs, but they had only mixed success.⁸⁰ By 1947, President Truman gained congressional approval for a consolidated Housing and Home Finance Agency (HHFA) to contain the federal housing agencies under one institutional umbrella.⁸¹

Even after authorizing the HHFA's creation, however, Congress sought to assure its independence from executive-branch control. Legislators hoped to preserve administrators' responsiveness to congressional oversight committees and to their housing-program constituents. They also feared that joining the FHA and PHA too tightly would shift the HHFA leader's sympathies toward the public-housing agency.⁸² Thus the 1947 Senate report on the creation of the

77. See Senate Historical Office, *Chairmen of Senate Standing Committees, 1789-present*, at 7-8, <https://www.senate.gov/artandhistory/history/resources/pdf/CommitteeChairs.pdf> [<https://perma.cc/F8R4-GRNC>]. Agency appropriations were overseen by the Independent Offices subcommittees in both House and Senate. WOLMAN, *supra* note 73, at 141.

78. WOLMAN, *supra* note 73, at 123 (describing Sparkman as "the key figure in housing legislation on the Senate side"). Sparkman was one of the Southern Democrats who supported New Deal type economic legislation, while defending racial segregation. See Interview by Paige E. Mulhollan with John Sparkman, Democratic Sen. of Ala. 33 (Oct. 5, 1968) [hereinafter Sparkman Interview]; *Sparkman Urges Loyalty to Party*, N.Y. TIMES, Sept. 3, 1958, at 24.

79. See Wolfgang Saxon, *Albert McKinley Rains, 89, Dies; Backed Housing Bills in Congress*, N.Y. TIMES, Mar. 24, 1991, at 38; *John Sparkman, 85, Ex-Senator, Dies*, N.Y. TIMES, Nov. 17, 1985, at 44; see also KEITH, *supra* note 65, at 14 (describing Sparkman and Rains, in contrast to other Southern Democrats, as "consistent, imaginative, and progressive legislative leaders in the field of housing"); WOLMAN, *supra* note 73, at 117, 127 (stating that Rains "dominated the housing process on the Hill" until 1965).

80. In 1942, President Roosevelt used his war powers to consolidate all federal housing bodies within a single entity, the National Housing Agency. Exec. Order No. 9070, 7 Fed. Reg. 1529 (Feb. 24, 1942).

81. Statement by the President on the New Housing and Home Finance Agency, 1 PUB. PAPERS 374 (Aug. 7, 1947).

82. Congress rejected a 1946 proposal from President Truman to reorganize the housing agencies in a single, permanent entity because the plan transferred statutory powers upward to the Administrator. Private housing interests including the "FHA, the private builders, the real-estate boards, the building and loan associations, and the savings and loan associations . . . had the fear that if [the housing agencies] were consolidated the man who dominated the

HHFA emphasized that the new Administrator's coordinating role did not include the power "to direct and to control" the constituents.⁸³ Instead, even within the HHFA, the relevant statutory powers remained vested directly in the heads of the FHA and PHA.⁸⁴ The HHFA Administrator had only "advisory and supervisory authority to discuss matters with them."⁸⁵ That structure persisted until the HHFA became the Cabinet-level Department of Housing and Urban Development (HUD) in 1965.⁸⁶

Congress's scheme worked. The overall set-up of the housing agencies that resulted was "an administrative monstrosity" that was virtually impossible for the executive branch to run.⁸⁷ Through the 1950s, "the Public Housing Commissioner would just refuse to meet with the [HHFA] Administrator and the FHA would thumb its nose."⁸⁸ The decentralized structure of the housing programs, which delegated significant power to regional and local officials, made it all the more difficult for the White House and the HHFA Administrator to control the constituent agencies.⁸⁹

whole thing would be a public-housing man." *Nomination of Robert C. Weaver: Hearings before the Comm. on Banking and Currency*, 87th Cong. 25 (1961) [hereinafter *Nomination of Robert C. Weaver*] (quoting 79 Cong. Rec. 8986-87 (1946) (statement of Sen. Taft)).

83. *Id.* at 23 (quoting Memorandum, Extent of Power of Housing and Home Finance Administrator).
84. *Id.* at 28 (quoting Memorandum, Legal Relation of Housing Administrator to Heads of Constituents of Housing Agency).
85. *Id.* at 27 (quoting Albert Cole, Administrator of HHFA, in 1955).
86. Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (1965).
87. Interview by William McHugh with Booker T. McGraw, former Assistant to the Adm'r of the Hous. and Home Fin. Agency, in Washington, D.C. 8-9 (Sept. 11, 1968) (on file with John F. Kennedy Library Oral History Program). HHFA "was usually regarded as pretty disorganized and some of the agencies very independent." Interview by William McHugh with Milton P. Semer, former Gen. Counsel for the Hous. and Home Fin. Agency, in Washington, D.C. 46 (Sept. 10, 1968) (on file with John F. Kennedy Library Oral History Program).
88. Interview by William M. McHugh with William L. Slayton, former Comm'r of the Urban Renewal Admin., in Washington, D.C. 12 (Feb. 3, 1967), <https://www.jfklibrary.org/sites/default/files/archives/JFKOH/Slayton%2C%20William%20L/JFKOH-WLS-01/JFKOH-WLS-01-TR.pdf> [<https://perma.cc/8WJD-466Q>]. The metaphor of constituent agencies being able to "thumb their noses" at the HHFA head was popular. As another long-time staffer put it, "All the commissioner [of a constituent agency] had to do was to thumb his nose nicely and politely say, 'Well Mr. Administrator, the statute is holding me responsible.'" Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 8.
89. The obstacles to reigning in the FHA were particularly pronounced. In the Deputy Administrator's words, "when you get to the insuring offices, the FHA regional offices, the district offices . . . [T]hat's where the powers of the administrator were very minimal." Interview by Larry J. Hackman with Jack T. Conway, in Washington, D.C. 63 (Apr. 11, 1972) <https://www.jfklibrary.org/sites/default/files/archives/RFKOH/Conway%2C%20Jack%20T>

Due to their diffuse, fragmented design, the federal housing agencies acquired significant autonomy from executive branch control. But the PHA's basic need for political survival kept it highly dependent on Congress, where Southerners dominated its oversight, along with the local housing officials that were its primary clientele. That structure had direct implications for the public-housing agency's approach to questions of racial justice; even where civil-rights activists found support from Democratic Presidents or their appointees, they faced a far more difficult struggle in convincing the agency to defy its congressional allies.⁹⁰

D. Legal Latitude

Housing administrators thus operated in a context of limited political choice. At the same time, they faced few binding legal constraints. At the origins of the public-housing program in the 1930s, the substantive meaning and scope of the Equal Protection Clause was deeply contested. That constitutional uncertainty allowed administrators to exercise legal discretion over their racial policies, while technical legal doctrines shielded them from defending those policies before the courts.

1. Substantive Ambiguity

Did equal-protection principles require the federal government to mandate racial nondiscrimination in public housing? This was unclear at the time of the program's creation during the New Deal. It became increasingly evident over time, though, that the answer was yes – and that segregation should be barred as a form of unconstitutional discrimination.

From at least the 1930s forward, civil-rights advocates began developing the case that the federal government was legally prohibited from using federal funds

/RFKOH-JTC-02/RFKOH-JTC-02-TR.pdf [https://perma.cc/H6PT-MQA6] (Robert Kennedy Oral History Program of the John F. Kennedy Library). Regional directors could be very slow in responding to Washington directives – sometimes the only recourse was to resort to civil service manipulation to move them. See Interview by Larry J. Hackman with Oliver W. Hill, in Richmond, Va. 40-41 (Feb. 29, 1968) <https://www.jfklibrary.org/sites/default/files/archives/JFKOH/Hill%2C%20Oliver%20W/JFKOH-OWH-01/JFKOH-OWH-01-TR.pdf> [https://perma.cc/KF68-EVSJ] (John F. Kennedy Library Oral History Program).

90. Congressional alliances also constrained the President and his aides, of course. See, e.g., *infra* notes 355-356 and accompanying text (discussing Kennedy's strategic decisions to avoid civil-rights action in housing out of a desire to achieve other legislative goals).

to support racial discrimination or segregation in housing.⁹¹ Their argument came to rest on the following set of interlocking premises:

First, that the Fourteenth Amendment barred not just discrimination in terms of the material resources allocated to members of different racial groups, but also de jure racial segregation itself—contra *Plessy v. Ferguson*'s “separate but equal” theory, which allowed segregation so long as the material resources provided were “substantially equal.”⁹² Beginning with *Buchanan v. Warley* in 1917, the Supreme Court had struck down local governments’ attempts to require residential segregation by law.⁹³ For NAACP lawyers, *Buchanan* and the cases following it indicated that regardless of segregation’s legality in other realms, government-imposed segregation in housing was distinct and impermissible under the Constitution.⁹⁴

Second, that the federal government, though not directly subject to the Fourteenth Amendment’s equal-protection mandate, was subject to parallel constraints on discrimination by virtue of the Fifth Amendment’s Due Process Clause.⁹⁵ By the early 1940s, the Court’s rulings in the Japanese American internment cases indicated that due process likely barred at least some forms of race discrimination.⁹⁶ In 1954, the Court squarely applied the Fifth Amendment to strike down discrimination by the federal government in *Bolling v. Sharpe*.⁹⁷

Third, that just as the federal government could not impose segregation directly, it could likewise not supervise, approve, fund, or otherwise aid other actors’ efforts to impose segregation. NAACP lawyers argued for the broad principle that the Constitution barred any governmental support for residential

91. See *infra* notes 157-168 and accompanying text.

92. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (examining whether Missouri had provided “substantially equal” facilities to African Americans).

93. See, e.g., *City of Richmond v. Deans*, 281 U.S. 704 (1930) (per curiam); *Harmon v. Tyler*, 273 U.S. 668 (1927) (per curiam); *Buchanan v. Warley*, 245 U.S. 60 (1917). On the origins of *Buchanan* as an NAACP test case for such segregation ordinances, see George C. Wright, *The NAACP and Residential Segregation in Louisville, Kentucky, 1914-1917*, 78 REG. KY. HIST. SOC’Y 39, 47 (1980).

94. See, e.g., *infra* notes 167-168, 178 and accompanying text. It is unsurprising that NAACP lawyers saw *Buchanan* as a crucial precedent—the decision was a key early victory for the organization, which managed to more than quadruple its membership by making the win the centerpiece of an expansion drive the next year. See Wright, *supra* note 93, at 52.

95. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”).

96. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process.”).

97. 347 U.S. 497, 500 (1954); see, e.g., *infra* notes 220-226 and accompanying text.

segregation, whether imposed by public or private actors.⁹⁸ They found support in cases expanding the boundaries of the state-action doctrine, from the white-primary cases to *Marsh v. Alabama*, as well as later cases enforcing *Brown*.⁹⁹

Finally, if federal aid for other actors' segregation practices violated the Fifth Amendment, then this constitutional prohibition bound the executive branch just as it bound the legislative and judicial branches.¹⁰⁰ Administrative officials could not avoid constitutional responsibility by arguing that their governing statutes seemed to require them to continue aiding those actors despite discrimination. Nor could they wait passively for a court to directly pass on the question (a practice that would return the NAACP and its allies to the procedural morass involved in challenging federal aid programs in the courts, as discussed below).

As the Supreme Court reconfigured its equal-protection jurisprudence in the 1940s and 1950s, the legal foundation for each of these premises strengthened.¹⁰¹ However, enough uncertainty persisted to give administrators a slim margin for judgment. In particular, two questions remained opaque. First, how much "federal action" sufficed to invoke constitutional prohibitions? State and local discrimination might violate the Fourteenth Amendment, but it was unclear at what point federal funding, supervision, or regulatory approval of other government actors' discrimination would also invoke the Fifth Amendment, meaning that federal officials themselves were violating the Constitution. Second, to what degree were executive agencies entitled to independently interpret the Constitution, especially if that meant acting contrary to statutory mandates or perceived congressional will? Over time, agency lawyers emphasized these ambiguities as reasons to avoid the overwhelming logic of *Shelley* and *Brown*.

98. See *Bolling*, 347 U.S. 497. *Bolling* was the federal companion case to *Brown*, involving school segregation in the District of Columbia.

99. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944). In the context of support for private discrimination, such as through FHA mortgage insurance, this was a "state action" problem – did federal support for private builders constitute sufficient government involvement to invoke the Constitution at all? In the public-housing context, one might term this a "federal action" problem – did federal support for local government's discrimination represent sufficient involvement to bring into play constitutional restrictions on federal, as opposed to state, actors? See, e.g., *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959, 967 (4th Cir. 1963) (en banc) (addressing both federal and state constitutional responsibility for racial segregation in a private hospital receiving public funding).

100. See, e.g., *infra* note 175 and accompanying text.

101. See *Cooper*, 358 U.S. 1; *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955); *Bolling*, 347 U.S. 497; *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944).

2. *Procedural Barriers to Review*

Critically, agency lawyers rarely had to defend their positions in the courts. Until the late 1960s, the federal government almost entirely avoided responding on the merits to litigation challenging its policies supporting housing segregation.¹⁰² Relying on standing requirements, governmental immunities, and other procedural barriers, the federal housing agency avoided substantive judicial oversight of its constitutional interpretations. In particular, Supreme Court doctrine shielded federal grant programs from most constitutional challenges. In 1923, the Court indicated that it would be rare for any individual or entity to have standing to challenge federal grant conditions as unconstitutional.¹⁰³ In the subsequent decades, the Court's standing doctrine effectively blocked equal-protection challenges to federal grant-in-aid programs.¹⁰⁴

The federal government's indirect approach to implementing public housing also insulated the agency from judicial scrutiny. Because federal officials purportedly acted in a more passive role—supplying funds, writing regulations, and overseeing implementation, without actually operating the segregated housing—civil-rights lawyers understood that courts would view any federal constitutional violations as secondary to the local government's overt role. NAACP lawyers advised their colleagues and allies that the courts would likely be reluctant to remedy plaintiffs' constitutional harms by ordering a halt to federal funding practices and would instead limit them to remedies against the state or local

102. *But see supra* notes 1-9 and accompanying text (discussing *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956), as the exception). For the later decisions addressing substantive constitutional and statutory challenges, see *infra* notes 399-402.

103. *Massachusetts v. Mellon*, 262 U.S. 447, 483, 487-89 (1923). *Mellon* involved a state's and an individual taxpayer's separate challenges to a federal maternal health grant program as being beyond the federal government's Spending Clause powers and invasive of the states' Tenth Amendment reserved rights. The Court refused to address the merits and dismissed the cases for lack of jurisdiction. During the New Deal years, though the Court did review challenges to federal Spending Clause programs, it both affirmed the broad scope of the Spending Clause authority and increasingly indicated that the states' consent to the conditions of such programs vitiated any constitutional concerns. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); see also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958) (“[B]eyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds”); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947) (“[T]he United States . . . does have power to fix the terms upon which its money allotments to states shall be disbursed.”); *United States v. Bekins*, 304 U.S. 27 (1938) (“As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress”).

104. See 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).

officials actually operating the programs.¹⁰⁵ Federal officials' insulation from the actual operation of public housing thus also protected them from legal liability. Sovereign immunity further shielded federal actors, at least in instances in which it could be argued that no statutory waiver of immunity applied.¹⁰⁶

Thus, constitutional ambiguity and protection from judicial review gave the PHA broad discretion to craft its own approach to race. As a result, political variables, not legal checks, proved to be the relevant constraint on the agency's constitutional decision-making.

II. HOUSING'S ORIGINAL RACIAL CONSTITUTION

How did public-housing officials use their legal discretion to craft racial policies? At the public-housing program's origins during the New Deal, political actors gave administrators significant leeway to require materially equal treatment between whites and African Americans.

This Part traces that early era of agency constitutionalism, in which the agency attempted to enforce *Plessy* as written—achieving some liberal goals around material equality, while also entrenching and extending physical segregation. During these early decades, the NAACP progressively sharpened its constitutional arguments against federal involvement in segregation, presenting a vision of the Fifth and Fourteenth Amendments that the Justice Department and the Supreme Court ultimately adopted. Yet federal housing officials and their allies argued that without segregation, the public-housing program could not survive in Congress: in their eyes, *Plessy* was the necessary political price to pay for housing the poor.

A. Racial Equity: A “Fair Share”

Public housing's racial policies originated in the earliest federal experiments in the field. Secretary of Interior Harold Ickes, one of the staunchest racial liberals in President Franklin D. Roosevelt's Cabinet, oversaw the initial incarnation

105. See, e.g., Memorandum from Constance Baker Motley to Lawyers and Other Specialists Invited to Attend the Conference in New York on March 13, 14, 15, 1953 17-18 (early 1953) (on file with NAACP Papers, Library of Congress, Box II:A311), https://hv.proquest.com/pdfs/001521/001521_007_0719/001521_007_0719_From_1_to_164.pdf#page=11 [https://perma.cc/TVT6-CGzT].

106. See Memorandum from Marshall W. Amis, Gen. Counsel, to Warren R. Cochrane, Dir. of Racial Relations (Nov. 29, 1951) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196) (discussing the public-housing agency's successful argument in several cases that Congress had not waived the agency's sovereign immunity).

of federal public-housing programs within the Housing Division of the Public Works Administration (PWA).¹⁰⁷ In a key move, Ickes mandated nondiscrimination in the agency's public-works jobs. Although the program's organic legislation did not bar discrimination, Ickes said, "it is to be assumed that Congress intended this program to be carried out without discrimination as to race, color, or creed of the unemployed to be relieved" – and he claimed the delegated power to implement that intent.¹⁰⁸

Along with a nondiscrimination mandate, Ickes also institutionalized an internal unit dedicated to issues of racial fairness. In 1933, after pressure by black leaders, Ickes created the Office of the Advisor on Negro Affairs to help oversee the Department.¹⁰⁹ The following year, Robert Weaver, an African American economist who had earned his Ph.D. at Harvard, took on the post; from that position, he also served as a consultant to the PWA's Housing Division.¹¹⁰ Weaver believed his job was "to serve his employer, the federal government, by protecting it from censure on racial grounds . . . [T]he best way to do this was to see that racial minorities were integrated throughout the programs of the housing agencies."¹¹¹

Soon, a Racial Relations office was formed to help implement what Weaver called "a positive racial policy" for public housing, focusing on "equitable participation of minorities as tenants, site selection, equitable participation of minorities in management, and fair employment practices in construction employment."¹¹² Weaver's vision included a "fair share" of public-works employment

107. Ickes was well known as a progressive on race. See, e.g., *People in the News*, CHI. DEFENDER, Feb. 16, 1952, at 10 (writing that Ickes "initiated the liberal trend in Government employment which eventually led to the wide acceptance of Negroes in Federal jobs," "broke down segregation in government cafeterias by instituting complete integration on his own," and secured the Lincoln Memorial for singer Marian Anderson after the Daughters of the American Revolution (DAR) refused to allow her to sing at Constitution Hall).

108. W. J. Trent, Jr., *Federal Sanctions Directed Against Racial Discrimination*, 3 PHYLON 171, 177-78 (1942).

109. Ickes generated backlash by appointing a white man, Clark Foreman, to the position, then subsequently appointed Weaver as his assistant with the understanding that he would become Administrator upon Foreman's departure (which took place within a year). See WENDELL E. PRITCHETT, ROBERT CLIFTON WEAVER AND THE AMERICAN CITY: THE LIFE AND TIMES OF AN URBAN REFORMER 44-47 (2008); *Think Weaver Should Be Over Clark Foreman*, BALT. AFRO-AM., Nov. 18, 1933, at 11.

110. PRITCHETT, *supra* note 109, at 19-30, 52.

111. Lucia M. Pitts, *A History of Public Housing for Negroes: Its Problems and Accomplishments 1933-1953*, at 16 (Nov. 1954) (on file with NARA II, Box 1, Records of the Intergroup Relations Branch, 1936-63, RG 196).

112. WEAVER, *supra* note 27, at 158.

and low-income housing units for African Americans. But Weaver went even further in laying out principles for substantive participation by minorities in local housing policy, governance, and management.¹¹³ To him, the resulting “racial policy . . . [was] full of implications for American democracy.”¹¹⁴

Weaver and his staff constructed two key guidelines for implementing those equitable participation principles. The first was “a sort of formula, developed by the Adviser’s office, to define discrimination in the employment of construction workers, and thus to assure employment for Negroes.”¹¹⁵ The second was “a policy of equity, providing that in any public housing undertaken, units should be provided for Negroes according to their local population and needs.”¹¹⁶ In effect, Weaver outlined a test of proportionality to measure whether jobs and housing were being granted to African Americans in ways that met the “separate but equal” principle.¹¹⁷ Even if the federal agency were to countenance segregation, a norm of distributive equity could be applied and enforced.

1. *Equitable Employment*

Weaver created the equity formula for black employment in response to the difficulty of enforcing Ickes’s nondiscrimination mandates in federally funded public-works projects. It became clear, in Weaver’s words, that “a pronounce-

113. The core principles of “equitable participation” were these:

[1] Since Negroes pay taxes just as other Americans, the Federal Government should see that they have their fair share of dwelling units in any housing program initiated by the Federal Government.

[2] Negroes should be treated as other citizens and taxpayers and take part in the planning, development and management of housing programs, particularly those in which they are to participate as tenants.

[3] As taxpayers, Negroes should have, also, their fair share of employment created by construction of housing projects.

Pitts, *supra* note 111, at 18.

114. Robert C. Weaver, *Racial Policy in Public Housing*, 1 *PHYLON* 149, 149 (1940).

115. Pitts, *supra* note 111, at 18.

116. *Id.*

117. See Observations Regarding Implications of Decisions of the U.S. Supreme Court for HHFA Programs and Policies 3 (June 29, 1954) (on file with NARA II, Box 748, Program Files, Race Relations Program, 1946-58, RG 207) [hereinafter Observations] (“PHA has earnestly sought, through administration, to countenance the ‘separate,’ and insist on the ‘equal.’”).

ment of policy did little if anything to assure equal job opportunities for minorities.”¹¹⁸ Moreover, it was difficult to detect discrimination on a case-by-case basis, particularly when it came to building contractors.¹¹⁹ Weaver therefore proposed “an administrative formula to guarantee equitable employment of non-whites on public-housing construction contracts.”¹²⁰

Weaver and his PWA colleagues formulated an approach whereby a contractor’s failure to pay a certain portion of its payroll to black workers would constitute prima facie evidence of discrimination.¹²¹ The required percentages were set separately for African American skilled and unskilled labor, using 1930 occupational census figures along with local updates on the availability of black workers. After more than a year of applying the device to PWA projects, agency officials viewed it as “a workable solution to a difficult problem. Its use had made it possible to spot and correct discrimination in the early stages of the work rather than after it was completed.”¹²² And it shifted the burden to the contractor to disprove discrimination, rather than vice versa. That the agency moved forward with this “racial equity” approach, given inevitable objections, “was due in large measure to the support of objective agency heads, and the cooperation of others, in and out of government.”¹²³

Once the 1937 Housing Act created a new, separate public-housing agency outside the PWA, the new agency’s leaders immediately set up an Office of Racial Relations.¹²⁴ As the office’s head, Weaver worked to ensure that the PWA principles persisted in the new agency. Overcoming initial objections from the

118. Robert C. Weaver, *Negro Labor Since 1929*, 35 J. NEGRO HIST. 20, 25 (1950).

119. Robert C. Weaver, *An Experiment in Negro Labor*, 14 OPPORTUNITY: J. NEGRO LIFE 295, 295 (1936) (stating that “[i]t was humanly impossible to define discrimination in a situation where a borrower, a contractor, and a labor union were involved”).

120. Weaver, *supra* note 118, at 25.

121. Agency construction contracts contained a clause that “for the purpose of determining questions of . . . discrimination . . . it is hereby provided that the failure of the contractor to pay at least” a set percentage of the monthly payroll to black workers “shall be considered prima facie evidence of discrimination.” Weaver, *supra* note 119, at 296.

122. Pitts, *supra* note 111, at 21.

123. *Id.* at 25.

124. The PWA’s staff largely transferred to the new agency, with the approving endorsement of civil-rights leaders. NAACP leader Walter White had supported a wholesale staff transfer, commenting, “Since we have been successful in getting Negroes appointed in strategic managerial positions . . . it would be desirable to have the employees in the present Management Branch of the [PWA] Housing Division transferred [to the new agency] . . .” Memorandum from Walter White to Charles Houston (Apr. 16, 1937) (on file with NAACP Papers, Library of Congress, Box I-C-257), https://hv.proquest.com/pdfs/001521/001521_001_0401/001521_001_0401_0001_From_1_to_50.pdf [<https://perma.cc/E6E9-R3KT>].

legal staff, Weaver's percentage-based approach to assuring equal employment ultimately prevailed, although in somewhat weakened form.¹²⁵ Instead of treating a failure to meet the guideline figures as prima facie evidence of discrimination, the new contracts treated a contractor's attainment of the baseline percentages for black employment as prima facie evidence of nondiscrimination—effectively converting the percentages into a “safe harbor” for contractors.¹²⁶

In the postwar years, the agency continued to adhere to its race-conscious, numbers-based approach to ensuring nondiscrimination in public-works jobs. Following Congress's enactment of the Housing Act of 1949, PHA Commissioner John Egan assured the Urban League that he “saw no reason for any change” in the agency's approach to assuring black workers “a fair share” of available employment.¹²⁷ The agency would continue to do its best to ensure “adherence to the recommended percentages.”¹²⁸

Over the subsequent decade, the PHA retained its percentage-based approach for public-works employment and argued that other agencies should adopt it as well.¹²⁹ The agency's early exercise of discretion had become entrenched, despite the lack of statutory grounding. The DOJ's Office of Legal Counsel in 1963 included the PHA when it noted that “a number of agencies have for many years required adherence to a policy of nondiscrimination in employment in federally assisted construction.”¹³⁰ The requirement was “neither

125. The lawyers worried that the prima facie clause might violate public-bidding requirements or constitute “discrimination” against contractors who could not employ sufficient African American workers. Memorandum from P.F. Jansen (Mar. 24, 1938) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196). But the agency's Labor Relations Division supported Weaver. Letter from Walter V. Price, Acting Dir. of Labor Relations, to Leon Keyserling (Apr. 26, 1938) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

126. See Letter from Marshall W. Amis, Gen. Counsel, to Thomas Edwards (Feb. 9, 1949) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196); Letter from Walter V. Price, *supra* note 125.

127. Letter from John Taylor Egan, Comm'r, Pub. Hous. Agency, to Julius A. Thomas, Dir., Dep't of Indus. Relations, Nat'l Urban League (Sept. 6, 1949) (on file with NARA II, Box 6, Records of the Intergroup Relations Branch, 1936-63, RG 196).

128. *Id.*

129. Recommendations from Marie C. McGuire, Comm'r, Pub. Hous. Agency, to Jack T. Conway, Deputy Adm'r, Hous. & Home Fin. Agency (May 10, 1961) (on file with NARA II, Box 9, Records of the Intergroup Relations Branch, 1936-63, RG 196).

130. AUTHORITY TO PROHIBIT DISCRIMINATION IN EMPLOYMENT ON FEDERALLY ASSISTED SCHOOL AND HOSPITAL CONSTRUCTION (July 15, 1963), *microformed on* Department of Justice, Legal Counsel, LBJ Library, Fiche 8 (Gen. Servs. Admin.).

clearly authorized nor clearly prohibited by statute. Such exercise of administrative discretion does not appear to have been challenged in the courts, or by Congress or the Comptroller General.”¹³¹

2. *Equitable Participation*

As with public-works employment, early officials worked within a context of legal ambiguity to fashion principles of racial fairness for the allocation of low-income housing. In the absence of legislative guidance, Weaver and his assistants crafted a simple rule: that African Americans should be provided a share of public-housing units “according to their local population and needs.”¹³² From his position as a consultant to the PWA, Weaver tried to ensure that black communities would benefit from the public-housing program. In 1935, he announced that African Americans would receive approximately 32% of the housing PWA built.¹³³

Once the PHA was formed, policies that had operated informally within the PWA Housing Division were institutionalized in written, general guidelines: “[F]air provision had to be made in local plans for all races in the eligible local population.”¹³⁴ Further, agency procedure reinforced the racial-equity policy by giving race-relations advisors a key role in project approval.¹³⁵

Even as federal officials mandated that public works and public housing be fairly distributed among whites and blacks, they did not attempt to bar racial segregation. In fact, many early federally owned projects were segregated.¹³⁶ Once the U.S. Housing Act of 1937 shifted public housing to local operational control, the agency allowed local authorities to determine the “racial occupancy”

131. *Id.*

132. Pitts, *supra* note 111, at 18.

133. *Id.* at 21 (citing “Weaver, Robert C., Newspaper Statement, 12/10/35”).

134. *Id.* at IV-6.

135. By “providing for review and comment by the Racial Relations Office of all applications for housing assistance . . . [the guidelines] insured that racial considerations became, as a matter of policy, one of the conditions to be taken into account in accepting or rejecting applications from various localities, and that equitable provision for Negroes was made in the local plans.” *Id.* at IV-8.

136. *Id.* at 21, 25, 27.

of future projects.¹³⁷ The PHA simply demanded that nonwhites receive a share of public housing proportional to their representation among those eligible.

Frank Horne, the long-serving chief of the PHA's race-relations section, explicitly acknowledged the agency's use of discretion in fashioning its racial-equity policy in 1947. He explained to President Truman's civil-rights committee that the agency's long-standing "equitable participation" policy "rested so far solely upon administrative policy without any specific legal authorization." Further, he continued, "[n]o legislation affecting these programs has contained specific non-discrimination or equitable participation provisions."¹³⁸

As the years wore on, the agency's equitable-participation policy increasingly gave rise to formal race consciousness throughout the agency. In 1951, federal officials updated a document called "Special References to Race in the Policies and Procedures of the Public Housing Administration," so that it began with a statement of general racial policy calling for "equitable provision for eligible families of all races."¹³⁹ By 1953, race-relations advisor Lucia Pitts could count eighty-eight references to race in PHA's formal policies and procedures.¹⁴⁰ Over the decade, the agency's formal practices incorporated more and more accounting for race. For example, officials were to report racial occupancy of housing projects on Form PHA-2212 ("Racial Relations Data Card"), although only for those projects that permitted any minority occupancy, not for whites-only projects.¹⁴¹ Monthly reports on changes in racial occupancy patterns were submitted on Form PHA-2214. In 1960, federal officials reissued "Special References to

137. Memorandum from David L. Krooth, Gen. Counsel, Fed. Pub. Hous. Auth., to Leon H. Keyserling, Gen. Counsel, Nat'l Hous. Agency (July 31, 1942) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196) (writing that "it is the responsibility of a local authority under our policy to pass upon matters relating to racial occupancy").

138. Memorandum from Racial Relations Service, Nat'l Hous. Agency, Minority Group Considerations in Administration of Governmental Housing Programs (June 1947) (on file with NARA II, Box 9, Records of the Intergroup Relations Branch, 1936-63, RG 196) [hereinafter *Minority Group Considerations*].

139. See Pub. Hous. Admin., *Special References to Race in the Policies and Procedures of the Public Housing Administration* from 1949 (Jan. 12, 1951) (on file with NARA II, Box 7, Records of the Intergroup Relations Branch, 1936-63, RG 196) [hereinafter *Special References to Race*].

140. See Pitts, *supra* note 111, at 118.

141. See PHFA, *Low-Rent Housing Manual* § 407.3A (May, 1957) (on file with NARA II, Box 7, Records of the Intergroup Relations Branch, 1936-1963, RG 196). The form provided for groups other than African Americans to be "identified as CA (Chinese-American), JA (Japanese-American), F (Filipino), (H) Hawaiian, (I) Indian." Latin Americans could be designated "LA" – "but it should be remembered that the U.S. Census and PHA consider Latin-Americans white." *Id.* at 3.

Race.”¹⁴² Agency bureaucrats had created an increasingly detailed and formal set of guidelines to implement their racial policies, all grounded in *Plessy*’s principle of “separate but equal.”

3. *The Conditions that Fostered “Racial Equity”*

How were Weaver and his staff able to build their innovative, results-oriented understanding of nondiscrimination into the early public-housing program? Several factors allowed Weaver to design and implement his “racial equity” approach: the program’s newness, early exclusive federal authority over implementation, and the existence of an internal cadre of race-relations officials to enforce the new requirements. Support from the agency’s leadership also proved critical.¹⁴³

Most important, providing housing was a new area of social intervention, where states and localities had not already established programs.¹⁴⁴ Weaver himself attributed agency leaders’ ability to construct their own racial policies to the fact that they were working with a blank slate: “Action was facilitated by the newness of the program and the absence of traditional patterns.”¹⁴⁵

At the start, the federal government directly operated its own low-income housing program, giving its officials the ability to design procedures without pushback from local authorities. Frank Horne, the long-time head of racial relations in the HHFA, wrote that it was “important . . . that these approaches were

142. Letter from Philip G. Sadler, Dir., Intergroup Relations Branch, to Holders of *Special References to Race in the Policies and Procedures of the Public Housing Administration* (Mar. 1960) (on file with NARA II, Box 7, Records of the Intergroup Relations Branch, 1936–1963, RG 196). By then the subject index listing alone was four pages. Highlights included the “Racial Policy” of Low-Rent Housing Manual in § 102.1; “Racial Equity in Communities with Small Minority Population” in § 102.2; Construction Payrolls in § 216.8 et seq.; “Recording Racial Occupancy Data” in § 407.3A; “Reports on Negro Employees and Authority Members” in § 102.3; “Living Space Available to Racial Minority Families” in Local Public Authorities Letter #16; and Handling of Correspondence on Racial Matters in an agency Circular dated 11/29/54. *Special References to Race*, *supra* note 139.

143. For a modern, broader treatment of the conditions that allow such internal advisory units to be effective, see Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *CARDOZO L. REV.* 85, 103–15 (2014) (emphasizing the necessity of what she terms “influence” and “commitment,” backed up by “external reinforcement” from actors and entities outside the agency).

144. See *supra* notes 56–61 and accompanying text.

145. Weaver, *supra* note 114, at 150. Or, as Weaver put it in 1938, “Public housing is practically a virgin field.” Robert C. Weaver, *The Negro in a Program of Public Housing*, 16 *OPPORTUNITY J. NEGRO LIFE* 198, 200 (1938).

established in a housing program which the Federal Government initiated, constructed, and managed the projects.”¹⁴⁶

Dedicated personnel were available to oversee the new framework because agency leaders created an institutional unit focused on racial-equity goals, which persisted over time. Weaver noted, “From the start, public housing had . . . an effective and respected race-relations office; it was accepted that both programs and projects were to be reviewed by that office, and other branches of [the PHA] had come to realize that racial participation was an agency concern.”¹⁴⁷ Achieving that acceptance within the agency had not been easy. It involved “a tremendous amount of spade work in developing certain basic principles and programs of action to assure Negroes were there at the start, helping to work out the various phases of the program.”¹⁴⁸

Finally, Secretary Ickes, as well as lower-level agency leaders, provided crucial support.¹⁴⁹ In subsequent years, leaders in the public-housing agency also demonstrated their commitment to nondiscrimination, as they understood it. Gunnar Myrdal wrote in the 1940s, “Many of the leading white officials of the [public-housing] agency . . . are known to have been convinced in principle that discrimination should be actively fought.”¹⁵⁰

The PHA’s commitment to racial equity won it praise, particularly in comparison to the FHA, which was known to embrace racially restrictive covenants and massive whites-only subdivisions, while refusing to insure integrated housing. Public housing, by contrast, was assured to black families in quantities proportional to their need. The PHA was a “bright light” that stood “in startling contrast with the irresponsible and vicious practices of the Federal Housing Administration.”¹⁵¹

146. Minority Group Considerations, *supra* note 138, at 2. Weaver also emphasized the early federal role: “[I]t was fortunate for Negroes that a Federal agency planned, constructed, and managed the first public-housing developments because a centralized program can do much to establish desirable precedents in racial participation.” Robert C. Weaver, *Federal Aid, Local Control, and Negro Participation*, 11 J. NEGRO EDUC. 47, 48 (1942).

147. WEAVER, *supra* note 27, at 158.

148. Pitts, *supra* note 111, at 17.

149. Weaver wrote, “At the outset . . . Secretary Ickes reaffirmed the policy of non-discrimination in employment.” Weaver, *supra* note 118, at 24.

150. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 350 (20th Anniversary ed. 1962).

151. *General Housing Act of 1945: Hearing Before the S. Comm. on Banking & Currency*, 79th Cong. 859 (1945) (statement of Mary McLeod Bethune, President, National Council of Negro Women).

B. Fighting Federally Funded Segregation

Yet the PHA's racial-equity mandates explicitly countenanced segregation. Even as they initially praised the agency's nondiscrimination initiatives, civil-rights leaders warned that "separate but equal" could not give rise to truly equal treatment. When the PWA began its housing program in the early 1930s, the agency had attempted to avoid the question of segregation by building primarily in "slum sites" and recreating the prior racial order in particular neighborhoods under a "neighborhood pattern" policy.¹⁵² The asserted goal was to maintain the status quo, under the principle that "public housing should not establish racial patterns less democratic than those which now exist in any given community."¹⁵³ But, as Robert Weaver noted a decade later, the effect of building new housing that replicated existing racial patterns was to "strengthen residential segregation in the North."¹⁵⁴ After all, "[federally]-aided projects are built to last 60 years."¹⁵⁵

Black leaders outside the agency understood the risks of accepting segregation as the cost of receiving federal aid. In 1936, Robert Taylor, an African American social reformer who later became head of the Chicago Housing Authority, wrote NAACP head Walter White with "a deep-seated question": "Should we acquiesce to [a federal public-housing] program if, in the planning, Negro areas are separated, thereby perpetuating for many, many years to come residential segregation?"¹⁵⁶ White lobbied Congress to enact a segregation prohibition as part of the 1937 Act, but his effort failed.

Two years later, White stood before the National Public Housing Conference, condemning the federal public-housing agency for "establishing and requiring patterns of racial segregation in areas where members of various racial groups have lived together for generations."¹⁵⁷ In 1940, out of 115 new projects, the agency announced that 9 would be integrated—45 others were slated for African American occupancy, and apparently the remaining 61 were to be whites-

152. WEAVER, *supra* note 27, at 73-76; see also ABRAMS, *supra* note 27, at 229-30 (discussing FHA loan policies to ensure "homogeneity" and "prevent[] infiltration").

153. Weaver, *supra* note 114, at 156.

154. WEAVER, *supra* note 27, at 76.

155. Weaver, *supra* note 114, at 156.

156. Letter from Robert R. Taylor to Walter White, Exec. Sec'y, NAACP (June 15, 1936) (on file with NAACP Papers, Library of Congress, Box I:C307), https://hv.proquest.com/pdfs/001521/001521_001_0663/001521_001_0663_From_1_to_74.pdf#page=10 [https://perma.cc/QB5S-HEXV].

157. *Plan Would House Million Families*, N.Y. TIMES, Jan. 28, 1939, at 1.

only.¹⁵⁸ Officials might claim that “the ideal is to keep the character of the neighborhood . . . intact,” but black journalists pointed out that even prior black residents of those neighborhoods were being rejected from projects designated as white.¹⁵⁹

By 1938, the NAACP had also made clear that the FHA was actively discriminating against blacks in its mortgage-insurance program. NAACP Assistant Secretary Roy Wilkins wrote the head of the agency: “The conclusion is inescapable” that the FHA had a policy of refusing to guarantee mortgages on housing for black families if located outside of a “Negro district,” and often refused such guarantees regardless of location.¹⁶⁰ Wilkins wrote, “We do not believe that the federal government, through one of its agencies, should use the public tax money to restrict instead of extend opportunities for home ownership and to enforce patterns of racial segregation.”¹⁶¹

Faced with the housing agencies’ embrace of segregation, civil-rights advocates drew on the Constitution. In the years before the Court decided *Shelley v. Kraemer*, their first sustained fight was to convince executive-branch leaders that they were drawing on the wrong judicial precedents to interpret the Fourteenth Amendment in the housing context. They argued that *Plessy* did not govern housing at all. Rather, *Buchanan v. Warley* meant that government could not impose or support segregation in housing.

NAACP officials argued as follows: The Court had first barred legislative bodies from enforcing racial segregation in housing in 1917, and had since reaffirmed the decision in multiple rulings.¹⁶² If the Fourteenth Amendment barred states and localities from imposing racial restrictions in housing, then the federal government must be similarly restricted under the Fifth Amendment. Further, helping others to segregate housing would amount to an unlawful circumvention of the prohibition, accomplishing indirectly what the government could not do directly.

158. Marvel Cooke, *Survey Shows Need for Better Housing*, N.Y. AMSTERDAM NEWS, Jan. 13, 1940, at 4.

159. *Id.*

160. Letter from Roy Wilkins, Assistant Sec’y, NAACP, to Stewart McDonald, Dir., FHA (Oct. 12, 1938) (on file with NAACP Papers, Library of Congress, Box II:L17), https://hv.proquest.com/pdfs/001521/001521_004_0912/001521_004_0912_From_1_to_103.pdf#page=16 [<https://perma.cc/V3QP-CGDJ>].

161. *Id.*

162. See *Buchanan v. Warley*, 245 U.S. 60 (1917); see also *City of Richmond v. Deans*, 281 U.S. 704 (1930) (per curiam) (invalidating Richmond segregation ordinance); *Harmon v. Tyler*, 273 U.S. 668 (1927) (per curiam) (invalidating New Orleans segregation ordinance).

Federal housing program lawyers did not doubt that the federal government was barred from discriminating, even in the 1940s.¹⁶³ But they did not necessarily accept two other key premises of the argument. First, they believed that *Plessy v. Ferguson*'s "separate but equal" rule controlled the government's actions in housing. Unlike the NAACP, agency lawyers did not entertain the idea that *Buchanan v. Warley* might represent a distinct line of precedent that applied a different rule to property than to other spheres, thereby barring all government-imposed residential segregation.¹⁶⁴ Second, they doubted that the federal government's support for segregation—even if intentional—was sufficient to implicate it as engaging in discrimination itself, or to provide the agency with a legal foundation for halting that support.¹⁶⁵

By 1944, the NAACP was clearly elaborating its argument that *Buchanan v. Warley* meant federal agencies could not achieve residential segregation through administrative policy, any more than legislative actors could do so through statutes. In a memo to President Roosevelt, they attacked the FHA, which was "with the use of Federal funds and power . . . requiring residential segregation . . . not only without legislative authority, but in plain violation of ministerial duty."¹⁶⁶ The Constitution barred such behavior, too, by analogy to *Buchanan* and the cases applying it: "[T]he FHA tends to crystallize and extend through Federal influence segregation of residence by race, which the Supreme Court itself has decided cannot be effected by municipal ordinance or state law."¹⁶⁷ However, the civil-rights organization failed to convince the federal housing agencies to embrace that reading of the *Buchanan* line of cases.

Civil-rights leaders instead found support in other key parts of the federal government. By 1947, the Justice Department publicly embraced the NAACP's

163. See Interoffice Memorandum from Herman I. Orentlicher, Briefs & Ops. Section, Nat'l Hous. Agency, to David L. Krooth, Gen. Counsel, Fed. Pub. Hous. Auth. 3-4 (Aug. 13, 1943) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

164. See Memorandum from David L. Krooth, Gen. Counsel, Fed. Pub. Hous. Auth., to Leon H. Keyserling, Gen. Counsel, Nat'l Hous. Agency (July 31, 1942) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

165. See Letter from John B. Blandford, Jr., Adm'r, Nat'l Hous. Agency, to Leslie Perry, Admin. Assistant, NAACP (June 10, 1943) (on file with NAACP Papers, Library of Congress, II:A310), https://hv.proquest.com/pdfs/001521/001521_006_1178/001521_006_1178_From_1_to_76.pdf#page=49 [<https://perma.cc/2RB5-UYLP>] (arguing that "that no federal agency alone can overcome attitudes of long standing or dictate in community affairs").

166. Memorandum from NAACP to President Franklin D. Roosevelt 3 (Oct. 28, 1944), (on file with NAACP Papers, Library of Congress, Box II:A268), https://hv.proquest.com/pdfs/001521/001521_005_0554/001521_005_0554_From_1_to_167.pdf#page=2 [<https://perma.cc/4F39-35R5>].

167. *Id.* at 3-4, 9.

key claims—most significantly, its broad understanding of “federal action” and the implications of *Buchanan* for federal action affecting residential segregation. That year, the DOJ filed an amicus brief in *Shelley v. Kraemer*, a case challenging state judges’ enforcement of racially restrictive covenants under the Fourteenth Amendment, and *Hurd v. Hodge*, a companion case involving federal enforcement of covenants in Washington, D.C., which implicated the Fifth Amendment.¹⁶⁸

In *Shelley* and *Hurd*, the United States took the position that the enforcement of restrictive covenants by state or federal courts violated the Constitution and federal law. In contrast to the housing agency’s lawyers, DOJ lawyers did not believe that *Plessy* qualified the prohibition on government-imposed race restrictions in housing.¹⁶⁹ Instead, like the NAACP, they drew on the line of precedent beginning with *Buchanan*, arguing that “the right to acquire, use, and dispose of property is a right which neither the States nor the Federal Government can abridge or limit on the basis of race or color.”¹⁷⁰ In fact, the DOJ brief endorsed even more sweeping readings of the restriction on federal racial discrimination, using language which would arguably invalidate any federal executive action supporting or sanctioning residential segregation.¹⁷¹

The NAACP and Justice Department’s arguments prevailed at the Supreme Court in *Shelley* and *Hurd*, with a key qualification. The Court ruled that state courts could not enforce private homeowners’ agreements barring subsequent sales or occupancies to racial minorities, without running afoul of the Constitution. “Equality in the enjoyment of property rights” formed a key aspect of Fourteenth Amendment protections, the Justices wrote, citing the Civil Rights Act of 1866, *Buchanan*, and subsequent cases.¹⁷² Judicial action to enforce discriminatory private agreements fell within the constitutional prohibition on government discrimination, because the Fourteenth Amendment governed the “exertion[] of state power in all [its] forms.”¹⁷³

Yet the precise reach of any Fifth Amendment bar on federal discrimination remained undefined. In *Shelley*’s federal companion case, *Hurd*, the Court barred

168. Attorney General Tom Clark and Solicitor General Philip Perlman signed the brief in the racial-covenant cases. Brief for the United States as Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87, 290, 291).

169. See *id.* at 49.

170. *Id.* at 62.

171. See *id.* at 52 (“Only those actions of individuals which are in no respect sanctioned, supported, or participated in by any agency of the government are beyond the scope of the Fifth and Fourteenth Amendments.”).

172. *Shelley*, 334 U.S. at 10-12.

173. *Id.* at 20.

federal courts from enforcing discriminatory covenants, but relied on statutory grounds and public policy, rather than the Fifth Amendment.¹⁷⁴

After the racial-covenant cases, the NAACP stepped up its argument that all federal agencies were barred from supporting residential segregation, whether in the FHA's program of mortgage insurance to private builders, or in PHA's public housing. Now the organization's reading of *Buchanan* was even more powerful. If neither legislatures nor courts could enforce or help others to enforce residential segregation, then how could the executive branch do so?¹⁷⁵

When direct entreaties to the agencies failed, the NAACP lodged a direct legal plea with the President. In February 1949, Walter White wrote President Harry Truman asking him to assure "that the federal government will cease giving its support to racial restrictions in housing under its F.H.A. program."¹⁷⁶ White attached a lengthy memo from Thurgood Marshall, arguing that the FHA's support for whites-only developments and concomitant refusal to insure integrated housing developments violated the Fifth Amendment.¹⁷⁷ Marshall argued that the executive branch was subject to the same restrictions as Congress or the courts. As it lobbied for FHA reform, the NAACP apparently found reason to hope for action from the PHA as well. In fall 1949, Marshall wrote to another civil-rights advocate, "We have been bending every effort to see to it that the new

174. *Hurd v. Hodge*, 334 U.S. 24, 30-36 (1948).

175. Loren Miller, an NAACP ally, helped formulate the arguments applying *Shelley* and *Buchanan* to the executive branch in letters and memoranda to Walter White. See Loren Miller to Walter White, Sec'y, NAACP (July 7, 1948) (letter with attached memoranda) (on file with NAACP Papers, Library of Congress, Box II:A268), https://hv.proquest.com/pdfs/001521/001521_005_0554/001521_005_0554_From_1_to_167.pdf#page=97 [https://perma.cc/6256-B86P]. These constitutional arguments were intended for executive branch officials, not judges: Miller argued that the legal issues were "best deal[t] with by direct representations to the government agencies involved, rather than by resort to litigation." *Id.* For more on Miller, including his evolving role and views as a civil-rights lawyer, see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 269-70, 305-06, 349-50 (2005).

176. Letter from Walter White, Sec'y, NAACP, to the President 2 (Feb. 1, 1949) (on file with NAACP Papers, Library of Congress, II:A311), [https://hv.proquest.com/pdfs/001521/001521_013_1025_From_1_to_135.pdf#page=24](https://hv.proquest.com/pdfs/001521/001521_013_1025/001521_013_1025_From_1_to_135.pdf#page=24) [https://perma.cc/JJ75-QM2D].

177. Memorandum from Thurgood Marshall, Special Counsel, NAACP, to the President of the United States Concerning Racial Discrimination by the Federal Housing Administration 9-14 (Feb. 1, 1949) (on file with NAACP Papers, Library of Congress, Box II:A311), https://hv.proquest.com/pdfs/001521/001521_009_0592/001521_009_0592_From_1_to_26.pdf [https://perma.cc/395B-3RZ4].

provisions [of the PHA manual] prohibit segregation in all public housing projects. The matter is now in the high levels of the administration with our recommendations.”¹⁷⁸

However, the civil-rights organization achieved only partial success. In December 1949, the FHA finally relented. Only DOJ intervention brought about the shift; the Solicitor General himself announced the policy change in a speech to New York’s State Committee on Discrimination in Housing.¹⁷⁹ Although he and the press exaggerated the policy’s scope, its impact was moderate at best: FHA would stop insuring properties with newly created racial covenants.¹⁸⁰ Properties with existing covenants would be unaffected.

But “no comparable steps were taken to realign PHA policy.”¹⁸¹ All of the NAACP’s constitutional arguments regarding the FHA’s duty to avoid explicit support for segregation were equally applicable—if not stronger—in the PHA context. Federal public-housing funds went to state actors, not private ones, so the Fourteenth Amendment clearly applied to their actions.¹⁸² While the federal government might claim its involvement was minimal, the PHA’s funding directly paid for the housing, in contrast to the FHA situation which involved government provision of insurance to mortgage lenders rather than direct subsidies.

Although the constitutional argument was more compelling in public housing, Horne later wrote in an internal memo that politics dictated a different outcome:

178. Letter from Thurgood Marshall, Special Counsel, NAACP, to Will Maslow (Oct. 14, 1949) (on file with NAACP Papers, Library of Congress, Box II:B81), https://hv.proquest.com/pdfs/001521/001521_018_0611/001521_018_0611_From_1_to_146.pdf#page=125 [https://perma.cc/6AHP-MG9W].

179. Frank Horne wrote, “[I]t was the guidance and insistence of the U.S. Department of Justice . . . which resulted in the removal by FHA of its sanctions of racial covenants” Observations, *supra* note 117, at 3.

180. Lewis Wood, *Truman Puts Ban on All Housing Aid Where Bias Exists*, N.Y. TIMES, Dec. 3, 1949, at 1. The AP reported: “The government . . . plans to halt federal aid for housing projects that bar tenants because of their color or creed.” *FHA to Amend Rules to Halt Discrimination*, CHI. DAILY TRIB., Dec. 2, 1949, at 3; see also CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 225-26 (1967) (discussing the FHA’s shift to prohibit support for housing incorporating new racial covenants).

181. Memorandum from Joseph R. Ray, Dir., Racial Relations Serv., Hous. & Home Fin. Agency, to Albert M. Cole, Adm’r, Hous. & Home Fin. Agency 2 (Aug. 13, 1954) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-1963, RG 196).

182. Cf. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that the Fourteenth Amendment limits discriminatory state action but not individual action); see also *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 550-51 (N.Y. 1949) (rejecting the argument that public aid to a private developer constructing segregated housing rendered the developer a “state actor” subject to constitutional constraints).

As the result of discussions held among Agency officials and with public interest group leadership in 1948, it was clearly evident that both groups understood that PHA sanction of enforced segregation . . . had no supportable legal authority; it was tacitly understood, also, that PHA application of the *Plessy v. Ferguson* theory of “separate but equal” in the federally subsidized housing program rested upon no sound legal theory but rather reflected “political expediency.”¹⁸³

C. *The Politics of Plessy*

What “political expediency” required the PHA to continue its embrace of *Plessy*’s “separate but equal” rationale after *Shelley*? The problem in 1948 and 1949 was simple: the federal public-housing program was in a desperate fight for survival in Congress.

From its origins, public housing always attracted powerful opposition from real-estate interests. During the fight to enact the initial 1937 Act, the bill came in for “rough treatment” by those who feared that public housing would crowd out private industry.¹⁸⁴ Opponents argued that “public housing was a dangerous socialistic experiment which threatened free enterprise and the traditional American principles of government.”¹⁸⁵ When Republicans gained power in the 1938 elections, the agency’s political fortunes dimmed further.¹⁸⁶ At the onset of World War II, the agency had built fewer than 100,000 units.¹⁸⁷

During World War II, the public-housing program was redirected toward defense housing. After the war, proponents of public housing fought to revive the program by securing new authorizing legislation. Though the housing legislation had the support of the powerful Republican leader Robert Taft, conservatives in both parties combined to defeat it repeatedly.¹⁸⁸ Real-estate interests refused to accept continuing the public-housing program, even if other

183. Observations, *supra* note 117, at 3.

184. MARK I. GELFAND, *A NATION OF CITIES: THE FEDERAL GOVERNMENT AND URBAN AMERICA, 1933-1965*, at 62 (1975).

185. McDONNELL, *supra* note 57, at 62; *see also id.* at 81-83, 241-43, 315-16, 350 (describing groups’ opposition in more detail).

186. *See* GELFAND, *supra* note 184, at 98.

187. *Id.* at 122.

188. *See* DAVIES, *supra* note 70, at 24-39, 47.

provisions of the legislative proposals would provide them with substantial benefits.¹⁸⁹

Eventually, with Truman's support, new housing legislation passed.¹⁹⁰ The Housing Act of 1949 reinvigorated the low-income public-housing program, authorizing slum clearance, redevelopment, and 810,000 new units of public housing over the next six years.¹⁹¹ For the first time, national legislation declared "the goal of a decent home and suitable living environment for every American family."¹⁹²

Southern support was key to the law's passage. One of the legislation's leading sponsors, Senator Allen Ellender (D-LA), was both a "staunch and effective friend of public housing" and a segregationist.¹⁹³ In exchange for enactment, liberal proponents of the Act explicitly promised to forgo any action against segregation in public housing. In spring 1949, conservative Senator John Bricker (R-OH) had proposed a nonsegregation amendment to the bill, which was widely understood as a strategic move to kill the legislation.¹⁹⁴ Liberals widely opposed the nonsegregation amendment over fears that it would "defeat[] needed social legislation."¹⁹⁵ A leading Northern housing reformer, Charles Abrams, predicted that "if the device succeeds, it will become the forerunner of a whole series of efforts of use [of] the civil rights issue as an instrument for staving off social reform."¹⁹⁶

Senator Paul Douglas (D-IL), later one of the strongest proponents of civil-rights measures, went further in attempting to save the legislation, telling Southern senators: "We are not proposing to abolish segregation in the South. We are not proposing to abolish it in housing, or in the Federal aid for education bill We do not want to impose rules against segregation on the South."¹⁹⁷ He

189. *Id.* at 38.

190. Real-estate interests had been somewhat mollified by Truman's appointment of former FHA chief Raymond Foley as head of the HHFA, the umbrella organization which oversaw both the FHA and PHA. *Id.* at 60-63, 72.

191. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413.

192. *Id.* § 2.

193. DAVIES, *supra* note 70, at 35 (quoting Senator Wagner).

194. See, e.g., 95 CONG. REC. 2669-70 (Mar. 17, 1949) (statement of Sen. Paul Douglas). White described Bricker and another sponsor of the amendment as "spokesmen for and defenders of real estate interests." Walter White, Opinion, *Liberals' Fuzzy Views Aid Senate Coalition*, CHI. DEFENDER, Apr. 30, 1949, at 7.

195. E.g., 95 CONG. REC. A2542 (1949) (statement of Sen. Wayne Morse).

196. *Say Senators Cain, Bricker Conspire to Kill Housing*, CHI. DEFENDER, Apr. 9, 1949, at 4 (quoting a Charles Abrams editorial in the *New York Post*).

197. 95 CONG. REC. 2670 (1949) (statement of Sen. Paul Douglas).

characterized segregation as involving “social relations” and thus constituting “an individual matter, and, in many cases, a matter for local decision.”¹⁹⁸

Thus, to ensure the low-income housing program’s revival, liberals explicitly traded off civil rights. As Walter White of the NAACP wrote then, “[B]attlers for public housing[] would rather see no anti-segregation amendment introduced or seriously considered than to see housing itself jeopardized.”¹⁹⁹ To preserve the social reform, they would accept segregation.

Many African American leaders, even as they staunchly supported the public-housing program, were unwilling to make that tradeoff. They called for the Bricker nonsegregation amendment’s passage despite the political risk it entailed.²⁰⁰ To White, there was a fundamental but “very simple” issue at stake: “Is America going to create genuinely democratic housing with federal monies or is it going to build a gilded ghetto?”²⁰¹ The Senate chose the gilded ghetto, voting down the amendment.²⁰²

Following the Housing Act’s passage, and just “as the multibillion-dollar public-housing program approved by Congress . . . gain[ed] momentum,” the PHA publicly announced its intent to allow local authorities to segregate their housing projects at will.²⁰³ An anonymous PHA spokesperson told the press that “there will be no change in the present practice of letting each community decide whether to have separate projects for racial groups under the new public housing law.”²⁰⁴ The NAACP quickly challenged the PHA’s stance. “[N]o State or Federal agency can require segregation in housing” after the racial-covenant decisions, Thurgood Marshall wrote to Commissioner Egan – to no avail.²⁰⁵

198. *Id.*

199. White, *supra* note 194, at 7.

200. See 95 CONG. REC. 4791 (1949) (reprinted statement of the director of the National Negro Council); *id.* at 4798 (reprinted NAACP press release). However, Mary McLeod Bethune and the National Council of Negro Women opposed the Bricker amendment. See 95 CONG. REC. 4853 (1949) (statement of Sen. Douglas).

201. White, *supra* note 194, at 7.

202. Douglas offered consolation to those, like NAACP’s White, who had wished to see segregation barred: “I should like to point out to my Negro friends what a large amount of housing they will get from this act.” 95 CONG. REC. 4852 (1949) (statement of Sen. Douglas); see also *id.* at 4853 (suggesting that the number of units constructed for African Americans would be enough to house nearly 10 percent of the black population).

203. *Racial Segregation Left up to Cities*, L.A. TIMES, Dec. 12, 1949, at 30.

204. *Id.*; *Segregation up to Localities, Says Homes Aid*, CHI. DAILY TRIB., Dec. 12, 1949, at 20 (citing a “spokesman [who] preferred to remain anonymous”).

205. *PHA Asked to Withdraw JC Public Housing Rule*, BALT. AFRO-AM., Feb. 11, 1950, at 19. The paper attributed the PHA’s original position statement to Lawrence Bloomberg, the agency’s chief economist. *Id.*

Despite liberals' express accommodation of segregation, the public-housing agency remained on the ropes even after 1949, fighting for appropriations (and survival) in the face of a hostile Congress. The 810,000 units of public housing authorized in 1949 were not built.²⁰⁶ Each year, congressional appropriations committees limited funding to less than half of the authorized units, and local opposition further limited requests by communities for new public housing.²⁰⁷

A later commentator wrote that "between 1949 and 1952 the public-housing program barely survived an intensive congressional onslaught; it was only the support of Southern Democrats which prevented the program's demise."²⁰⁸ Many Southern legislators were willing to support such programs for the poor, so long as they did not expose the Jim Crow regime to federal attack.²⁰⁹ Even their support proved insufficient: in 1953, the House Appropriations Committee voted to kill all funding for future units and to allow only a third of the units already in contract to be built. Powerful Representative Albert Thomas (D-TX) commented that "for all practical purposes this program is wound up."²¹⁰ Public housing was ultimately revived only because the real-estate industry came to believe that some public housing was necessary to house the poor urban residents (disproportionately nonwhite) displaced by urban renewal.²¹¹

Given the political circumstances, most supporters of public housing apparently accepted that the program would continue only if segregation were tolerated. In 1951, Clarence Mitchell reported that the NAACP was "the only major organization in the country that has taken an all out position against segregation

206. WOLMAN, *supra* note 73, at 37 (stating that "nearly twenty years later, the full 810,000 units are still not completed").

207. Hunt, *supra* note 66, at 195; Charles J. Orlebeke, *The Evolution of Low Income Housing Policy, 1949 to 1999*, 11 HOUSING POL'Y DEBATE 489, 493 (2000).

208. Jordan D. Luttrell, *The Public Housing Administration and Discrimination in Federally Assisted Low-Rent Housing*, 64 MICH. L. REV. 871, 877 (1966) (citation omitted).

209. See, e.g., Sparkman Interview, *supra* note 78, at 33 ("I have always supported programs that might be called liberal so far as the South is concerned— economics programs, because I realized from the very first— as did practically everyone from the South— that we had to have help down there.").

210. Hunt, *supra* note 66, at 197.

211. See *id.* at 202-06. President Eisenhower also thought that public housing might be useful as a fiscal tool to combat future economic recessions; even his conservative housing administrators opposed killing the program entirely. See *id.* at 199-200.

in housing.”²¹² Other groups, although theoretically opposed to segregation, “either oppose or are indifferent to the possibility of having this principle included in legislation.”²¹³

PHA lawyers continued to deem segregation permissible. General Counsel Marshall Amis in 1951 reviewed the scant cases addressing racial segregation in public housing.²¹⁴ Technical barriers had precluded substantive rulings in most cases, but Amis noted that the courts had indicated that discrimination violated the Fourteenth Amendment while leaving the status of *Plessy*’s “separate but equal” theory ambiguous.²¹⁵ “Whether the provision of equal facilities in separate projects constitutes such discrimination would appear to be uncertain” – given conflicting rulings from state and federal courts.²¹⁶ Amis appeared to lean toward maintaining *Plessy*.²¹⁷

In the Truman Administration’s waning days, the NAACP renewed its constitutional argument that the housing agencies had the power and legal responsibility to stop supporting segregated housing. Earlier, the housing agencies had suggested that they could resolve the problem using their existing legal powers but then quickly backtracked.²¹⁸ In response, NAACP leaders sought to discredit

212. 4 THE PAPERS OF CLARENCE MITCHELL JR. 257 (Denton L. Watson ed., 2010).

213. *Id.*

214. See Amis, *supra* note 106.

215. *Id.* at 8 (“[I]n the majority of the cases, the courts have not disposed of the issues on the merits because of basic jurisdictional defects.”).

216. *Id.* Compare *Favors v. Randall*, 40 F. Supp. 743, 747-48 (E.D. Pa. 1941) (rejecting a challenge to segregation in public housing), *Denard v. Hous. Auth. of Fort Smith*, 159 S.W.2d 764, 765 (Ark. 1942) (same), *Miers v. Hous. Auth. of Dallas*, 266 S.W.2d 487, 490 (Tex. Civ. App. 1954) (same), and *Hous. Auth. of Dallas v. Higginbotham*, 143 S.W.2d 95, 96 (Tex. Civ. App. 1940) (same), with *Vann v. Toledo Metro. Hous. Auth.*, 113 F. Supp. 210, 212 (N.D. Ohio 1953) (holding segregation by public-housing authorities unconstitutional), *Banks v. Hous. Auth.*, 260 P.2d 668, 677-78 (Cal. Dist. Ct. App. 1953) (same), and *Seawell v. MacWithey*, 63 A.2d 542, 546 (N.J. Super. Ct. Ch. Div. 1949) (same).

217. Amis later forwarded the memo to a private attorney, commenting that the case law indicated that it was constitutional to condemn privately owned land for use as segregated public housing. Amis even suggested “still another valid argument” rooted in standing doctrine for the attorney to use in defending against the plaintiffs’ challenges. Letter from Marshall W. Amis, Gen. Counsel, Pub. Hous. Admin., to Evan A. Chriss 2 (Oct. 31, 1952) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

218. In 1951, Representative Abraham Multer (D-NY) asserted on the floor of the House that the housing agencies had agreed to address segregation and discrimination in their programs using their administrative powers – thus obviating the need for an antisegregation amendment to housing legislation. 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 288. But they soon backtracked: “The Housing Agencies, on the advice of their lawyers and after coun-

the housing agencies' supposed lack of authority to address segregation. In early 1952, Walter White, Robert Weaver (in his capacity as an NAACP board member), and Clarence Mitchell met with HHFA Administrator Raymond Foley to urge that the federal housing agencies "deny any assistance or finances unless there is a guarantee that the housing made available will be open to all qualified applicants without regard to race."²¹⁹

To counter the housing agencies' claims that they lacked legal authority to bar discrimination within the housing they supported, the NAACP officials delivered up another legal memo to the executive branch.²²⁰ The 1952 memo argued that all the housing agencies currently had the power to bar discrimination in their programs.²²¹

Statutory silence was irrelevant because the federal Constitution automatically constrained any grant of statutory authority: "[I]t is completely unnecessary for an Act of Congress to contain an expressed prohibition against discrimination including segregation, for the reason that any Act of Congress is proscribed by . . . the prohibitions of the Fifth Amendment . . ." ²²² The logic of prior housing cases, from *Buchanan* to the Court's ruling in *Hurd v. Hodge*, implied a series of necessary conclusions regarding the constraints on federal agencies. "If the states cannot constitutionally prescribe the segregation of the races in housing neither can the federal government, nor can the federal government . . . give support or effect to discrimination or segregation by private individuals, as such would violate the public policy of the United States."²²³

As for public housing, the NAACP memo reiterated that the federal government could not legally support segregation by others: "[T]he aid and authority given by the federal government to [local public housing] makes it a function of the federal government and thus subject to the same restrictions imposed upon

seling with White House advisers, have taken the position that the Federal Government cannot require those who build housing with Federal assistance to refrain from segregating or excluding tenants or buyers solely because of race." *Id.* at 289.

219. *Id.* at 302.

220. The 1952 memo's title—a mouthful—described its core claim concerning executive power: The Authority and Power of the Administrator of the Housing and Home Finance Authority, the Federal Housing Administration, the Public Housing Administration, and the Division of Slum Clearance and Urban Redevelopment, Constituent Units of the Housing and Home Finance Agency, to Prohibit Discrimination in Federal and Federally-Aided Housing Programs Administered by Them (Jan. 11, 1952) (on file with NARA II, Box 751, Program Files, Race Relations Program, 1946-58, RG 207) [hereinafter 1952 Memo].

221. *Id.* at 1.

222. *Id.* at 3. The memo also relied upon the public policy and laws of the United States that had underpinned the Court's decision in *Hurd*. *Id.* at 4-5.

223. *Id.* at 5 (citations omitted).

the federal government itself.”²²⁴ Just as government support could convert ostensibly private acts into state action, so too could federal support convert ostensibly local-government acts into federal actions.²²⁵ Under that logic, federal officials themselves became perpetrators of constitutional violations when they financed and oversaw segregated local institutions.²²⁶

However persuasive the memo may have been legally, it produced no change. The Truman Administration did not counter the NAACP’s substantive arguments, opting for inaction. Shortly after Republican candidate Dwight Eisenhower won the fall 1952 presidential election, the outgoing HHFA Administrator finally wrote White to say that “under the present circumstances, I believe that . . . I should make available to the new Administration such recommendations as I may have” – while retaining the status quo.²²⁷

Thus, early attempts by liberals to foster “racial equity” became embedded in the agency’s formal rules and long-term practices. Though the PHA’s enforcement of “separate but equal” provided a more equal share of material resources to African Americans from the New Deal onward, the agency’s early decisions also entrenched *Plessy*. While civil-rights activists appreciated the housing provided to black communities, they accurately foresaw the resulting long-term segregation of U.S. cities.

III. PRESERVING PLESSY

During the Eisenhower years, the NAACP prevailed in its litigation campaign, producing a clear judicial mandate against racial segregation in *Brown v. Board of Education* and *Bolling v. Sharpe*. President Eisenhower, however, vocally supported civil-rights principles in only one domain: areas of acknowledged federal power. Eisenhower repeatedly stated that federal funds should not support discrimination, while doing nothing to enforce that edict in federal housing programs. Nor did federal housing officials attempt to implement the new equal-protection mandates. With judicial review curtailed, political appointees and agency lawyers refused to acknowledge the constitutional bar on segregation.

224. *Id.* at 8.

225. For support, the authors cited cases that had broadened the concept of “state action” under the Constitution, including *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944), which extended the concept to a political party’s primary election, and *Marsh v. Alabama*, 326 U.S. 501, 507–09 (1946), which applied constitutional constraints to private “company-owned towns.” *Id.*

226. *Marsh*, 326 U.S. at 509; *Smith*, 321 U.S. at 664.

227. Letter from Raymond M. Foley, Adm’r, Hous. & Home Agency, to Walter White, Exec. Sec’y, NAACP (Nov. 26, 1952) (on file with NAACP Papers, Library of Congress, Box II:A313), https://hv.proquest.com/pdfs/001521/001521_008_0809/001521_008_0809_From_1_to_245.pdf#page=80 [https://perma.cc/U5S3-HCNW].

The only dissenting voices came from race-relations officials inside the agency and civil-rights advocates outside the agency. Those critics lost: leaders overruled the constitutional arguments of race-relations officials, and the strongest voices among them were purged.

Politics and administrative resistance thus reinforced one another. From the top of the housing agencies to front-line officials, no one wished to take up *Brown's* mandate and challenge racial segregation. Instead, the political bargain of "separate but equal" that was set at the agency's origins persisted, institutionalized in internal "racial equity" frameworks and reinforced by the ongoing precarity of public housing itself.

A. "Things . . . the President Now Has the Power to Do"

As President-Elect Eisenhower prepared to take office at the end of 1952, the NAACP began lobbying the incoming administration for executive action against housing discrimination.²²⁸ The Republican victory had not boded well for public-housing supporters, and Eisenhower's choice for head of the housing agencies, Albert Cole, elicited distrust from housing advocates and civil-rights groups.²²⁹ Some feared that Cole, a former Congressman from Kansas, had "been appointed to liquidate th[e] program."²³⁰ At Cole's Senate confirmation hearings, Cole said he personally opposed segregation but did not commit to ending federal support for segregated housing.²³¹

Still, the NAACP pressed its case. Clarence Mitchell met with both Attorney General Herbert Brownell and Cole to make the organization's argument that executive officials had the power (and responsibility) to halt federal support for segregated housing, but they received only an equivocal response.²³²

228. 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 335.

229. See generally *Nomination of Albert M. Cole: Hearing on the Nomination of Albert M. Cole to Be Administrator of the Housing and Home Finance Agency Before the S. Comm. on Banking & Currency*, 83d Cong. (1953) (statements submitted for record expressing concerns about Albert Cole) [hereinafter *Hearing on Albert Cole*].

230. *Id.* at 27 (statement of Clarence Mitchell Jr., Director, Washington Bureau, NAACP) (quoting Cole as having stated that public housing "tends to destroy our Government" and leads "to a surrender of our own responsibility"); GELFAND, *supra* note 184, at 168 (describing Cole's "reputation . . . as a staunch foe of liberal housing legislation").

231. *Hearing on Albert Cole*, *supra* note 229, at 7-8, 17 (statement of Albert M. Cole); see also *id.* at 29-30 (statement of Clarence Mitchell, Director, Washington Bureau, NAACP).

232. 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 355, 360. After giving Cole the organization's January 1952 memo, see 1952 Memo, *supra* note 220, Mitchell wrote that Cole had commented that "he is opposed to using any Federal funds for creating segregation in Housing. We shall see . . . how much of this he is willing to make policy." Memorandum from

Cole's early moves as HHFA Administrator amplified reformers' distrust. Cole shuffled the Racial Relations Service, removing the long-serving chief, Frank Horne, in favor of a political appointee, a black Republican named Joseph Ray. When liberal organizations protested Horne's removal, Cole created a special post for him as head of "minority studies."²³³ Cole's other initial actions suggested that he would continue the HHFA's "racial equity" approach of pursuing "separate but equal" housing for minorities, rather than trying to do away with segregation.²³⁴

Liberal leaders continued to trade off the political viability of the federal housing program against the Constitution's racial-equality guarantees. Attempts to enact nonsegregation amendments in housing legislation had been defeated, due in Clarence Mitchell's view to: (1) "the strong belief among many liberal members of the Congress that passage of these amendments would defeat overall Housing legislation," and (2) "the intervention of the Housing Agencies in the form of assurances to Congress that the problem could be handled without legislation."²³⁵ But lobbying the agency had also failed: "We have repeatedly met with the top Housing officials in the previous Administration and in the present Administration" — to no avail.²³⁶

Dissatisfied with agency intransigence and congressional inaction, White telegraphed President Eisenhower in April 1954, urging executive action barring discrimination in federal housing programs.²³⁷ In May 1954, as the nation waited

Clarence Mitchell Jr., Dir., Wash. Bureau, NAACP, to Walter White, Exec. Sec'y, NAACP (Mar. 20, 1953) (on file with NAACP Papers, Library of Congress, Box II:A309), https://hv.proquest.com/pdfs/001521/001521_006_0423/001521_006_0423_From_1_to_113.pdf#page=34 [<https://perma.cc/LF68-CJLU>].

233. It is unclear whether Cole himself supported the ouster. According to Horne's deputy at the time, the Republican National Committee had wanted to dismantle the Racial Relations Service entirely, but Cole resisted. Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 3.
234. The NAACP Washington Bureau wrote in its monthly report that Cole had expressed his support for the organization's proposals to end segregation in federal housing programs, but that he would have to seek the views of the FHA and PHA heads, as well as the highest levels of the Eisenhower Administration "because of the great significance of what [they were] suggest[ing]." 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 360.
235. Memorandum from Clarence Mitchell Jr., Dir., Wash. Bureau, NAACP, to Walter White, Sec'y, NAACP 3 (May 7, 1954) (on file with NAACP Papers, Library of Congress, Box II:A312), https://hv.proquest.com/pdfs/001521/001521_008_0001/001521_008_0001_From_1_to_121.pdf#page=61 [<https://perma.cc/PSF4-CKSP>].
236. 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 3.
237. Telegram from Walter White, Sec'y, NAACP, to President Dwight D. Eisenhower (Apr. 22, 1954) (on file with NAACP Papers, Library of Congress, Box II:A310), https://hv.proquest.com/pdfs/001521/001521_006_1037/001521_006_1037_0002_From_51_to

for the Court to hand down its decision in *Brown*, Mitchell suggested that the NAACP again directly petition the President.²³⁸

B. Distinguishing *Brown*

Just days after Mitchell's memo, the Court decided *Brown v. Board of Education*, vindicating the NAACP's view of the Constitution. The Court ruled that "inherently unequal" segregated schools violated the Fourteenth Amendment.²³⁹ In *Bolling v. Sharpe*, the Justices applied the same reasoning to hold that school segregation by federal authorities violated the Fifth Amendment's Due Process Clause.²⁴⁰ A week later, the Court denied certiorari in *Housing Authority v. Banks*, a California state court decision ruling a local housing authority's enforcement of segregation unconstitutional.²⁴¹ Some observers read *Banks* as a signal that the Court intended *Brown* to apply not only to schools but also to segregated public housing.²⁴²

A few days after *Brown*, Frank Horne spoke to civil-rights advocates "with . . . a new pride in the Government of the United States."²⁴³ Yet he warned that the nation was at a critical juncture. If "governmental housing policies continue to lend federal sanction" to the racially exclusionary practices of real-estate brokers, lenders, and builders, the danger was that "rigid patterns of economic and racial segregation [will] be crystallized in brick and mortar to haunt us for

_100.pdf#page=33 [https://perma.cc/NQ9R-CZ7P] ("We again strongly urge that you order the housing agencies to cease giving assistance of any kind . . . unless there is positive assurance that housing and facilities constructed with the help of the federal government . . . are available to all qualified lenders, buyers or users without regard to race."). Mitchell had urged White to ask only for executive action, on the ground that these were "things which the President now has the power to do and that suggesting legislation might be seized upon as the excuse for not exercising the executive powers he now has." Letter from Walter White, Sec'y, NAACP, to Robert C. Weaver, Dir., Opportunity Fellowships, John Hay Whitney Found. (Apr. 22, 1954) (on file with NAACP Papers, Library of Congress, Box II:A310), https://hv.proquest.com/pdfs/001521/001521_006_1037/001521_006_1037_0002_From_51_to_100.pdf#page=32 [https://perma.cc/MX48-LQCS].

238. Mitchell, *supra* note 235.

239. 347 U.S. 483, 495 (1954).

240. 347 U.S. 497, 500 (1954).

241. *Banks v. Hous. Auth.*, 260 P.2d 668 (Cal. Dist. Ct. App. 1953), *cert. denied*, 347 U.S. 974 (1954).

242. See, e.g., *High Court Bans Bias in Public Institutions*, L.A. SENTINEL, May 27, 1954, at A1.

243. Frank S. Horne, Assistant to the Adm'r, Hous. & Home Fin. Agency, Keynote Address at the Annual Meeting of the New York State Committee on Discrimination in Housing and the National Committee Against Discrimination in Housing: After Fifteen Years—The Record and the Promise 1 (May 20, 1954) (transcript on file with NARA II, Box 9, Records of the Intergroup Relations Branch, 1936-63, RG 196).

generations.”²⁴⁴ Horne remained optimistic, in part because President Eisenhower had “reiterated the principle that wherever the federal government is clearly involved, there is no place for distinctions or discriminations based solely upon race.”²⁴⁵

Southerners reacted differently to *Brown* and the Court’s refusal to hear *Banks*. Senator Burnet Maybank, a Democrat from South Carolina who was until then a fervent supporter of public housing, declared his instant opposition – opposition that other members of Congress feared doomed further federal support for public housing, if not federal aid more broadly.²⁴⁶ An “important” (but anonymous) Southern congressman commented that “if you carry it to extremes, it might also mean voting against Federal aid to schools, hospitals, and other projects.”²⁴⁷ PHA officials expressed their concern but withheld further comment.²⁴⁸ The Southern senator’s action provided “an object lesson to any federal administrator contemplating action against segregation.”²⁴⁹

For their part, federal housing lawyers mounted a deeply legalistic defense of their support for segregation: they denied agency discretion to act against segregation, emphasized deference to congressional will, and explicitly acknowledged the constitutional compromises built into the agency’s statutory framework. Just two weeks after *Brown*, PHA attorney Joseph Burstein sent the agency’s general counsel a twelve-page memo on the effect of the Court’s two decisions, in which he rejected the idea that *Brown* (or the Court’s refusal to hear *Banks*) might require changes in public housing.²⁵⁰ Burstein had been at the agency for over a decade and would eventually become its general counsel himself.²⁵¹

244. *Id.* at 11.

245. *Id.*

246. *President’s Program Probably Is Doomed as Maybank Now Will Oppose It Due to Supreme Court Ruling*, WALL ST. J., May 26, 1954, at 3.

247. *Id.*

248. *Id.*

249. MCINTIRE, *supra* note 53, at 296.

250. Memorandum from Joseph Burstein, Legal Div., PHA, to John L. McIntire, Gen. Counsel, PHA (June 2, 1954) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

251. In 1954, Burstein had already served with the public-housing agency for eleven years; he eventually became the general counsel in August 1961. *Top Law Post in PHA Goes to Burstein*, WASH. POST TIMES-HERALD, Aug. 12, 1961, at D10. He emigrated to the United States from Eastern Europe as a child, grew up in Massachusetts and eventually attended law school in Washington, D.C., while working as a post office messenger. Burstein worked in the federal housing program for nearly forty years, retiring from HUD in 1980. *Joseph Burstein, HUD Lawyer*, WASH. POST (Aug. 15, 2003), <https://www.washingtonpost.com/archive/local/2003/08/15>

Burstein argued against interpreting the Court's decisions to require change in the agency's approach to segregation. He dismissed the idea that either *Brown* or *Banks* had broad implications for the constitutionality of segregation in public housing. *Brown* governed schools only, insofar as the Court's reasoning hinged on segregation's "detrimental psychological effect" on black children's learning.²⁵² The state court's ruling in *Banks* was limited to California, he argued, since the Court's denial of certiorari lacked substantive legal effect. Nor had the lower court in *Banks* directly questioned the validity of "separate but equal," so long as segregated accommodations were available to all. Burstein concluded that "[l]ocal housing authorities may continue to follow the laws and decisions of their own states."²⁵³ This was "particularly true" in jurisdictions where courts previously had upheld segregation in public housing, he added.²⁵⁴

More sweepingly, Burstein concluded that agency support for segregation could not end. "The PHA must continue its present policies in view of the Congressional directive stemming from the legislative history of the Housing Act of 1949 that the PHA not prohibit segregation, and in view of the absence of a decision holding this legislative directive unconstitutional."²⁵⁵ He treated Congress's rejection of earlier antisegregation amendments as decisive choices to pursue federal housing programs even at the cost of sacrificing civil rights. In his analysis, the legislative history alone deprived the agency of any potential authority to revisit that choice.²⁵⁶ When Congress rejected the proposed antisegregation amendment to the 1949 Act, he argued that "the issue was so clearly drawn that the legislative history amounts to a directive to the administering agency, the PHA, not to prohibit it."²⁵⁷ As a consequence, the agency was "not authorized to insist on non-segregation" in existing or future projects aided under the Act, unless and until the Supreme Court resolved the question.²⁵⁸

[/joseph-burstein-hud-lawyer/f2740de4-244c-40fo-801d-0d9e549068b9](https://perma.cc/AQN9-DP3S) [https://perma.cc/AQN9-DP3S].

252. Burstein, *supra* note 250, at 1.

253. *Id.*

254. *Id.* at 7.

255. *Id.* at 1.

256. In 1949, Congress had grappled with "the tormenting issue which faces us now, that is, whether to proscribe segregation and almost certainly deprive the beneficiaries in the South, mostly Negroes, and the rest of the country, of low-rent housing for a good many years, or to continue a neutral policy and allow each locality to decide for itself and work out the problem locally." *Id.* at 8.

257. *Id.*

258. *Id.*

Even without the legislative history, Burstein argued that federalism principles implicit in the statutory framework meant that the PHA lacked the power to bar segregation in places where judicial decisions or “prevailing custom and public policy” supported it.²⁵⁹ “[B]ecause the United States Housing Act clearly emphasizes local autonomy” and only one judicial decision had outlawed segregation in public housing, Burstein concluded that “[i]t would not be proper” for the agency to act.²⁶⁰ It would not even be appropriate for the PHA to integrate federally owned but locally operated projects because “[t]he basis for the Congressional decision not to endanger public housing by insisting on non-segregation contrary to local desires allows for no distinction premised on Federal rather than local ownership of the projects.”²⁶¹ Adopting a different policy based on federal ownership “would be indulging in a mere technicality.”²⁶² Nor should the PHA attempt to extend *Brown* on its own, as this would be “substituting its judicial wisdom for that of the Supreme Court,” which, he argued, had manifested “a neutral position” by refusing to review the *Banks* case.²⁶³

Thus, the agency’s legal staff took statutory silence—and congressional refusal to adopt an antidiscrimination provision—as a “directive . . . not to prohibit [segregation].”²⁶⁴ Against suggestions that the Constitution might require otherwise, they cited judicial silence. Without contrary directions from Congress or the courts, then, the agency would maintain the status quo—and continue to fund new racially segregated housing projects.

Like Burstein, white liberals outside the agency argued in favor of the status quo. Leading housing reformer and litigator Charles Abrams vehemently warned against overreading the Court’s denial of certiorari in *Banks* in a speech to the National Housing Conference that same week: “Failure to review means nothing.”²⁶⁵

Abrams cautioned against rupturing the delicate alliance between liberals and Southern Democrats in support of public housing. In his eyes, segregation was a second-order problem. More pressing than that was “simple discrimination in housing” which involved “depriv[ation] of rights or privileges extended

259. *Id.*

260. *Id.*

261. *Id.* at 9–10.

262. *Id.* at 10.

263. *Id.*

264. *Id.* at 8.

265. Charles Abrams, Address at the 23rd Annual Meeting of the National Housing Conference 2 (June 7, 1954) (transcript on file with NARA II, Box 9, General Legal Opinions Files, 1936–70, RG 196).

to others”—and was “the principal form of housing discrimination against which minority groups and social groups have been protesting and for which they have been attacking the discriminating federal agencies.”²⁶⁶ For example, less than one percent of FHA-aided housing was available to African Americans.²⁶⁷ Senator Maybank and other Southerners, he argued, “would be the first to protest such discrimination.”²⁶⁸ “[S]egregation as a form of discrimination” was “more complex.”²⁶⁹ That problem was if anything more acute in the North. He acknowledged that, in time, the Court might extend *Brown* to the housing context. “But the Northerner and the Southerner who in public housing have always had a common bond . . . should realize that at the present juncture the issue of segregation in public housing is irrelevant and premature.”²⁷⁰

Race-relations staff within the agency and NAACP leaders outside the agency saw the significance of *Brown* and *Banks* quite differently and drew heart from President Eisenhower’s own statements opposing discriminatory uses of federal funds.²⁷¹ In August 1954, Frank Horne sent Administrator Cole a memo posing a stark choice: further racial-equity policies, which attempted to achieve “separate but equal” housing à la *Plessy*—or a more absolute equality, which required open occupancy in all federally assisted housing à la *Brown*.²⁷² “The basic racial policy question involved in the administration of governmental housing programs is whether or not non-white families are to be afforded the same rights to the ownership and use of real property as white families.”²⁷³ If the answer was yes, “then there is neither justification nor necessity for ‘minority group housing programs,’ for ‘equity’ formulae nor for special planning, financing, production,

266. *Id.* at 5-6.

267. *Id.*

268. *Id.* at 5.

269. *Id.* at 6.

270. *Id.* at 7.

271. Asked at an August press conference, “what will be done to halt the practice of using Federal funds to assist in the promotion of housing from which racial minorities are excluded,” President Eisenhower said, “I have tried as hard as I know how to have accepted this idea, that where Federal funds and Federal authority are involved, there should be no discrimination based upon any reason that is not recognized by our Constitution. I shall continue to do that.” Dwight D. Eisenhower, The President’s News Conference of August 4, 1954, in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER*, 1954, at 681 (1960).

272. Memorandum from Frank S. Horne, Assistant to the Adm’r, Hous. & Home Fin. Agency, to Albert M. Cole, Adm’r, Hous. & Home Fin. Agency (Aug. 12, 1954) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-63, RG 196).

273. *Id.* at 0.

or marketing devices to ‘equalize’ the housing opportunities for nonwhite families.”²⁷⁴ All housing aided by the federal government, including privately constructed FHA-insured housing, would be open occupancy.

The alternative, as Horne described it, was to continue race-conscious attempts to ensure equal opportunity amidst segregation – in other words, continuing the *Plessy* approach. But he believed that strategy doomed to fail: “Operating experience . . . through the last 15 years would establish the practical impossibility of attaining substantial equality of opportunity through these special devices.”²⁷⁵ Moreover, judicial decisions increasingly rejected that approach, while President Eisenhower had said he opposed federal funding of segregation.²⁷⁶

The next day, Director of Racial Relations Service Joseph Ray sent another memo to Cole calling for a shift to open occupancy.²⁷⁷ “During the past 15 to 20 years,” he wrote, “the housing agencies of the Federal Government have generally followed the lead of the U.S. Supreme Court in accepting, sanctioning, and refining the spurious and now outmoded concept of ‘separate-but-equal.’”²⁷⁸ Yet the federal government’s own legal positions before the Court indicated the questionable legal standing of the agency’s course. Justice Department briefs since at least *Shelley* and *Hurd* left “little doubt that ‘no agency of government should participate in any action which will result in depriving any person of essential rights because of race or color or creed.’”²⁷⁹ Ray argued that it had been clear since 1948 that the government had no legal basis for permitting segregation of public housing. *Brown* itself dispelled “any vestige of justification for a practice which the Court has never sanctioned in the field of real property.”²⁸⁰

274. *Id.*

275. *Id.*

276. *Id.* Horne suggested that the agency need not rush into controversy; it could implement an open-occupancy policy “in conformance generally with the tempo to be followed in the implementation of [*Brown* and *Bolling*].” *Id.* at 1. By starting in programs where federal authority and funds were directly involved, and in the North, the agency could gradually progress to more challenging areas. *Id.*

277. Memorandum from Joseph R. Ray, Racial Relations Serv., OA, to Albert M. Cole, Adm’r, Hous. & Home Fin. Agency (Aug. 13, 1954) (on file with NARA II, Box 748, Program Files, Race Relations Program, 1946-58, RG 207).

278. *Id.* at 1.

279. *Id.*

280. *Id.* at 2.

Subsequent lower court decisions invalidating public-housing segregation clinched the matter.²⁸¹

Agency lawyers, though, resisted such constitutional analysis. Soon, another legal memo circulated among the heads of the constituent agencies and their race-relations advisors, opposing the proposals for open occupancy in the context of federal aid to private developers.²⁸² In an attachment to the memo, an associate general counsel addressed Horne and Ray's "recommendation . . . that contractual requirements be imposed . . . providing that all housing provided through FHA aid or upon land assembled with [federal] assistance be made available without regard to race."²⁸³ The lawyer argued that statutory text, fear of federal overreach, caution regarding administrative authority, legal ambiguity, and the indirect nature of federal involvement all militated against taking action against segregation.²⁸⁴

The housing agency lawyers' positions prevailed within the agencies, which took no steps to comply with *Brown*.²⁸⁵ In fall 1954, the NAACP concluded that,

281. *Id.* Ray also argued that the principle of an open, competitive private market for housing required open occupancy, and recent statements by President Eisenhower and Administrator Cole reinforced the urgency of updating the agency's policy. *Id.* at 3-4.

282. Memorandum from J.W. Follin, Dir., Div. Slum Clearance & Urban Redevelopment, to Norman P. Mason & Charles E. Slusser, Comm'rs, Pub. Hous. Auth. (Sept. 13, 1954) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-63, RG 196).

283. Memorandum from Joseph Guandolo, Assoc. Gen. Counsel, Hous. & Home Fin. Agency, to J.W. Follin, Dir., Div. Slum Clearance & Urban Redevelopment (Aug. 24, 1954) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-63, RG 196).

284. First, the associate general counsel argued that there was no basis in the Housing Act's text for such an action. It would not fit within the Act's catch-all clause empowering the Administrator to impose conditions "necessary to carry out the purposes" of the Act. Second, imposing such a requirement upon private developers would "involve[] a major extension of Federal authority," one that arguably should not be "impose[d] . . . administratively without authorization by the Congress." Third, the HHFA should not act alone; rather, all housing agencies (especially the Veterans Administration) should act upon orders from the White House itself. Fourth, "[t]he policy in question does not constitute an administrative implementation of a judicial determination of constitutional, or even statutory, rights." Fifth, in contrast to *Brown* or other recent segregation cases, "the Federal governmental action . . . is far more remote" in urban renewal projects. Finally, he argued that the federal assistance to private redevelopers in urban renewal projects did not constitute a federal subsidy or grant, and that the policy might "seriously impede the disposition of project land in certain localities." *Id.*

285. Cf. Note from J.A. Weiseger to Philip Sadler, Dir., Intergroup Relations Branch (Apr. 14, 1955) (on file with NARA II, Box 14 (Set 2), Records of the Intergroup Relations Branch, 1936-1963, RG 196) (describing Burstein's views, as voiced the subsequent year, on prohibition of discrimination and segregation in public housing as "represent[ing] the Agency's policy"); see also Schlanger, *supra* note 143, at 111 (noting likelihood that an agency's Office of General Counsel will prevail in any intra-agency debate over legality).

amidst hopeful steps in other arenas, “[t]he most prominent field in which a responsible Executive agency has resisted change relating to discrimination has been that of housing.”²⁸⁶ They also charged that “no action has been taken by the Housing Agencies to implement the President’s statement,” referring to President Eisenhower’s January housing message to Congress, when he had committed to forceful administrative action to expand minority housing.²⁸⁷

Civil-rights leaders hoped that the Justice Department might once again side with them. In December 1954, Mitchell drafted a letter to Attorney General Brownell on White’s behalf, urging him “to halt government participation in the practice of extending racial segregation in housing.”²⁸⁸ He enclosed the NAACP’s recommendations that “[a]ll public housing must be open to tenants without regard to race” and that urban renewal, FHA, and the Veterans Administration (VA) should contract to ensure that housing they supported “would be open to all renters, buyers or users without regard to race.”²⁸⁹ Soon after, Mitchell wrote to White that the Attorney General had said “he fully supports the NAACP’s recommendations, and, if necessary, will back them up before the President.”²⁹⁰ Brownell first intended to speak to HHFA Administrator Cole. Yet nothing came of it.

Advocates expressed increasing pessimism that the agencies would shift course. In March 1955, the National Committee Against Discrimination in Housing (NCADH), representing a coalition of liberal groups, wrote to the President

286. 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 439.

287. *Id.* at 440.

288. See Draft Letter from Clarence Mitchell, Dir., Wash. Bureau, NAACP, to Herbert Brownell, Att’y Gen. (Dec. 22, 1954) (on file with NAACP Papers, Library of Congress, Box II:A312), https://hv.proquest.com/pdfs/001521/001521_008_0001/001521_008_0001_From_1_to_121.pdf#page=116 [<https://perma.cc/BE93-EGWJ>].

289. Recommendations of the National Association for the Advancement of Colored People at the Conference on Minority Housing Problems held in Washington, D.C. (Dec. 9-10, 1954) (on file with NAACP Papers, Library of Congress, Box II:A312), https://hv.proquest.com/pdfs/001521/001521_008_0001/001521_008_0001_From_1_to_121.pdf#page=121 [<https://perma.cc/RDN3-P737>].

290. Letter from Clarence Mitchell, Dir., Wash. Bureau, NAACP, to Walter White, Sec’y, NAACP (Dec. 31, 1954) (file with NAACP Papers, Library of Congress, Box II:A312), https://hv.proquest.com/pdfs/001521/001521_008_1054/001521_008_1054_From_1_to_37.pdf#page=113 [<https://perma.cc/WCC2-J535>].

asking him to halt federal funding for segregated housing but received no response.²⁹¹ They also met with Administrator Albert Cole, during which “[i]t became apparent . . . that the period of negotiation with HHFA had been exhausted.”²⁹²

While the housing agencies remained immovable on the question of complying with *Brown*, the most forceful internal advocates of reform were soon forced out. Within a year of his memos calling for an end to segregation in federally assisted housing, Horne and his longtime colleague, Corienne Morrow, were gone. In early August 1955, the black press reported that Horne’s position had been terminated, and that his staff, including Morrow, would also be dismissed.²⁹³ To many observers, their firings “confirmed the deterioration of HHFA racial relations policy.”²⁹⁴

Housing reformer Charles Abrams linked the firing of the most vocal race-relations advisors to the housing industry’s lobbying:

[S]trong groups in Washington . . . felt that segregation in the expanding American neighborhoods was essential to the building boom and that the more liberal policy espoused by the Racial Relations Service was becoming a political liability It was also felt that dissident elements on the Southern fringe might be won over by a slow-down policy toward integration.²⁹⁵

291. NAT’L COMM. AGAINST DISCRIMINATION IN HOUS., EXECUTIVE DIRECTOR’S REPORT 1 (May 1956) (on file with NAACP Papers, Library of Congress, Box III:A162), https://hv.proquest.com/pdfs/000004/000004_008_0617/000004_008_0617_From_1_to_165.pdf [<https://perma.cc/RER4-R5LJ>] [hereinafter NCADH].

292. *Id.* at 2.

293. Al Sweeney, *Horne Ouster Hit*, BALT. AFRO-AM., Aug. 6, 1955, at 1; *National Grapevine: Hurricane in Housing*, CHI. DEFENDER, Aug. 20, 1955, at 2.

294. NCADH, *supra* note 291, at 2. To the NAACP’s Clarence Mitchell, it seemed that “these housing veterans have been terminated because they favor non-segregation clauses in government-assisted housing.” Sweeney, *supra* note 293, at 1. Horne said only, “those employees who were opposed to taking a strong stand on what I feel is a basic issue are still there.” *Id.* at 2. Other commentary suggested that “political pork barreling” accounted for the dismissal given that “top man Cole personally admired Horne” but was “said to have been under terrific pressure from politicians to fire Horne and Mrs. Morrow.” *Purpose Accomplished*, CHI. DEFENDER, Aug. 6, 1955, at 2. In subsequent weeks, civil-rights groups charged that “the racial relations functions of the Agency are now being handled on a basis of what is good for Republican job seekers.” *See Politics in Dr. Horne’s Firing*, CHI. DEFENDER, Aug. 13, 1955, at 1. Cole, they believed, was under “a cross current of pressures,” including from the housing industry. *Reinstate Horne, Urban League Asks*, WASH. POST & TIMES-HERALD, Aug. 26, 1955, at 55.

295. Charles Abrams, Letter to the Editor, *Discrimination in Housing: Reinstatement of Racial Relations Service Officials Is Asked*, N.Y. TIMES, Aug. 19, 1955.

The initial attempt to dismiss Horne in 1953 indicated the shift, and after *Brown* “the power of those who favored a less progressive policy gained headway.”²⁹⁶

After winning her civil-service appeals in 1956, Corienne Morrow wrote a scathing resignation letter, free at last to voice her true sentiments about federal housing policy and its impact on African Americans’ equal-protection rights.²⁹⁷ She condemned the agency’s “promotion of [a] ‘minority housing program,’ conceived to counteract the effects of the United States Supreme Court’s decision [in *Brown*] calling for public school integration” as well as the agency’s official opposition to “the outlawing of racial discrimination in housing built with Federal aid.”²⁹⁸ Morrow concluded: “[T]he [HHFA] stands firmly as the last bastion of Governmentally sanctioned racism in the United States.”²⁹⁹

C. *The Federal Role: Never to Dictate or Coerce*

Civil-rights leaders did not give up on their legislative attempts to uproot the *Plessy* framework. Congress in its 1954 revisions to the Housing Act had “ducked the issue of segregation.”³⁰⁰ Clarence Mitchell thus renewed the NAACP’s call for discrimination bans in housing legislation during spring 1955, in testimony to both the Senate and the House.³⁰¹ Mitchell told the Senate’s housing subcommittee that the housing agencies participated in “an iron-clad policy of building whole cities for whites only” — an approach that he called a “cruel and disgusting

296. *Id.*

297. Letter from Corienne R. Morrow to Douglas E. Chaffin, Dir. of Pers., Hous. & Home Fin. Agency (July 6, 1956) (on file with NAACP Papers, Library of Congress, Box III:A158), https://hv.proquest.com/pdfs/000004/000004_004_0705/000004_004_0705_From_1_to_140.pdf#page=12 [<https://perma.cc/8JP4-9XLK>].

298. *Id.*

299. *Id.*

300. 4 THE PAPERS OF CLARENCE MITCHELL JR., *supra* note 212, at 442.

301. Press Release, NAACP Urges Anti-Bias Clause in Federal Housing Bill (June 16, 1955) (on file with NAACP Papers, Library of Congress, Box II:A308), https://hv.proquest.com/pdfs/001521/001521_005_0963/001521_005_0963_From_1_to_184.pdf#page=183 [<https://perma.cc/Z52E-2P6D>] [hereinafter Press Release, NAACP House Testimony]; Press Release, Federal Government Expands Housing Bias, NAACP Tells Senate Committees (May 19, 1955) (on file with NAACP Papers, Library of Congress, Box II:A308), https://hv.proquest.com/pdfs/001521/001521_005_0963/001521_005_0963_From_1_to_184.pdf#page=179 [<https://perma.cc/F2E3-QYUZ>] [hereinafter Press Release, NAACP Senate Testimony]. The NAACP’s proposed amendment read: “The aids and powers made available under the several titles of this Act are not to be conditioned or limited in any way on account of race, religion, or national origin of builders, lenders, buyers or families to be benefited.” *Id.*

hoax.”³⁰² Once again, Congress’s white liberals worried that any such ban would kill the legislation.³⁰³

In response to civil-rights advocates’ appeals for Congress to act, federal administrators argued to Congress that barring segregation would undermine public housing and threaten federal overreach. In spring 1956, Administrator Cole delineated the agency’s stance on nondiscrimination requirements in a letter to Senator Prescott Bush. Cole emphatically opposed barring segregation in federally aided housing. “[S]o drastic a step” was neither “possible or desirable,” primarily because it “would set us back in the accomplishment of our goal of decent housing for all and produce a severe impact upon our economy.”³⁰⁴ He argued that public-housing authorities and private developers would reject federal aid on such conditions, curtailing the housing supply.³⁰⁵

More fundamentally, he wrote, using federal power to bar segregation at the local level was inappropriate based on structural tenets of federalism: “The role of the Federal government in the housing programs is to assist, to stimulate, to lead, and sometimes to prod, but never to dictate or coerce, and never to stifle the proper exercise of private and local responsibility.”³⁰⁶ Housing was “peculiarly local,” while “undue federal intervention is incompatible with our ideas of political and economic freedom.”³⁰⁷ Cole subsequently affirmed this position in congressional testimony, commenting that segregation was “the problem of the people in the locality. If they want integrated [public] housing, they have it. If they don’t want it, they don’t have it.”³⁰⁸

Civil-rights advocates expressed incredulity at the Administrator’s refusal to acknowledge any constitutional mandate against segregation. In “projects . . . directly subsidized by federal funds . . . [t]he notion that the locality may determine for itself whether to obey the law and Constitution is quite fantastic,”

302. Press Release, NAACP Senate Testimony, *supra* note 301.

303. Press Release, NAACP House Testimony, *supra* note 301.

304. Letter from Albert M. Cole, Adm’r, Hous. & Home Fin. Agency, to Senator Prescott Bush 3 (May 3, 1956) (on file with NAACP Papers, Library of Congress, Box II:A162), https://hv.proquest.com/pdfs/000004/000004_008_0617/000004_008_0617_From_1_to_165.pdf#page=36 [<https://perma.cc/CT75-WW2Q>].

305. *Id.*

306. *Id.* at 3-4.

307. *Id.* at 4.

308. Letter from Frances Levenson, Exec. Dir., Nat’l Comm. Against Discrimination in Hous., to Senator Prescott Bush 2 (July 23, 1956) (on file with NAACP Papers, Library of Congress, Box II:A162), https://hv.proquest.com/pdfs/000004/000004_008_0617/000004_008_0617_From_1_to_165.pdf#page=62 [<https://perma.cc/E2AL-VPME>] (quoting Cole’s testimony).

Frances Levenson, head of NCADH, wrote.³⁰⁹ She argued that the Supreme Court's recent decisions "require that the federal government refuse to support segregated housing" and that the government's own briefs "clearly affirmed the doctrine that racial segregation imposed or supported by law or public powers is per se unconstitutional." Cole's position supporting local power and "separate but equal" had been nullified by *Brown* and subsequent decisions.³¹⁰

Yet growing legal clarity did not shift housing policies. Rather, as Levenson warned in early 1956, "The movement to use residential containment to enforce school segregation [was] gaining momentum."³¹¹ Southern cities were using urban-renewal projects to bulldoze integrated neighborhoods and replace them with segregated housing, dimming the prospect that such communities might produce integrated schools post-*Brown*.³¹² NCADH's director bleakly evaluated

309. *Id.*

310. *Id.* Even if the Supreme Court's decisions applying *Brown* across a variety of public institutions had been thought ambiguous, various courts had struck down segregation in public housing by July 1956. See *Detroit Hous. Comm'n v. Lewis*, 226 F.2d 180, 185 (6th Cir. 1955) (finding it "self-evident" that the housing commission has "the primary responsibility for solving the problems presented by the required implementation of the constitutional principles declared" in *Brown*); *Davis v. St. Louis Hous. Auth.*, 1 Race Rel. L. Rep. (Vand. U. Sch. L.) 353, 355 (E.D. Mo. 1955) (finding the housing authority's "policy of racial segregation" to be "a violation of the Constitution and laws of the United States"); *Vann v. Toledo Metro. Hous. Auth.*, 113 F. Supp. 210, 212 (N.D. Ohio 1953) (emphasizing that "[t]he trend of all of the later cases involving property rights is to conform strictly with the requirements of the Fourteenth Amendment and of the Civil Rights Statutes"); *Woodbridge v. Evansville Hous. Auth.*, Civ. No. 618 (S.D. Ind., July 6, 1953). For a discussion of *Woodbridge*, see Note, *Discrimination Against Minorities in the Federal Housing Programs*, 31 IND. L.J. 501, 503-04 (1956). See also Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515, 518 (1959) ("Since the school segregation cases, every final state and lower federal court decision on the merits of the question has denied the existence of state power to provide 'separate but equal' housing facilities."). As to federal support for segregation, no extant decision directly addressed that question, but the Fifth Circuit's decision in *Heyward v. Public Housing Administration* followed Levenson's testimony by only a few months, indicating that such support was unlawful. 238 F.2d 689, 696-97 (5th Cir. 1956).

311. Letter from Frances Levenson, Dir., to Exec. Bd. Members & Friends of the Nat'l Comm. 2 (Mar. 19, 1956) (on file with NAACP Papers, Library of Congress, Box II:A162), https://hv.proquest.com/pdfs/000004/000004_008_0617/000004_008_0617_From_1_to_165.pdf [https://perma.cc/EXD9-UJXE].

312. Recommendations from Frances Levenson to Reginald Johnson et al. 2 (Mar. 25, 1959) (on file with NAACP Papers, Library of Congress, Box II:A158), https://hv.proquest.com/pdfs/000004/000004_004_0705/000004_004_0705_From_1_to_140.pdf [https://perma.cc/6E5B-LPCL] (citing examples of Gadsden, Alabama; Eufala, Alabama; and Savannah, Georgia); Memorandum from the Nat'l Comm. Against Discrimination in Hous. on Prepared for Trends (June 16, 1958) (on file with NAACP Papers, Library of Congress, Box III:A157), https://hv.proquest.com/pdfs/000004/000004_003_0786/000004_003_0786_From_1_to_205.pdf [https://perma.cc/6K7W-R6WP].

the group's efforts to stop such trends. "There has been no progress toward the establishment of basic policy; the Federal Government continues to subsidize and underwrite racially-restricted housing State and federal courts have ruled segregation unconstitutional in public housing. But these decisions have not affected federal policy."³¹³ The group's assessment of its allies within the housing agencies was similarly bleak: "The Racial Relations Service is no longer a constructive factor. Its practical demise is symbolic of the retrogression that has taken place in recent years."³¹⁴ Amidst all this, "residential segregation continues to increase."³¹⁵

D. Increasing Constitutional Clarity

By the late 1950s, even more prominent organizations joined the NAACP and the NCADH in calling for the executive branch to implement *Shelley* and *Brown* in federal housing programs.

A privately organized Commission on Race and Housing wrote bluntly in 1958: "[B]y endowing private business and local authorities with unprecedented power to determine the racial pattern in housing, and then taking no steps to control the use of this power, the Federal government indirectly gives major support to . . . racial segregation."³¹⁶ Echoing the NAACP's longstanding logic, the Commission argued that federal support for segregation violated the Constitution.³¹⁷ "[T]he power of the segregationist bloc in Congress" explained federal officials' refusal to bar discrimination in federal programs.³¹⁸ As for the housing agencies' racial-relations officials, they could not "infringe upon the agencies' basic policy of letting local authorities and private builders make the decisions concerning the racial pattern"—lest they run into "bureaucratic trouble."³¹⁹

313. Memorandum from Nat'l Comm. Against Discrimination in Hous. on Program Suggestions for Discussion at Executive Board Meeting 2-3 (May 8, 1957) (on file with NAACP Papers, Library of Congress, Box II:A162), https://hv.proquest.com/pdfs/000004/000004_008_0617/000004_008_0617_From_1_to_165.pdf [<https://perma.cc/XES5-42KB>].

314. *Id.* at 4.

315. *Id.*

316. COMM'N. ON RACE & HOUS., WHERE SHALL WE LIVE? 49 (1958).

317. *Id.* at 63-64.

318. *Id.* at 49.

319. *Id.* at 51. The Commission noted also that the advisors lacked "line administrative or decisionmaking responsibilities," that their jobs were "considered 'Negro jobs,' . . . [which] tend[ed] to identify racial matters as being of concern only to Negroes," and that they had only "token" roles in urban renewal operations. *Id.*

Soon, the newly formed United States Commission on Civil Rights (USCCR) added its voice to the chorus. Choosing housing discrimination as one of its first topics of investigation, the USCCR solicited information from the housing agencies and held hearings with federal officials. In spring 1959, the HHFA Administrator asked his constituent agencies to give him a “careful review of [their] program operations and policy” in order “[t]o be sure we are providing equal treatment and opportunity to all American citizens.”³²⁰ He expressly linked the request to the recent Commission on Race and Housing report as well as the USCCR investigation.

Public-housing officials responded defensively, citing their long-standing “racial equity” policies. PHA Commissioner Charles Slusser wrote: “PHA feels that it is doing all it can”³²¹ Attaching the PHA’s formal racial policies, Slusser explained the agency’s “separate but equal” framework.³²² The agency required “equitable treatment of all races,” and “[w]here because of local laws and customs there is separation of the races,” the agency required that housing of the same quality be provided to all. Lauding the agency’s “equitable employment” policy, he noted that “when the President’s Committee on Government Contracts was established, . . . this agency was the only one with established procedures and operations in this field.”³²³ African Americans were also employed by local housing authorities as staff, and served as members of the authorities or advisory committees in some places.³²⁴

On segregation, public-housing officials would not budge. “As to open occupancy,” the Commissioner wrote, “PHA takes no position. We leave such decisions to the localities. . . . If a locality decides on projects separated by race, we . . . interpose no objections but require that there be equity.”³²⁵ Slusser indi-

320. Memorandum from Norman P. Mason, Adm’r, Hous. & Home Fin. Agency, to Comm’rs of All Constituent Agencies (Apr. 6, 1959) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-63, RG 196).

321. Letter from Charles Slusser, Comm’r, Pub. Hous. Auth., to Norman P. Mason, Adm’r, Hous. & Home Fin. Agency 1 (Apr. 23, 1959) (on file with NARA II, Box 11, Records of the Intergroup Relations Branch, 1936-63, RG 196).

322. Slusser forwarded the agency’s formal racial policy as contained in the Low-Rent Housing Manual, noting that “racial considerations are pointed up in numerous other manual releases” and compiled in “a sizeable volume called References to Race in the Policies and Procedures of the PHA.” *Id.*

323. *Id.*

324. *Id.* at 2.

325. *Id.*

cated the limited influence of the Racial Relations service, the long-standing internal critics of these practices: “We have not always felt it possible or wise to approve all their recommendations, but we respect their opinions.”³²⁶

When a more liberal Administrator took the helm of the housing agencies at the end of the Eisenhower Administration, the agency’s rhetoric shifted but its positions did not. Norman Mason replaced Albert Cole as HHFA Administrator, and civil-rights activists expressed optimism about the change. The NAACP’s housing aide wrote that the Administrator said during their first meeting that the agency’s racial policy “stinks.”³²⁷ But Mason was as reluctant as his predecessors to take actual enforcement steps, favoring “a system of rewards” over “police actions.”³²⁸ At USCCR hearings in 1959, he defended existing policies and pointed to signs of progress in producing “minority housing.”³²⁹ Mason asserted that he planned to adopt “more positive” policies than his predecessor but demurred on the question of barring segregation.³³⁰ He argued that an executive order “might be a dangerous step to take” that would depress the housing supply.³³¹

Amid battles for comprehensive housing legislation and civil-rights bills that year, the question of barring federal aid to segregated housing resurfaced in Congress.³³² Fair-housing advocates continued to argue that federal aid should be conditioned on nonsegregation and suggested that it could be done administratively if Congress lacked the will. Frances Levenson, the NCADH leader, argued that federal aid for segregated housing represented “an unconstitutional exercise of Federal powers and expenditure of Federal money.”³³³ The housing agencies, she pointed out, were ignoring explicit judicial rulings, and the PHA’s case was “most shocking” because the courts were in complete accord: segregation in

326. *Id.*

327. Open Memorandum from J. Wood, Special Assistant for Hous., NAACP 1 (Mar. 13, 1959) (on file with NAACP Papers, Library of Congress, Box II:A158), https://hv.proquest.com/pdfs/000004/000004_004_0705/000004_004_0705_From_1_to_140.pdf [<https://perma.cc/6E5B-LPCL>].

328. U.S. COMM’N ON CIVIL RIGHTS, 1959 REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 460 (1959).

329. *Id.* at 459.

330. *Id.*

331. *Id.* at 461 (quoting Mason).

332. Representative Adam Clayton Powell again proposed such a ban on federal aid to segregated housing. See H.R. 1053, 86th Cong. (1959).

333. *Housing Act of 1959: Hearings Before the S. Comm. on Banking and Currency*, 86th Cong. 808 (1959) (statement of Frances Levenson).

public housing violated the Fourteenth Amendment.³³⁴ Still, Congress did not act.

That fall, the USCCR's housing report similarly emphasized the Constitution, stating that "the fundamental legal principle is clear."³³⁵ Federal housing programs were subject to the constitutional prohibition on racial discrimination, and therefore, "[f]ederal housing policies need[ed] to be better directed toward fulfilling the constitutional . . . objective of equal opportunity."³³⁶ Within the agencies, race-relations officials reiterated the Commission's legal points. A race-relations officer within the FHA summarized the USCCR's position eloquently in an internal memo: "[A]lthough Congress has never enacted any anti-discrimination legislation pertaining to these agencies, the agencies are, nevertheless, clearly bound by the [c]onstitutional requirements of equal protection of the laws and due process."³³⁷

Yet despite the constitutional principles at stake, executive-branch policy did not change. As the NAACP housing liaison summarized in 1959, "Recommendations submitted by the NAACP, in conjunction with other minority housing leaders, that the President issue an Executive Order outlawing discrimination in all publicly assisted housing . . . have been ignored."³³⁸

The public-housing program itself was in sorry shape. Decades of political battle over public housing had taken their toll on the federal agency and its personnel.³³⁹ By May 1960, Charles Abrams testified to Congress that the "tattered, perverted, and shrunk" public-housing program had "become little more than an adjunct of . . . [an] urban renewal program" — a means to rehouse the urban poor while allowing urban redevelopment to go forward.³⁴⁰ The home builders'

334. *Id.* at 811, 817.

335. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 328, at 537.

336. *Id.*

337. John A. McDermott, An Analysis of the Report of the Civil Rights Commission as It Relates to the F.H.A. 1 (undated 1959) (on file with NAACP Papers, Library of Congress, Box III:A157), https://hv.proquest.com/pdfs/000004/000004_003_0786/000004_003_0786_From_1_to_205.pdf#page=202 [<https://perma.cc/5K3Y-G5FW>].

338. Memorandum from Jack E. Wood, Jr., Special Assistant for Hous., NAACP, to State & Local Presidents & Hous. Comm. Chairmen, NAACP 2 (June 5, 1959) (on file with NAACP Papers, Library of Congress, Box III:A157), https://hv.proquest.com/pdfs/000004/000004_003_0786/000004_003_0786_From_1_to_205.pdf#page=74 [<https://perma.cc/E95J-WRA8>].

339. See WOLMAN, *supra* note 73, at 153 (describing public housing as a "debilitated program" by the early 1960s).

340. *General Housing Legislation: Hearing Before the Subcomm. on Hous. of the S. Comm. on Banking and Currency*, 86th Cong. 363 (1960) [hereinafter *General Housing Legislation*] (statement of Charles Abrams, Visiting Professor of Housing, Massachusetts Institute of Technology). On

association claimed “a growing realization that public housing has failed,” even among “its former proponents.”³⁴¹ Within the PHA, the reformers of an earlier era had evolved. Having begun as “dedicated public servants who believed in the program,” they had become, in one insider’s view, “a true bureaucracy. . . . spiritless, engrossed with process to the extent that it had almost forgotten what their objectives were.”³⁴²

IV. DELAYING BROWN

Yet dramatic change appeared near. In fall 1960, Democratic presidential candidate John F. Kennedy campaigned on promises to implement civil rights more forcefully than Eisenhower had. Taking up the NAACP’s proposal for an executive order barring discrimination in all federal housing programs, Kennedy vowed that if elected he would act against housing segregation with a “stroke of the pen.”³⁴³ Once elected, President Kennedy named Robert Weaver, the original architect of the “racial equity” framework and a long-time NAACP ally, to oversee federal housing programs as the first African American HHFA Administrator.

Yet as the Kennedy Administration took office, Southerners extracted a high price for confirming Weaver. Even formal reforms were slow to emerge; once they did, agency lawyers read them very narrowly. To administrators, their contractual commitments to local authorities, long structured into the public-housing program via statute, trumped the judiciary’s mandates and the Civil Rights Act of 1964. As a result, the PHA’s operational frameworks around segregation barely changed.

A. *The Gordian Knot*

As head of the housing agencies, Robert Weaver quickly tied his own hands. The black New Dealer, Harvard-trained economist, and originator of the PHA’s “racial-equity” mandates came under attack at his confirmation hearings over his

the severe harms that urban-renewal programs wreaked on the African American urban poor, see, for example, WOLMAN, *supra* note 73, at 37-40.

341. *General Housing Legislation*, *supra* note 340, at 157, 165.

342. Interview by Joe B. Frantz with Don Hummel, Assistant Sec’y for Renewal and Hous., Dep’t of Hous. & Urban Dev., in Washington, D.C. 7, 25 (Jan. 13, 1969) (on file with Lyndon B. Johnson Library Oral Histories).

343. NCADH, Needed – “A Stroke of the Pen” (on file with NARA II, Box 64, Robert C. Weaver Subject Correspondence Files, 1961-68, RG 207).

support for fair housing and his purported radical ideology. To mollify Southerners, Weaver assured Senator John Sparkman (D-AL), chair of the Housing Subcommittee, that he would not act independently to prohibit segregation in federal housing programs.³⁴⁴

Once installed, Weaver proved to be a passive administrator: he left many of the prior administration's top staff in place and worked closely with former aides to Southern committee chairs. When Milton Semer became the HHFA's general counsel, he recalled that he "operated almost as if I was still Sparkman's Chief Counsel which I'd been just a few months before."³⁴⁵ Top race-relations officials criticized Weaver's unwillingness to take robust steps on civil rights. The FHA's race-relations advisor said in 1968, "I think Bob could have done a hell of a lot more than he did."³⁴⁶

Even as Weaver successfully stewarded housing legislation through Congress, he found himself in the disheartening position of writing to civil-rights advocates to explain that he was committed to inaction on segregation, the political price he had paid for ascension.³⁴⁷ Weaver and his PHA Commissioner periodically wrote such letters. They acknowledged that the courts had generally ruled government-enforced public-housing segregation unconstitutional but still argued that their hands were tied.³⁴⁸ When a local NAACP president wrote Weaver complaining of segregation in local public housing and asking him "to take whatever steps are necessary to correct this injustice," Weaver responded

344. *Nomination of Robert C. Weaver*, *supra* note 82, at 16 (exchange between Weaver and Sparkman).

345. Interview by William McHugh with Milton P. Semer, *supra* note 87, at 48.

346. Interview by Larry J. Hackman with Oliver W. Hill, *supra* note 89, at 42-43.

347. In September 1961, he wrote an Illinois state official to tell him that while he personally favored an open-occupancy requirement, he had testified to Congress, "I do not believe I could or should undertake to impose an open-occupancy requirement without . . . a policy directive from either the Congress or the Executive." Letter from Robert C. Weaver, Adm'r, Hous. & Home Fin. Agency, to Dr. J.B. Stafford (Sept. 3, 1961) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196). In the interim, his goal was to "provide maximum participation by all elements of the population" and he was "hopeful of being able, in due time, to move more directly" to address segregation "where housing is Federally-assisted." *Id.*

348. See Letter from Robert C. Weaver, Adm'r, Hous. & Home Fin. Agency, to Dr. Lindley Burton (July 12, 1962) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196) ("[I]t has generally been held that governmentally enforced segregation in public housing, as distinguished from voluntary segregation, violates the Fourteenth Amendment . . . Whether governmentally enforced segregation is found to exist, however, depends upon the facts of the particular case.").

that “the PHA has felt precluded from imposing [an open-occupancy] requirement administratively.”³⁴⁹

At the request of a newly formed White House Subcommittee on Civil Rights, the housing agencies did begin reviewing their policies on race in 1961. But the agencies still implacably opposed action against segregation.³⁵⁰ PHA Commissioner Marie McGuire wrote that her agency believed “that, because [public-housing] projects will be owned and operated locally, we do not have the right to dictate the occupancy policies.”³⁵¹ Even if local authorities chose to build public housing in sites that would extend racial segregation to previously integrated areas, “PHA considers these local matters to be fought out and resolved on the local level.”³⁵²

Yet the PHA chief acknowledged that the agency had the legal power to prohibit segregation in the housing it approved and funded. McGuire stated that the agency had created its own racial policies in the past, and could do so again, using the broad delegation of authority it enjoyed under the United States Housing Act: “PHA’s [racial] equity policy was arrived at by administrative decision. It could be changed in the same manner”³⁵³ However, citing fears of “the impact” of such a decision, she was “reluctant to institute such a policy unless by order of . . . higher authority.”³⁵⁴ The PHA did not wish to act against segregation because of the political backlash against the agency that such steps would provoke.

President Kennedy initially refused to deliver on his “stroke of the pen” for the same reason. The promised executive order did not materialize in 1961, nor in spring or summer 1962. A White House official expressed the key problem

349. Letter from John A. Bennett, President, Johnstown, Pa., Branch, NAACP, to Robert C. Weaver, Adm’r, Hous. & Home Fin. Agency. (June 28, 1962) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196); Letter from Robert C. Weaver, Adm’r, Hous. & Home Fin. Agency, to John A. Bennett, President, Johnstown, Pa., Branch, NAACP (Aug. 17, 1962) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

350. The April 1961 summary of HHFA nondiscrimination policies reported a status quo largely unchanged since the early 1950s. See Memorandum from Hous. & Home Fin. Agency, Summary of Present Agency Nondiscrimination Policies (Apr. 10, 1961) (on file with NARA II, Box 9, Records of the Intergroup Relations Branch, 1936-1963, RG 196). For example, the PHA continued to leave segregation decisions to local authorities, while enforcing a policy of “equitable provision for . . . all races.” *Id.* at 3.

351. Report from Comm., Pub. Hous. Admin., to Jack T. Conway, Deputy Adm’r, Hous. & Home Fin. Agency 2 (June 28, 1961) (on file with NARA II, Box 9, Records of the Intergroup Relations Branch, 1936-63, RG 196).

352. *Id.*

353. *Id.*

354. *Id.*

succinctly in fall 1961: “Reconciling [minority groups’] pressure with the need for Southern votes on major legislation remains the Gordian knot.”³⁵⁵ White House aides noted that the powerful Southern chairs of the housing agencies’ oversight committees, Senator John Sparkman and Representative Albert Rains, were “strongly opposed.”³⁵⁶

B. *The Executive Order*

Finally, in November 1962, President Kennedy issued the long-awaited and controversial Executive Order 11,063, barring discrimination in federally funded housing.³⁵⁷ The Civil Rights Commission described it as “a logical extension of the [Court’s] 1948 decisions” in *Shelley* and *Hurd*.³⁵⁸ But after exhaustive deliberations on the scope, the White House chose to issue only a narrow prohibition on discrimination in federally funded public housing and in developments with FHA- or VA-backed mortgages.

Critically, the executive order applied only to housing to be constructed in the future. Existing housing, and even unbuilt but already-contracted-for housing, was unaffected.³⁵⁹ That meant that the federal government would continue to pay annual subsidies to existing public-housing projects for decades to come,

355. Memorandum from Frederick G. Dutton, Special Assistant to the President, to Louis Martin 5 (July 8, 1961) (on file with the John F. Kennedy Presidential Library and Museum), <https://www.jfklibrary.org/asset-viewer/archives/JFKWHCSF/0358/JFKWHCSF-0358-012> [<https://perma.cc/8FEV-K96Y>]; see also Anthony Lewis, *Kennedy Decides on Housing Edict*, N.Y. TIMES, Oct. 22, 1962, at 1, 18.

356. Memorandum to the President on Civil Rights Program 3 (Nov. 17, 1961) (on file with John F. Kennedy Library).

357. Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962); see also President John F. Kennedy, The President’s News Conference (Nov. 20, 1962), in *The American Presidency Project*, U.C. SANTA BARBARA, <https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-170> [<https://perma.cc/9CRN-NNVQ>].

358. U.S. COMM’N ON CIVIL RIGHTS, 1963 REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS 96 (1963).

359. President Kennedy’s order stated:

I hereby direct all departments and agencies in the executive branch . . . to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin— (a) in the sale, leasing, rental, or other disposition of residential property and related facilities (including land to be developed for residential use), or in the use or occupancy thereof, if such property and related facilities are . . . (ii) provided in whole or in part with the aid of loans, advances, grants, or contributions *hereafter* agreed to be made by the Federal Government

Exec. Order No. 11,063, 27 Fed. Reg. 11,527 (Nov. 24, 1962) (emphasis added).

even if they were openly and intentionally segregated. Regarding existing housing, the President's order in Section 102 directed federal officials "to use their good offices . . . to promote the abandonment of discriminatory practices."³⁶⁰ Racial-relations staff termed Section 102's "good offices" provision "a snare and delusion," since "most people know that you got no real backup, no clout behind this thing."³⁶¹ It was a matter of "exhortation."³⁶²

By fall 1963, a year after the order's issuance, it had had a negligible impact on de jure segregation in public housing. Nearly 500,000 existing units were not covered by the order.³⁶³ Of those still in construction, barely more than a third would be covered by the order once finished. Most public housing remained segregated and nearly two-thirds of black families were in projects that did not adhere to open occupancy, even on paper.³⁶⁴

Local NAACP chapters and concerned citizens wrote the federal housing agencies to ask how it was possible that local authorities still planned to build and maintain segregated public housing using federal funds. Administrator Weaver and Public Housing Commissioner McGuire found themselves repeatedly writing to local activists to explain that, in fact, localities continued to be free to segregate projects built or contracted for prior to November 20, 1962—at least from the federal agencies' perspective, though they did not address the Constitution. In formalistic language, Weaver and McGuire pointed out that the projects in question were simply "not subject to the requirement" of nondiscrimination under the order.³⁶⁵ Only contracts signed on November 21, 1962, or afterward were covered. That, they suggested, was because the United States Housing Act vested "maximum responsibility" in local authorities. For example, in Campbellsville, Kentucky, officials signed the contract the very day that President Kennedy issued the order—hence no prohibitions on discrimination applied to the projects that would subsequently be built under it.³⁶⁶

^{360.} *Id.* at 11,528.

^{361.} Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 19.

^{362.} Interview by William McHugh with Milton P. Semer, *supra* note 87, at 86.

^{363.} Memorandum from Pub. Hous. Admin., Steps Taken in Civil Rights Since January 1961, to Paul Southwick, White House (Oct. 1963) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

^{364.} *Id.*

^{365.} *E.g.*, Letter from Marie McGuire, Comm'r, Pub. Hous. Admin., to Dr. Lindley Burton, Hous. Comm. Member, NAACP (Mar. 14, 1963) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

^{366.} See Letter from Marie M. McGuire, Comm'r. Pub. Hous. Admin., to Betty Lou Shipp (Mar. 7, 1963) (on file with the NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

Exacerbating the executive order's failure to reach existing housing, agency lawyers interpreted it narrowly. PHA lawyers read it to allow racial segregation in almost any form – including through the explicit selection of separate sites for housing in white and black neighborhoods – so long as applicants were formally allowed “free choice” between the sites.

Joseph Burstein, now General Counsel, expressly cited Louisville, Kentucky's “Plan for Integration” as an example of compliance with the executive order.³⁶⁷ The Louisville “freedom of choice” plan was adopted following an NAACP suit against the Louisville housing authority challenging explicit segregation.³⁶⁸ That plan allowed public-housing applicants to request placement into any project, but explicitly permitted white and black tenants to refuse a placement in any project that was made up predominantly of the other race.³⁶⁹ In other words, no integration needed to occur at all under the Louisville approach, if no one requested it and no one wished to be among the first to integrate a previously segregated project.³⁷⁰ Nonetheless, Burstein approved the plan as a model form of compliance with the new nondiscrimination mandate.

The General Counsel also interpreted the order to allow localities to choose public-housing sites in ways that would ensure continued racial segregation. According to Burstein, localities were free to divide a housing project into separate sites in white and black neighborhoods, so long as tenants were not formally

367. Joseph Burstein, Legal Div., Pub. Hous. Admin., to Arthur R. Hanson, Dir. Atlanta Reg'l Office, Pub. Hous. Admin. (Dec. 17, 1962) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

368. *Eleby v. City of Louisville Mun. Hous. Comm'n*, 2 Race Rel. L. Rep. (Vand. U. Sch. L.) 815, 815-16 (W.D. Ky. 1957). In 1958, when the district court approved the Louisville plan, the Louisville housing program presented a near-perfect mirror of the racial equity formula, based on the theory that no discrimination occurred so long as *Plessy*-type “separate but equal” housing was provided. To the Louisville authorities, the *Plessy* regime of “racial equity” had involved no discrimination at all. See Plan of Integration at ¶2, *Eleby v. City of Louisville Mun. Hous. Comm'n*, Civ. No. 3240 (W.D. Ky. 1957) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196) (“There has never been any discrimination between White and Negro applicants or White or Negro tenants.”).

369. *Id.* ¶4 (“[T]he Commission will not compel a White applicant against his wishes to occupy a unit in a project which is occupied predominantly by Negro tenants nor compel a Negro applicant to occupy a unit in a project which is occupied predominantly by Negro tenants.”).

370. A press release drafted by the Louisville Commission bluntly predicted that the plan would not significantly change public housing's segregation: “The Commission believes that the proposed plan will not materially change the present occupancy” See Press Release (May 24, 1957) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

excluded on the basis of race.³⁷¹ Separation alone did not violate the nondiscrimination mandate: “[T]he mere fact that a project is divided into two or more separate sites in ‘white’ and ‘non-white’ neighborhoods would not of itself constitute a violation” An outcome of one hundred percent segregation would not even violate the order.³⁷²

Burstein emphasized local sovereignty, writing that the Housing Act vested “maximum amount of responsibility” for administration in local housing authorities. Moreover, “no one can foresee all the ultimate effects of the selection of a particular site.” Given limited federal power and the purportedly unpredictable effects of site selection, Burstein concluded that it would be highly unlikely that a local authority’s site selection could be “so arbitrary, capricious, or unreasonable . . . as to permit the PHA to substitute its judgment.”³⁷³

Thus, the General Counsel interpreted the order to permit nearly any formal “free choice” approach to satisfy the nondiscrimination requirement in tenant assignment. Moreover, the General Counsel interpreted the order so that it did not apply at all to the critical stage of site selection, deferring instead to local authorities’ discretion.

In September 1963, a young African American lawyer, Earle White, Jr., submitted a memo to Burstein arguing that the Louisville-type “open choice” plan was unconstitutional.³⁷⁴ White pointed out that subsequent appellate decisions rejected analogous “open choice” plans in the school-desegregation context. Such a plan “would not be approved today as a valid method for eliminating racially segregated public housing.”³⁷⁵ He argued that even where the executive order did not formally apply, “state action which is not designed to carry out the purposes of such order should be denied Federal funds.” Anticipating an objec-

371. Memorandum from Joseph Burstein, Gen. Counsel, to Walter A. Simon, Dir., Phila. Reg’l Office (Dec. 21, 1962) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

372. “Neither would such a violation be established merely by reason of the fact that separate portions of the project were occupied exclusively by members of different races, creeds or nationalities, providing such a situation came about through choice of eligible occupants. . . .” *Id.* at 2.

373. *Id.* at 2-3.

374. Memorandum from Earle W. White, Jr., to Joseph Burstein, Gen. Counsel 4 (Sept. 19, 1963) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196); *see also* Rachel J. Anderson, *African American Legal History in Nevada (1861-2011)*, NEV. LAW., Feb. 2012, at 8, 13.

375. White, Jr., *supra* note 374, at 4.

tion based on the United States Housing Act's vesting of "maximum responsibility" in local authorities, White argued that such statutory responsibility was necessarily constrained by constitutional requirements.³⁷⁶

It is unclear whether Burstein responded to the memo, and White's stint at the PHA was brief.³⁷⁷ His constitutional arguments had little impact. Several months later, the PHA reaffirmed Burstein's stance on both site selection and the legality of the Louisville "open choice" plan, forwarding both memos to Administrator Robert Weaver as part of a report on implementation of the executive order.³⁷⁸

On the ground, implementation of President Kennedy's order also proved limited, due in part to an ineffective enforcement apparatus.³⁷⁹ In public housing, strikingly few complaints were filed.³⁸⁰ Some thought the problem also lay partly in advocates' inattention to housing, as NAACP lawyers shifted their focus

376. *Id.* at 4-5.

377. The transmittal slip on the memo notes in pencil: "Mr. White is no longer with agency." *Id.* Having graduated at the top of his Howard Law School class, White was recruited to Nevada the following year, becoming one of the first two black lawyers admitted to the Nevada bar in 1964 and later a Nevada district-court judge. See Anderson, *supra* note 374, at 13, 16; Thomas L. Berkley, *On the Sidewalk*, OAKLAND POST, Sept. 18, 1968, at 1.

378. Actions and Results Under Executive Order 11,063 (Nov. 21, 1962-Nov. 30, 1963) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

379. Initially, Weaver decided to divide the enforcement of the executive order from the racial-relations service's role. He argued that this would insulate it politically, as "if you put it all together it makes it easy for Congress to knock it out." Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 17. But McGraw noted that "he never went up for any budget to speak of [for enforcing the order]." *Id.*

380. A few months after the order's issuance, the PHA reported that "[n]o formal complaints have been filed under its provisions, and programming new units does not seem to be very much affected." Report of Commissioner, Pub. Hous. Admin., to Robert C. Weaver, Adm'r, Hous. Home Fin. Agency (Feb. 15, 1963) (on file with NARA II, Box 9, Records of the Intergroup Relations Branch, 1936-63, RG 196); see also Report on Status of Complaints of Racial Discrimination as of Dec. 31, 1963, Feb. 20, 1964, Mar. 20, 1964, Apr. 30, 1964, May 31, 1964, June 30, 1964, July 1, 1964, July 31, 1964, Aug. 31, 1964, Sept. 30, 1964, Oct. 31, 1964, Nov. 30, 1964, Dec. 1, 1964 (series) (on file with NARA II, Box 9, General Legal Opinions Files, 1936-70, RG 196).

to the grassroots civil-rights movement and issues such as public accommodations.³⁸¹ Agency pushback also surfaced.³⁸²

In the field, the status quo prevailed. In spring 1964, Philip Sadler, the head race-relations advisor for the PHA, protested ongoing “segregated planning” in regional offices.³⁸³ Sadler specifically condemned the continued “use of two sites in planning public housing” in the Atlanta and Fort Worth regional offices, which he described as the “almost exclusive[.]” practice in those regions.³⁸⁴ The regional directors believed that it was a matter of allowing segregation, or not having any public housing at all.³⁸⁵ That summer, regional officials acknowledged to central PHA administrators that “programs are still proposed mainly in terms of racial factors, and . . . sites are still selected with racial occupancy in view.”³⁸⁶ In some instances, local authorities believed the PHA staff had expressly instructed them to adopt segregated sites.³⁸⁷

The executive branch’s first real gesture toward addressing segregation in federal housing thus proved ineffectual. President Kennedy’s Executive Order 11,063 itself did not cover existing (or even contracted-for, but not-yet-built)

381. Race-relations chief Booker McGraw recalled that “before all this stuff broke the NAACP was beginning systematically to develop some court cases in housing. They had to drop that to take care of King’s people and these kids . . . to do legal work for them on public accommodation and all this other bit, so that during the whole Kennedy administration you never had the pressure on housing.” Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 32. McGraw believed that was “one reason we didn’t do any more with the order, we didn’t get any more complaints than we got . . . I would have gotten some staff. We would have had to move vigorously if they’d gotten around to this housing bit, in my judgment.” *Id.*

382. While career staff in the constituent agencies’ central offices did not openly oppose the order, neither did they necessarily embrace it; as a top race-relations official put it, “There’s always a lot of confusion on the minds of program people . . . that somehow this is going to kill the program if you do anything on this [civil-rights] front.” *Id.* at 15.

383. Note from Philip G. Sadler, Dir., Intergroup Relations Branch, to Comm’r 2 (Mar. 6, 1964) (on file with NARA II, Box 3, General Legal Opinions Files, 1936-70, RG 196). Sadler wrote: “[T]he Atlanta Regional Office continues, almost without exception, to handle projects just as they did before November 20, 1962. Projects are still designated for specific racial use and units are proposed for the different races on separate sites.” Sadler noted that of 217 projects then under annual contract that were covered by the executive order and had originated from the Atlanta regional office, 215 were designated for segregated white or black occupancy. *Id.*

384. *Id.* at 1.

385. The directors told Sadler that “unless this kind of planning is done there will be no low-rent public housing in the localities [at issue].” *Id.*

386. Letter from Philip G. Sadler, Dir., Intergroup Relations Branch, PHA, to Francis X. Servaites, Deputy Comm’r, PHA (Oct. 30, 1964) (on file with NARA II, Box 4, General Legal Opinions Files, 1936-70, RG 196).

387. *Id.*

housing, meaning that federal funds would continue to flow to de jure segregated projects. Through narrow interpretation, PHA lawyers further limited the order's impact on communities that sought future housing developments. Even for those projects that fell under the order's coverage, no real desegregation measures were required for compliance—simply formal adherence to “free choice” for tenants. As a longtime racial-relations official commented, “freedom of choice” meant simply “freedom of choice of whites to stay in . . . all white projects and freedom of choice of Negroes to stay in all Negro projects.”³⁸⁸ Localities were also free to extend segregation, simply by choosing new housing sites in segregated neighborhoods.

C. *The Irrevocable Subsidy*

The lack of a practical remedy further disabled any post-1962 attempt to enforce the constitutional prohibition on segregation. From the start, the agency ruled out use of the most powerful weapon in its arsenal: the funding cutoff. Because the 1949 Housing Act had included a statutory provision that committed the federal government to take over local housing projects as its sole remedy for contractual breach, the agency viewed itself as irrevocably committed to its annual contractual payments. According to the PHA, it was legally impossible to halt the federal subsidies. The only remedy was for the agency itself to take possession and assume the operations of local housing projects found to have violated contractual obligations.

The PHA made clear its policy of continuing annual subsidies, no matter the violation, in several contexts. For example, the PHA denied any authority to withhold funding based on civil-rights violations in response to a summer 1963 congressional inquiry regarding the agency's existing power to avoid funding segregation.³⁸⁹ In August 1963, Weaver wrote that the agency “would regard it as contrary to [the statutory framework and its own past practice] . . . to contract with Local Authorities so as to permit withholding of annual contributions upon breach of a contract provision for equal opportunity in housing.”³⁹⁰ Such action “would substantially increase the cost of financing.”³⁹¹ Not only did the PHA feel

388. Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 27.

389. For the inquiry, see 109 CONG. REC. S12089-115 (daily ed. July 2, 1963) (statement of Sen. Javits).

390. Letter from Robert C. Weaver, Adm'r, Pub. Hous. Admin., to Philip A. Hart, U.S. Senator 3 (Aug. 6, 1963) (on file with NARA II, Box 2, General Legal Opinions Files, 1936-70, RG 196).

391. *Id.*

that it could not withhold federal subsidies for segregated housing without “specific statutory authority,” the agency did not want Congress to give it that statutory authority.³⁹² Essentially, then, the decades-old statutory scheme for financing public housing at the lowest possible cost to the government meant that the PHA believed it could never stop paying local authorities, no matter the violation.

The agency maintained that position even after the Civil Rights Act of 1964 finally overhauled its approach to racial segregation. Because Title VI of the Act barred discrimination in any program receiving federal funds, the agency interpreted the prohibition to apply even to existing public housing—as the earlier executive order had not.³⁹³ In theory, at least, Title VI thus meant that public housing receiving ongoing federal funds could no longer be segregated.³⁹⁴

Yet the PHA announced that it would not, in fact, use the primary enforcement tool available under Title VI. Insofar as it understood its annual subsidies to public-housing developments to be legally “irrevocable,” the agency stated that it would not withhold those funds from localities that violated the Civil Rights Act.³⁹⁵ Instead, for projects under annual-contribution contracts before President Kennedy’s executive order—the overwhelming bulk of public housing—the agency’s theoretical sanction was simply to refuse to approve future projects in the locality.³⁹⁶ For projects with contracts signed after the order’s issuance in November 1962, which contained contractual language expressly prohibiting discrimination, the PHA stated that it could employ the contractual sanction of recovering title or possession to the projects or refer the matter to the DOJ for legal enforcement.³⁹⁷

The PHA thereby tied its hands to a remarkable degree. By viewing itself as unable to override its initial contractual agreements to fund local public housing

392. *Id.* at 4.

393. PHA decided that it would “take the position that Title VI is applicable . . . to . . . the low-rent housing program regardless of the date of the execution of the contract so long as annual contributions remain to be paid under the contract.” Letter from Robert C. Weaver, Adm’r, Pub. Hous. Admin., to Kermit Gordon, Dir., Bureau of the Budget (July 17, 1964) (on file with the LBJ Library, Papers of Lyndon Baines Johnson, President, 1963-1969, Files of Lee White, Box 1).

394. See Robert A. Sauer, *Free Choice in Housing*, 10 N.Y.L.F. 525, 533 (1964). Sauer had been Assistant General Counsel at HHFA and was Special Assistant to the Deputy Administrator there as well. *Id.* at 525 n.*.

395. See Questions and Answers on the Effect on HHFA Programs of the Nondiscrimination Requirements of Title VI of the Civil Rights Act of 1964, HHFA 4 (May, 1965) (on file with NARA II, Box 129, Robert C. Weaver Subject Correspondence Files, 1961-68, RG 207).

396. See *id.*

397. See *id.*

over forty to sixty years,³⁹⁸ the PHA left itself without any effective remedy against many local housing authorities – at least those who were willing to forgo building any public housing in the near term, since the sole sanction PHA claimed for most existing public housing was to reject future projects.

Under that analysis, PHA's contractual obligations apparently overrode any Fifth Amendment (or statutory) obligations to refrain from funding de jure segregation. That was the state of the affairs as the Civil Rights Act came into effect.

It came as little surprise, then, that the federal courts assessed the public-housing agency harshly in subsequent years, as litigants began successfully bringing claims against the agency under Title VI, the Fair Housing Act of 1968, and the Constitution itself. In 1969, a federal court surveyed the PHA's practices in Bogalusa, Louisiana, writing that the agency "was not only aware of" local authorities' decisions to continue building expressly segregated housing projects throughout the 1960s but "effectively directed and controlled each and every step in the program," thus qualifying as an "active participant since it could have halted the discrimination at any step."³⁹⁹ The Seventh Circuit, writing in 1971, was slightly more generous in describing the agency's actions. Federal officials overseeing Chicago's public-housing applications had decided, the court wrote, "that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of [the] city."⁴⁰⁰ Nonetheless, doing so had violated the Constitution.⁴⁰¹ By 1985, a federal court in east Texas was no longer willing to view the agency so generously, concluding that the federal agency had "played a crucial and continuing role in creating and maintaining a large system of publicly funded segregated housing" in the region.⁴⁰²

Congress affirmed that *Shelley* and *Brown* were the law of the land in the Civil Rights Act of 1964. Only then did the federal public-housing agency turn away from its *Plessy*-based regime.

398. Federal subsidies extended up to sixty years under the original public-housing program, but the 1949 Housing Act reduced this term to forty years. Compare Housing Act of 1949, Pub. L. No. 81-171, § 22, 63 Stat. 413, 426, with United States Housing Act, Pub. L. No. 75-412, § 9, 50 Stat. 888, 891 (1937).

399. *Hicks v. Weaver*, 302 F. Supp. 619, 623 (E.D. La. 1969) (ruling that HHFA's successor, HUD, had violated Title VI by approving and funding segregated public-housing sites).

400. *Gautreaux v. Romney*, 448 F.2d 731, 737 (7th Cir. 1971).

401. See *id.* at 740 (ruling that HUD, in approving and funding Chicago's segregated public housing, had violated the Fifth Amendment and Title VI).

402. *Young v. Pierce*, 628 F. Supp. 1037, 1056-1057 (E.D. Tex. 1985) (ruling that HUD violated the Fifth Amendment, two Reconstruction-era civil-rights statutes, Title VI, and the Fair Housing Act by knowingly funding segregated public housing).

Segregation had become a basic aspect of the public-housing program — part of its political viability, *modus operandi*, and everyday practices. Long-term personnel like General Counsel Burstein had seen it woven into the agency’s operating principles since its origin. Segregation formed part of the agency’s original commitment to constitutional principles of racial equality under Weaver’s “racial equity” policies, and segregation was the political price paid to maintain a public-housing program. Institutional inertia around that regime was powerful, as was the fear of backlash from the program’s clientele of local housing officials and congressional oversight committees. A change in leadership, even a change in the White House, proved insufficient to overcome those forces. Agency personnel used legal interpretation and on-the-ground implementation to defend the status quo and the older Constitution it represented.

By the time Congress approved the creation of a new Housing and Urban Affairs Department in 1965 and confirmed Weaver as its head a year later, Weaver had clearly succeeded in one respect: he had resolved congressional concerns that he would radicalize the housing agencies. Senator A. Willis Robertson, a Democrat from Virginia and chair of the Senate Banking and Currency Committee, praised Weaver’s record as the Committee considered Weaver’s nomination to head the new Department, stating that he had “watched [Weaver] very closely” and would “vote for his confirmation.”⁴⁰³ As Weaver later recalled, his initial tenure in office showed that the earlier charges against him “were without foundation and therefore in contrast to the ‘61 experience, in 1966 [he] was unanimously confirmed and the hearings lasted about ten minutes.”⁴⁰⁴ Weaver thus became the first black Cabinet member, having allayed fears of a racial revolution.⁴⁰⁵

As of the late 1960s, race-relations advisor Booker McGraw thought PHA and FHA had switched positions: “[T]he agency which was leading the parade [PHA] . . . is probably the last in line today.”⁴⁰⁶ The FHA had improved its efforts to protect minority rights, thanks to the efforts of new Commissioners. “[I]t isn’t easy to bring a structure like that along,” he said.⁴⁰⁷ As Oliver Hill, the

403. *Nominations of Robert C. Weaver and Robert C. Wood, Hearing Before the S. Comm. on Banking & Currency*, 89th Cong. 2 (1966) (statement of Sen. Robertson, Chairman, S. Comm. on Banking & Currency).

404. Interview by James Mosby with Robert C. Weaver, Sec’y of Hous. & Urban Dev., in Washington, D.C. 2 (Mar. 12, 1969) (on file with Civil Rights Documentation Project, Washington, D.C., Ralph J. Bunche Oral Histories Collection).

405. Cf. WOLMAN, *supra* note 73, at 106 (stating that “[f]rom all accounts HUD was often politically more cautious than the Administration” during Weaver’s tenure).

406. Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 9.

407. *Id.* at 23.

FHA's race-relations advisor put it, "It was a case of dragging them [top level staff] along The old-line was very slow, very slow to change."⁴⁰⁸ At the PHA, though, Commissioner McGuire had not prevailed over the career bureaucracy. McGraw commented, "If you aren't careful, the structure will take over that person [at the top] and change that person. . . . I think they succeeded in influencing her more than she was able to influence them."⁴⁰⁹ Part of the problem was that the PHA bureaucracy was tightly linked to local housing authority officials (represented by the NAHRO): "They've been in bed together so long; they look at it as their constituency"⁴¹⁰

The bureaucracy was difficult to penetrate, the long-time race-relations advisor explained: "[T]hey always felt any change you want to make, no matter how committed you are, they see it as an effort, as you're going to kill public housing, you're an enemy of the program."⁴¹¹ He went on, "Issuing orders don't succeed; you've got to do more than that if you're going to change the structure. . . . [A]ny change they see as a threat, and you got to do something about their view of the change threatening them."⁴¹²

Administrative power thus sustained the *Plessy* "separate but equal" framework in federally funded housing, long after the federal government's leading lawyers and the Supreme Court rejected it. Despite the clarity in judicial doctrine, the agency's lawyers resorted to legislative history, executive discretion, and implicit federalism principles to sustain its approach. Behind the agency's formal legal interpretations stood a harsh political reality: the decades-long attacks of conservatives and private industry had so tarnished government anti-poverty programs that the PHA was perpetually pleading for its life. Whether driven by overriding attachment to the mission of housing the poor, or relative indifference to segregation, administrators chose to sacrifice *Shelley* and *Brown*. In the built environment of American cities, *Plessy* governed.

V. UNCOVERING THE EFFECTIVE CONSTITUTION

Despite agencies' power to shape the legal frameworks that effectively govern Americans' lives, some administrative constitutions still go unseen — or at least

408. Interview by Larry J. Hackman with Oliver W. Hill, *supra* note 89, at 37.

409. Interview by William McHugh with Booker T. McGraw, *supra* note 87, at 25.

410. *Id.* at 27.

411. *Id.* at 26.

412. *Id.* at 26-27.

unremarked. Such frameworks can be difficult to trace, going undescribed in legal sources.⁴¹³ Lawyers and scholars often focus on the Constitution's text and judicial decisions interpreting that text, omitting agencies' constitutional frameworks.⁴¹⁴ The greater public is even more likely to equate the Constitution with such sources, rather than the legal norms that state officials actually adopt internally and implement externally. Even those who study the administrative Constitution sometimes miss key aspects of agencies' participation in constitutionalism, because of the inevitable limits of particular theoretical or temporal frames.

This Article reveals one such administrative Constitution, which has remained largely submerged—though its vestiges in urban segregation are nearly impossible to ignore. Below, I ask how this particular case adds to civil-rights history, while challenging conventional narratives of resistance to *Brown*. I then consider how this account might lead us to scrutinize the broader phenomenon of administrative constitutionalism.

A. Seeing Plessy in the Administrative State

Apartheid, as others have observed, must be administered.⁴¹⁵ In the U.S. case, the most vivid examples of bureaucrats enforcing racial strictures—often with bloody violence—have been sheriffs, voting registrars, county clerks, and other local officials. Federal administrators, though, also played their part. Their role highlights the other face of Jim Crow in both the North and South: one in which its operation appeared banal, humdrum, even benign. Agency officials were not ready-made villains. Operating within the scope of statutory law as

413. See, e.g., Metzger, *supra* note 20, at 1901-02 (arguing that the recent increase in “attention to administrative constitutionalism is overdue” while noting “the frequent difficulty involved in identifying instances of administrative constitutionalism in action”).

414. This is true even though a growing number of scholars comment on agencies' influence on constitutional interpretation in the courts. Such work focuses on a subset of agency constitutional frameworks—those that have manifested in litigation and been incorporated into judicial doctrine. For influential early examples, see STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT* (1995); and Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971*, 110 AM. J. SOC. 709 (2004).

415. See IVAN EVANS, *BUREAUCRACY AND RACE: NATIVE ADMINISTRATION IN SOUTH AFRICA* 1 (1997) (“[A]partheid . . . had to be constantly *administered*: the feasibility of apartheid came to rest on the pervasive presence of the state in every facet of life.”); ANTHONY W. MARX, *MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL* 108 (1998) (noting that the South African public workforce “explode[d] in size to administer apartheid”).

written in Congress, interpreted by agency lawyers, and explained in administrative issuances, they simply administered the *Plessy* regime. The PHA was hardly alone; administrators in the Office of Education, for example, grappled with essentially the same dilemma and came to similar resolutions.⁴¹⁶

How did federal officials reconcile their support for segregation with conflicting principles from the Fifth and Fourteenth Amendments? Empowered under broad grants of authority from Congress, assuaged by their long-standing commitment to serving the poor of all races, and reinforced by their lawyers' considered views, administrators chose what they likely understood as the best of imperfect options.

Uncovering public housing's racial Constitution is crucial to an accurate grasp of civil-rights history. Along with recovering the full historical narrative itself, what else can we learn from the complex origins, political dynamics, and legal reasoning behind the PHA's constitutional choices? I argue that the administrative state's long-term reliance on *Plessy* should lead us to revisit entrenched assumptions about how resistance to *Brown* played out, as well as the broader conclusions that we draw from that era.

1. Law

Accounts of resistance to *Brown* often suggest that Southern lawlessness was the problem. More generally, sociolegal theorists argue that a gap between the "law in the books" and the "law in action" is inevitable in implementing any policy, even constitutional mandates.⁴¹⁷ Some might conclude that evidence of federal actors' resistance to *Brown* merely fleshes out such explanations, without challenging them.

Public housing's history challenges our ideas of a gap between the formal law and other actors' compliance with it, suggesting that we should instead adopt a more pluralistic understanding of law's role. Federal PHA officials did not merely defy the implementation of the law but instead adopted and abided by their own version of the law. The PHA's *Plessy* framework was formalized in agency contracts, rules, and manuals, and supported by repeated legal memoranda.⁴¹⁸ The framework was approved and disseminated from the top of the organization to its furthest reaches, and communicated to the state and local actors who implemented federal policy. Leaders and legal personnel considered

416. See Milligan, *supra* note 23, at 876-913.

417. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

418. See, e.g., *supra* notes 126, 134, 139-142 and accompanying text.

and rejected the NAACP's longstanding constitutional arguments.⁴¹⁹ Critics within the agency, the racial-relations advisors, who reiterated the constitutional arguments were ignored, or even fired, for their pains.⁴²⁰

Ongoing segregation in federally supported housing did not result from frontline personnel or external actors ignoring formal legal frameworks. Rather, agency leaders and lawyers actively turned away from judicial decisions, resting on their own views of congressional power, statutory meaning, and federal constitutional responsibility.⁴²¹

While bureaucratic resistance to new legal edicts may be predictable, it is useful to recognize that law itself is pluralistic and potentially works at cross-purposes.⁴²² Competing versions of the law may reside in administrative norms, as well as judicial decisions. Insofar as administrative Constitutions exist as a set of internal rules, memorialized in writing in internal directives, manuals, and memoranda, and justified by lawyers' arguments, they operate with the assumed legitimacy and stability of other forms of law.⁴²³ Further, when agencies rely on their own legal interpretations, that legitimizes and reinforces resistance. If bureaucratic inertia is powerful, inertia backed up by government lawyers and internal legal frameworks is even more so.⁴²⁴ The PHA's legalistic defense of *Plessy* thus contributed to the resilience of the agency's "separate but equal" frameworks over time. In such instances, an apparent gap between the "law on the books" and "law in action" may turn out to be more accurately understood as a gap between competing "laws on the books."

419. See *supra* Parts II-IV.

420. See *supra* notes 293-299 and accompanying text.

421. See, e.g., *supra* notes 250-264 and accompanying text.

422. Cf. John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 2 (1986) (defining "legal pluralism" as that state of affairs, for any social field, in which behavior pursuant to more than one legal order occurs").

423. Administrative constitutions like the PHA's thus are not quite "white-letter law," the type of law that Bennett Capers defines as existing in powerful social norms and practices, as opposed to formal black-letter law. See I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 8 (2006) (describing "societal and normative laws that stand side by side with, and often undergird, black-letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye"); see also Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 1 (2018) (citing James Baldwin's concept of society's "hidden laws" as "unspoken but profound assumptions on the part of the people"). To the extent they remain undocumented in traditional lawyers' sources, yet are ensconced in internal administrative texts that administrators themselves see as binding, such administrative constitutions may better be thought of as an intermediate category — "gray-letter" law.

424. Cf. RICHARD A. HARRIS & SIDNEY M. MILKIS, *THE POLITICS OF REGULATORY CHANGE: A TALE OF TWO AGENCIES* 45-48 (1996) (describing theories of the "inertial force of bureaucracy").

2. *Liberal Accommodation*

Public housing's racial history also highlights the strategic risks of political accommodation. During the mid-twentieth century, Northern liberals faced a perceived choice between sustaining national programs to aid the poor, or addressing Jim Crow.⁴²⁵ Most chose accommodation to Jim Crow and incremental gains toward liberal goals to avoid a bruising fight over segregation and the potential defeat of social welfare programs – and perhaps also to avoid challenges to similar practices within their own Northern jurisdictions.⁴²⁶

The NAACP stood nearly alone among national organizations in deeming the price of accommodation too high.⁴²⁷ Given the resilience of segregation in the built landscape of cities, that judgment looks accurate in hindsight. As Robert Weaver recognized early in the program's life, public housing was built to last sixty years or more.⁴²⁸ African American leaders recognized that trading segregation as the political price of securing housing for the poor would “perpetuat[e] for many, many years to come residential segregation.”⁴²⁹ They predicted that the constitutional trade-off would mean “rigid patterns of economic and racial segregation [will] be crystallized in brick and mortar to haunt us for generations.”⁴³⁰ Today, urban housing patterns put into place after the New Deal persist.⁴³¹

425. See, e.g., *supra* notes 197–202, 265–270 and accompanying text.

426. See, e.g., Cooke, *supra* note 158, at 4 (citing New York City's segregation of its public housing in 1940); see also Clarence Mitchell, Dir., NAACP Wash. Bureau, Speech to Richmond Civil Council 2 (Dec. 6, 1951) (transcript on file with NARA II, Box 751, Program Files, Race Relations Program, 1946–58, RG 207) (citing the role of “northern Senators and Congressmen” in maintaining “the present program of extensive segregation in Government assisted housing”).

427. See *supra* note 212 and accompanying text.

428. See Weaver, *supra* note 114, at 156.

429. See Letter from Robert R. Taylor to Walter White, *supra* note 156.

430. See Horne, *supra* note 243, at 11.

431. Recent studies indicate that segregation patterns have been ameliorated but not fundamentally transformed. See, e.g., Janice Fanning Madden & Matt Ruther, *The Paradox of Expanding Ghettos and Declining Racial Segregation in Large U.S. Metropolitan Areas, 1970–2010*, 40 J. HOUSING ECON. 117, 118 (2018); Jenny Schuetz et al., *Are Central Cities Poor and Non-White?*, 40 J. HOUSING ECON. 83, 83–84 (2018).

3. *Federal Jim Crow*

Federal officials' explicit, enduring support for Jim Crow also provides a basis to push back on scholars' skeptical assessments of the relative institutional capacity of the judiciary versus the executive branch. Gerald Rosenberg famously argued that the courts were ineffective in implementing *Brown* until executive-branch actors stopped standing on the sidelines, acquired legal authority to intervene, and joined the struggle after the 1964 Civil Rights Act.⁴³² Rosenberg's assessment has proved highly influential, grounding a more general view that courts are ineffective in implementing social reform.⁴³³

But if we see federal agencies as prior active participants in Jim Crow, not simply passive bystanders, that partly undermines the empirical foundation for Rosenberg's claims. To the extent that courts faced active resistance to *Brown* from within the federal administrative state, rather than simply passive noninvolvement, one cannot draw conclusions regarding courts' effectiveness as solo actors from this period. At most, one might conclude that courts are relatively ineffective at implementing reform when they face resistance from the federal executive branch, along with state and local actors.

The larger point is that we misread civil-rights history when we think of the federal government as simply a neutral bystander that later actively fought Jim Crow—a narrative that Rosenberg's work and subsequent reliance on him can be understood to reinforce. It is more accurate to think of the federal government as a “many-handed state” that contained various actors, often working at cross-purposes with regards to racial inequality and segregation.⁴³⁴ Even after the federal courts and the DOJ took an active role in enforcing desegregation, other federal actors like the PHA could maintain segregationist approaches.

432. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 42-71 (2d ed. 2008).

433. Rosenberg's book has been cited thousands of times since it was first published in 1992, per recent searches in Google Scholar and HeinOnline. While *The Hollow Hope*'s thesis has been subjected to criticism, it remains the foundation for “conventional wisdom” among legal scholars that “[j]udicial decisions are of limited efficacy in bringing about social change.” See William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 277-78 (2013) (describing conventional wisdom's overlap with Rosenberg's thesis, while foregrounding recent critiques of Rosenberg in the context of litigation over marriage equality); see also Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 765 (1991) (citing Rosenberg's then-forthcoming book for the “limited efficacy” point).

434. See Kimberly J. Morgan & Ann Shola Orloff, *Introduction: The Many Hands of the State*, in *THE MANY HANDS OF THE STATE: THEORIZING POLITICAL AUTHORITY AND SOCIAL CONTROL* 1, 3-8 (Kimberly J. Morgan & Ann Shola Orloff eds., 2017).

4. *Civil-Rights Activism Obscured*

A related methodological point emerges from studying the PHA's history: just as the administrative Constitution may go unseen, so too may attempts to challenge such effective constitutions. In interpreting the past, observers sometimes overread the available record—particularly its silences. An absence of judicial decisions may be taken to suggest that leaders and organizations chose not to pursue those claims for their own strategic reasons, that such claims were not the most pressing ones, or even that they did not arise at all.⁴³⁵

Such judgments assume that judicial review was available, among other things. As documented here, the NAACP sought to challenge federal funding for segregation in the courts but found itself stymied by procedural doctrines that prevented merits review.⁴³⁶ At some point, the organization apparently deemed the transactional costs of litigating against federal agencies too high, recommending that litigants seek relief against state and local actors in the majority of cases.⁴³⁷ *Heyward*, the rare and temporary exception to the lack of merits review, had little impact, and largely slipped through the cracks of history.⁴³⁸ Meanwhile, the organization kept hammering at the agencies themselves, as well as at Congress. That all these efforts were unsuccessful until the 1960s does not mean that they did not happen. The absence of judicial decisions should indicate the need for deeper investigation before coming to any firm conclusions.

The history presented in this Article also provides a basis for pushing back on critiques of the NAACP and its apparent preference for litigation regarding formal rights over economic claims or over other forms of political activity aimed

435. Other interpretations of an absence of reported decisions are also possible. For example, Richard Primus noted in 2004 that relatively few decisions have invalidated federal race discrimination on Fifth Amendment grounds, arguing that similarity in norms across the three branches of the national government explained the absence. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1021-25 (2004). But Primus did not focus on another cause: litigants' inability to surmount procedural barriers to suit, as discussed here.

436. See *supra* notes 1-9 and accompanying text (describing the *Heyward* litigation); see also *Massachusetts v. Mellon*, 262 U.S. 447, 483, 487-89 (1923) (holding that taxpayers generally lack standing to contest public expenditures); Kranz, *supra* note 104, at 76 n.192 (noting that standing limitations of *Massachusetts v. Mellon*, 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").

437. See Memorandum from Constance Baker Motley, *supra* note 105, at 16-17 (warning NAACP-allied lawyers against joining federal defendants in most suits to desegregate local public housing, since it would delay the cases and it was sufficient to sue the local housing authority and its director).

438. See *supra* notes 4-9 and accompanying text.

at Congress and the administrative state.⁴³⁹ Civil-rights groups such as the NAACP were not blind to or complacent about the deep economic inequality that national social programs entrenched.⁴⁴⁰ They simply failed to dislodge those policies despite ongoing efforts to do so. Clarence Mitchell, the group's Washington representative, may be the single most unsung civil-rights hero of the twentieth century. Although Mitchell is deservedly credited for his role in enacting later civil-rights legislation, his long-term lobbying of the executive branch has largely flown below the radar.⁴⁴¹ Just as the administrative Constitution's impact has been underrecognized, so too have been civil-rights activists' tireless efforts to change it—likely because of legal scholars' tendency to focus on litigation (and legal successes, rather than failures).⁴⁴²

Plessy was entrenched in legal frameworks, supported by liberals, and sanctioned by federal actors, even after the Court decided *Shelley* and *Brown*. Recognizing these facts should cause us to question our accounts of resistance to civil-rights mandates (and the role of law in such resistance, more generally), the virtues of accommodation as a political strategy, and the relative capacities of different institutional actors to enforce their mandates. Moreover, as a matter of

439. Many implied critiques are found within critical theorists' attack on rights-based strategies for social change. See, e.g., Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 350 (1988) (“[A] strategy of seeking formal, legal rights of equality through litigation and, later, legislation, became the predominant goal of civil-rights activists in the 1950s.”); see also Susan D. Carle, *Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890*, 77 FORDHAM L. REV. 1479, 1479 (2009) (describing the common critique “that civil rights lawyers and other activists too greatly emphasized court-focused strategies aimed at achieving what would turn out to be . . . gains solely in ‘formal’ equality”). See generally Mack, *supra* note 175, at 351 (challenging scholarly accounts of early civil-rights lawyers as pursuing a “program centered on formal juristic deployment of rights-based liberalism” as a post-*Brown* myth, divorced from the reality of multiple modes of civil-rights work and lacking a focus on economic rights as well as formal equality).

440. Dona Cooper Hamilton and Charles V. Hamilton elaborate this point at length in their book, *THE DUAL AGENDA: RACE AND SOCIAL WELFARE POLICIES OF CIVIL RIGHTS ORGANIZATIONS* (1997).

441. On Mitchell's long NAACP career, see generally DENTON L. WATSON, *LION IN THE LOBBY: CLARENCE MITCHELL, JR.'S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS* (1990).

442. Legal scholars have also focused on the work of the NAACP Legal Defense & Educational Fund (LDF), the legal arm of the NAACP, over that of the original NAACP, the membership organization. After the two entities formally separated to allow lobbying by the NAACP while providing tax-exempt status to LDF, LDF staff generally avoided nonlitigation work. Thurgood Marshall “did his best to confine his [LDF] lawyers' contacts with public officials to situations in which litigation was planned or pending.” MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1956-1961*, at 48 (1996); see also *id.* at 27 (describing the early organizational separation of the NAACP and LDF). Thus, legal academics' attention has been decentered from civil-rights leaders' efforts at legal reform outside of litigation, simply by focusing on one organization over the other.

historical method, the NAACP's fight against the administrative *Plessy* regime reminds us to dig deeper. A lack of judicial decisions does not mean that lawyers did not try to bring those cases or that underlying rights violations did not occur. When litigation does occur as a matter of prominent public record, we should still ask whether activism also took place by less public means, such as lobbying the administrative state.

B. Grappling with the Complex Administrative Constitution

Plessy's persistence within the administrative state provokes larger questions about "administrative constitutionalism." How should administrative resistance to *Brown* affect our assessments of agencies' role as constitutional interpreters? As a single case, the PHA's history cannot answer large-scale questions about the desirability or nature of agency constitutionalism. However, like other case studies, it improves our ability to describe and evaluate the phenomenon.

Sketched in basic form, the public-housing case reflects administrative officials initially extending judicial precedents into a more elaborate (and apparently progressive-for-its-time) administrative framework, then resisting later reformers' calls to revise that framework. Shielded from judicial review by procedural doctrines, administrators were able to operate under a regime that diverged considerably from judicial principles for decades. Those officials, and their liberal allies outside the agency, believed that their agency's social-welfare mission took priority over racial integration—and that wrenching political pressures on the agency made the trade-off a necessary one.

Thus understood, the PHA's history reflects a number of often-praised features of administrative constitutionalism: the potential for administrators to creatively extend existing judicial precedent; the influence of contemporaneous politics on administrative interpretation; agencies' responsiveness to multiple political principals (including Congress, the President, and particular clienteles or social movements); and the essential pragmatism of administrative interpretation in light of multiple, sometimes competing pressures and imperatives.⁴⁴³

Yet because *Plessy* forms part of our anticanon, and moral condemnation of segregation is near universal,⁴⁴⁴ this instance of administrative constitutionalism seems unacceptable on its face. From a formal legal perspective, the decision to

443. See ESKRIDGE & FERREJOHN, *REPUBLIC*, *supra* note 20, at 12-22; Metzger, *supra* note 20, at 1922-29; Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 553-65 (2015).

444. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

sidestep a clear constitutional directive seems impossible to justify.⁴⁴⁵ The PHA history thus forces us to confront the potential risks inherent in such institutional features.

Among the questions that result are the following:

1. Are we willing to accept such outcomes – and if not, what are the potential safeguards?

Agencies must interpret the Constitution to perform their functions. Like any interpreter, they may go astray in serious ways. Leading scholars of administrative constitutionalism recognize this point and rely on judicial review or political forces to correct such interpretations.⁴⁴⁶ But in the case of the PHA, such forces proved ineffective over decades, seriously entrenching residential segregation.

Are there ways to bolster the checks that act upon potentially flawed administrative interpretation? At a minimum, the PHA's history reinforces the desirability and necessity of assuring a role for courts in monitoring agencies' constitutional frameworks. Earlier judicial intervention might have overridden the PHA's administrative approach to segregation in time to ward off some of its most harmful impacts. The obvious tension between official Justice Department positions and those of the federal housing agencies during the post-WWII years also suggests that centralization, or at least coordination, of executive-branch constitutionalism offers one way to check errant agencies.

Notably, both of these safeguards (access to judicial review and executive-branch coordination) have become stronger in the intervening decades.⁴⁴⁷ Are they effective enough to prevent such divergent frameworks from taking root without judicial or presidential override? That remains questionable, since it seems quite plausible that a large volume of agency activity may remain effective

445. Pragmatists might wonder whether liberals were wrong to prioritize public housing over integration; the evidence of segregation's durability and direct undermining of any ability to achieve racial equality seems clear enough now to outweigh the beneficial but limited reach of public housing.

446. See ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 20, at 22-24, 381-86, 457-58; Metzger, *supra* note 20, at 1934-35.

447. See, e.g., Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2272-2309 (2000) (describing enlarged mechanisms of presidential control of the administrative state); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 *COLUM. L. REV.* 1432, 1441-47 (1988) (describing doctrinal expansion of standing to challenge agency action in the 1960s to 1970s); see also *Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 118 (3d Cir. 1970) (noting in challenge to HUD support for segregation that "[c]lasses of persons deemed by the courts to be sufficiently aggrieved by agency action for standing to sue are expanding").

tively insulated from both legal challenge and centralized executive branch monitoring.⁴⁴⁸ Agencies' constitutional practices may have gone underground, too; divergent constitutional norms might be more likely to operate in informal practices than formal documents today.

At a minimum, it is worth reassessing and probing deeper into what we know of agencies' constitutional practices, beyond what is revealed in formal, well-documented processes like litigation and rulemaking. Are there fields of agency practice that reflect divergent readings of the Constitution but continually evade review?

2. Do such histories caution against judicial deference to administrative interpretations of the Constitution?

Some scholars have argued for greater judicial deference to agency interpretation of the Constitution, at least when the constitutional issues arise in the course of interpreting the statutes that the agency itself administers and knows best.⁴⁴⁹ Their position rests on the argument that agencies are institutionally well equipped to take on constitutional interpretation.⁴⁵⁰ Should histories like that of the PHA constitute reason for hesitation?

Arguably, yes. The problem is that agencies are institutions that can be constructed to serve various ends, as a deep scholarship on agency design teaches.⁴⁵¹

448. See, e.g., Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1069 (2013) (arguing that presidential oversight of agency enforcement has been "informal, episodic, and opaque" compared to centralized regulatory review); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 255-64 (2017) (noting practical constraints on judicial enforcement of the Constitution in the prosecutorial context).

449. Cf. Metzger, *supra* note 20, at 1933 (expressing doubts regarding Eskridge & Ferejohn's proposal for deference to agency's constitutional interpretations).

450. But cf. David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic's Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381, 1400-05 (2019) (presenting institutional reasons for skepticism regarding agencies' role in constitutionalism).

451. See, e.g., DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997* (2003); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 42-64 (2010); Jacob E. Gersen, *Designing Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93 (1992); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul Peterson eds., 1989); Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1 (1994); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655 (2006).

Some agencies' mission, clientele, and mechanisms of political oversight may orient them toward principled implementation of the Constitution, in ways we find normatively attractive.

But agencies may be constructed in other ways: to serve missions that agency staff perceive as at odds with the Constitution, to respond only to narrow interests or powerful minorities, or to prioritize some political principals over others (for example, particularly influential members of Congress over the White House).⁴⁵² Even agencies that appear constructed to serve progressive ends, such as the PHA, may understand their mission and political environment as forcing trade-offs with constitutional principles. Further, agencies' roles may vary over the life cycle of the statutes they implement: while a new statutory regime may invite creative constitutionalism, maintaining an older statutory regime may incentivize agencies to defend political compromises enacted in earlier times against later reform efforts. Relying on agencies to embrace reforms before other institutional actors do, or to otherwise produce better constitutional interpretations, thus seems risky.

It is difficult to weigh these risks, and so it may be too early to accurately assess administrative constitutionalism. Agencies have certainly sometimes adopted rights-enhancing interpretations of the Constitution before other actors.⁴⁵³ Unsurprisingly, they seem most likely to do so when they are charged with implementing a statute that enforces key constitutional principles, and when they have the early backing of the White House or otherwise enjoy sufficient insulation from political blowback.⁴⁵⁴ But such cases may not generalize well. At the very least, we should survey the many other agencies that appear less institutionally prone to rights-enhancing interpretations, particularly at times when they have less political cover to do so.

As for judicial review of agencies' constitutional interpretations in the meantime, one answer might be for courts to calibrate the level of deference depending on whether the agency's particular mission aligns with the constitutional principle at stake. Such a design would orient agency officials toward protecting that principle against competing concerns, thereby justifying greater

452. Cf. Bernstein, *supra* note 450, at 1415 (arguing that civil-rights agencies will not adequately account for competing constitutional principles, due to structural and institutional predispositions to prioritize their own enforcement mission).

453. See ESKRIDGE & FERREJOHN, *REPUBLIC*, *supra* note 20, at 8-12.

454. For example, it is not surprising when the Equal Employment Opportunity Commission (EEOC), created to enforce equality principles and structured as an independent commission (albeit with relatively weak powers), strikes out in new directions to protect individual rights. See *id.* at 29-34; see also Ross, *Denying Deference*, *supra* note 22, at 250-83 (citing administrative extensions of constitutional principles via innovative readings of civil-rights statutes).

deference to the agency's good faith implementation of the principle in question. But the larger problem is that agency constitutionalism often shifts to reflect the occupancy of the White House, and a principled way to cope with that oscillation is difficult to identify.⁴⁵⁵ Even incentivizing consistency in agency interpretation, as current deference doctrine does, may simply entrench early, problematic interpretations.⁴⁵⁶

3. Can an institutional account of administrative constitutionalism, emphasizing agencies' openness to political influences, expertise, and pragmatism, be convincing as to its legitimacy?

This is the most difficult question. The legitimacy of administrative constitutionalism necessarily rests on ideas about the appropriate way to approach constitutional interpretation and the institutional qualities that we desire in our interpreters. Scholars who praise administrative constitutionalism tend to cite agencies' political openness, expertise, and pragmatism as key traits.⁴⁵⁷ In contrast, the original argument for minority-protecting judicial review rests at least in part on the judiciary's political insulation and particular mode of legalist decision-making—that is, the traits that most distinguish them from agencies.⁴⁵⁸ Proponents of agencies emphasize the often-disappointing record of courts in protecting rights and embracing constitutional reforms as evidence that agencies may perform better.⁴⁵⁹

The history presented here cannot answer the comparative institutional question: are courts or agencies more likely to protect rights across the majority of cases? But this history, alongside similar instances of sustained administrative resistance to *Brown*, does suggest postponing judgment, pending a more complete understanding of agencies' constitutional practices over time. Arguably, the state of our current understanding is simply insufficient to ground conclusions about the efficacy of one institution versus another. For every historical “success

455. See, e.g., Press Release, Dep't of Justice, Statement by Attorney Gen. Jeff Sessions on the Withdrawal of Title IX Guidance (Feb. 22, 2017), <https://www.justice.gov/opa/pr/statement-attorney-general-jeff-sessions-withdrawal-title-ix-guidance> [https://perma.cc/529T-WXDU] (withdrawing agencies' guidance issued under the previous Obama Administration, which interpreted Title IX of the Education Amendments Act of 1972 to bar discrimination against transgender students in bathroom access).

456. See, e.g., *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (indicating that an agency statutory interpretation's “consistency with earlier and later pronouncements” is one factor in determining judicial deference, in areas where agencies are not accorded mandatory deference).

457. ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 20, at 23-24; Metzger, *supra* note 20, at 1922-29.

458. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

459. See ESKRIDGE & FEREJOHN, *REPUBLIC*, *supra* note 20, at 4.

story” we encounter, we should wonder how many other dispiriting instances of administrative constitutionalism remain to be uncovered.

CONCLUSION

Sometimes the administrative Constitution is more powerful than the judicial one. For the families living in public housing and the communities around them, residential segregation has reigned since the New Deal.⁴⁶⁰ That reflects the ability of administrators to adopt and enforce a detailed framework based on *Plessy*, to defend it long after the Supreme Court decided cases like *Shelley* and *Brown*, and to continue it even after the White House and Congress formally mandated integration. In many ways, it is the administrators’ *Plessy*, not the judiciary’s *Brown*, that still governs.

The consequences are severe: our segregated world reproduces the most egregious forms of inequality. With communities sorted along racial lines, all resources that follow geography also track race, entrenching unequal opportunity and membership across generations. Schools, parks, policing, jobs, transit, public health—even the basic condition of streets and sidewalks or essential services like water—are provided to communities of color upon radically worse terms than for whites.⁴⁶¹ Sharply different life chances for black and

460. Current data on segregation levels across all public housing is difficult to come by, but segregation levels appear to have remained quite high into recent decades. See, e.g., John Goering et al., *Recent Research on Racial Segregation and Poverty Concentration in Public Housing in the United States*, 32 URB. AFF. REV. 723, 734 (1997) (“[T]he typical black family household [in public housing] lives in a project that is 85% black and 8% white The typical white family household lives in a project that is 60% white [and] 27% black” (emphasis omitted)). The New York City Housing Authority’s current data indicates that its housing projects include almost no white residents at all, composing just 4.8 percent of the population, a figure far below the proportion of whites among poor families in the city. *Special Tabulation of Resident Characteristics*, N.Y.C. HOUSING AUTHORITY (Jan. 1, 2016), <https://www1.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Summaries.pdf> [<https://perma.cc/9KFS-8XDE>].

461. See, e.g., James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010-2014*, 107 AM. J. PUB. HEALTH 295 (2016); Liam Downey & Brian Hawkins, *Race, Income, and Environmental Inequality in the United States*, 51 SOC. PERSP. 759 (2008); Roberto M. Fernandez, *Race, Spatial Mismatch, and Job Accessibility: Evidence from a Plant Relocation*, 37 SOC. SCI. RES. 953 (2008); Roberto M. Fernandez & Celina Su, *Space in the Study of Labor Markets*, 30 ANN. REV. SOC. 545 (2004); Mark Garrett & Brian Taylor, *Reconsidering Social Equity in Public Transit*, 13 BERKELEY PLAN. J. 6 (1999); Renee Mehra et al., *Racial and Ethnic Disparities in Adverse Birth Outcomes: Differences by Racial Residential Segregation*, 8 SSM - POPULATION HEALTH 100417 (2019); Ted Mouw, *Job Relocation and the Racial Gap in Unemployment in Detroit and Chicago, 1980 to 1990*, 65 AM. SOC. REV. 730 (2000); Alessandro Rigolon, *A Complex Landscape of Inequity in Access to Urban Parks: A Literature Review*, 153 LANDSCAPE AND URB. PLAN. 160 (2016); Jeff Rojek et al., *Policing Race: The Racial Stratification of Searches in Police*

brown children, as compared to white ones, follow directly from those spatial and distributional realities.⁴⁶²

Was there ever an alternative? We cannot know what would have resulted if federal policy had taken a different path because liberals chose not to force the issue. But leading civil-rights activists of the mid-twentieth century believed that to continually acquiesce in segregation in pursuit of “higher ends” was to assure its permanency. Federal dollars paid for the long-term construction of segregation.

Had reformers instead pursued social programs only within the framework required by the Reconstruction Amendments—on terms of racial equality and integration—that could have forced a choice upon needy whites and their representatives: were social benefits worth integration?

Requiring whites to make that choice might have produced surprising results. If implementing *Buchanan*, *Shelley*, and *Brown* had halted social programs, by Congress voting them down or localities refusing federal aid, the programs’ absence might have forced a political reckoning with white supremacy. Fewer decent homes would have been offered to the poor of all races in the short to medium term. Yet whites—experiencing the choice of integrated public housing or none at all—might have shifted their thinking if forced to forgo concrete benefits to retain racial separation. Moreover, segregated programs shaped the nature of politics itself. Segregation helped to foster distinct racial interests and coalitions within politics, as whites and racial minorities saw their respective interests divided and often in conflict. Integrated programs (or the requirement that they be so, in order to exist at all) might have fostered unified coalitions, to the extent that poor and working-class people recognized that the programs they sought had to serve all or none.

Or perhaps not. Enforcing the Fifth and Fourteenth Amendments’ integration mandates instead might have worsened racial tensions or permanently scuttled the possibility of enacting any national social programs serving the poor. The counterfactual is impossible to recreate. All we can know for certain is that we inhabit the present world, the one that *Plessy* and its administrators built.

Traffic Stops, 50 CRIMINOLOGY 993 (2012); Gerard C. Wellman, *Transportation Apartheid: The Role of Transportation Policy in Societal Inequality*, 19 PUB. WORKS MGMT. & POL’Y 334 (2014); Ming Wen et al., *Spatial Disparities in the Distribution of Parks and Green Spaces in the USA*, 45 ANNALS BEHAV. MED. S18 (2013); Jonathan Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS (Apr. 2012), https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf [<https://perma.cc/5H5L-PWKZ>].

462. See, e.g., David Satcher et al., *What if We Were Equal? A Comparison of the Black-White Mortality Gap in 1960 and 2000*, 24 HEALTH AFF. 459 (2005); Edward Rodrigue & Richard V. Reeves, *Five Bleak Facts on Black Opportunity*, BROOKINGS (Jan. 15, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/01/15/five-bleak-facts-on-black-opportunity> [<https://perma.cc/P2Z8-EQ9W>].