Remembering: The Constitution and Federally Funded Apartheid

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For much of the twentieth century, the U.S. government authorized and invested heavily in segregation and racial inequality. Often it did so through federal programs authorized under Congress's Spending Clause powers. Federal spending allowed powerful national investments in areas like health, education, and housing but frequently created segregated hospitals, schools, and communities. From the New Deal onward, Black leaders pressed constitutional arguments to hold the federal government responsible for its role in deepening racial inequality. Early on, federal lawyers and administrators recognized the strength of those arguments but explicitly decided against halting federal involvement in Jim Crow.

Decades later, the civil rights advocates prevailed. By the 1970s, the federal courts overwhelmingly agreed that the Fifth Amendment's Equal Protection component barred federal subsidies or support for racial discrimination. The same "no-aid" principle was codified in the landmark Civil Rights Act of 1964. However, from the 1980s onward, this hard-won constitutional mandate became increasingly difficult to enforce, blocked by judicially constructed procedural obstacles. The substantive Fifth Amendment ideal of preventing the federal government from aiding systemic discrimination receded because of increasing challenges to its substance, judicial fatigue with institutional oversight, and the sweeping scope of the problem—along with collective amnesia regarding the prior decades of constitutional struggle.

This Article reveals that forgotten constitutional history. After excavating the Fifth Amendment struggles, I argue that the no-aid norm, and the underlying reality of long-term federal participation in racial apartheid, should be remembered and debated once again. The costs of forgetting the constitutional principle and its history are significant: Civil rights frameworks have been distorted, leaving no systemic check or means of redress for the discriminatory use of federal funds. Further, the

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nation's constitutional memory and deliberations have been shortchanged, leaving us unable to reckon with the past honestly and adequately. Our polity should again debate federal constitutional responsibility for Spending Clause programs, and, in doing so, confront the nation's obligation to repair the apartheid it once bankrolled.

INTRODUCTION

In 1995, Black families from Baltimore sued the federal government for violating their constitutional rights.[1] They charged the Department of Housing and Urban Development (HUD) with having "deliberately created and perpetuated systemic racial segregation" throughout Baltimore's public housing program, in cooperation with local officials, beginning in the 1930s and for many decades afterward.[2] The *Thompson v. HUD*[3] plaintiffs argued that the Fifth Amendment's equal protection mandate barred federal administrators from approving and funding systemic discrimination within the federally subsidized public housing program. They also asserted that the Constitution required the federal government to remedy those long-running violations, by "eliminat[ing] the vestiges of unlawful segregation 'root and branch.'"[4]

Such arguments regarding federal constitutional obligations may seem intuitive, but they are almost never litigated. Relatively few cases address such claims; almost all that do are decades old.[5] Scholarship largely passes over them.[6]

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1 Thompson v. HUD, 348 F. Supp. 2d 398, 432–33, 436 (D. Md. 2005).

2 Class Action Complaint ¶¶ 1–9, 37, *Thompson*, 348 F. Supp. 2d 398 (No. MJG 95-309).

3 348 F. Supp. 2d 398 (D. Md. 2005).

4 Class Action Complaint, *supra* note 2, ¶¶ 2–6, 252; *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (describing the post-*Brown* mandate "to eliminate from the public schools all vestiges of state-imposed segregation"); Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968) (charging segregated school districts with "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch").

5 *See infra* Part III (discussing cases decided between the 1960s and 1980s).

6 Academics have probed the Fifth Amendment's equal protection mandate (and, in some instances, its link to Spending Clause programs), but they have not traced the overall path of Fifth Amendment no-aid arguments by civil rights advocates and the courts' response, as this Article does. In 2004, Professor Richard Primus asked why the *Bolling v. Sharpe*, 347 U.S. 497 (1954), doctrine—which incorporates the equal protection mandate against the federal government—had done little to constrain federal actors. Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975, 977–78 (2004) (citing *Bolling*, 347 U.S. at 500). Leading legal historians have highlighted agencies' distinctive understandings of their Fifth Amendment equal protection obligations. *See generally* SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014) (revealing historical struggles among activists, lawyers, and agencies over the Constitution's application to the workplace); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (tracing how the federal Social Security Board interpreted its equal protection obligations over time). Of particular relevance, Professor Sophia Lee has traced agencies' evolving application of the Fifth Amendment no-aid norm to the employment practices of those they licensed or regulated. *See generally* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010). Professor Olatunde Johnson has extensively mapped the role of Spending Clause mandates in promoting civil rights and racial equality. *See generally* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN.

That constitutional silence is puzzling. Federal actors played an extensive role in subordinating Black Americans and other racial minorities during the twentieth century.[7] Much of that participation occurred via federal Spending Clause authority—i.e., Congress's power to provide federal funds in exchange for states' and localities' participation in far-reaching social programs and linked regulatory mandates.[8]

Spending Clause programs allowed federal intervention in the spheres of education, health, housing, employment, and others traditionally thought reserved for state and local governance.[9] Until the late twentieth century, such programs often involved explicit federal authorization and funding for segregated or

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L. REV. 1293 (2014) (discussing enforcement of these mandates and their application in the contexts of school desegregation, public transit, and school discipline); Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339 (2012) (examining administrative enforcement of these mandates in housing and transportation); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374 (2007) (arguing for strengthening such mandates' mode of addressing racial disparities). Recently, Professors Cristina Isabel Ceballos, David Engstrom, and Daniel Ho have highlighted the troubling consequences of judicial nonreviewability of disparate impact claims under the Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.), which stems from the same line of D.C. Circuit cases that I probe in Part IV. *See* Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. __ (forthcoming 2021) (manuscript at 39–55) (on file with author). A substantial literature interrogates whether or not the Fifth Amendment is correctly interpreted to contain an equal protection mandate. *See generally* Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415 (2014); Peter J. Rubin, *Taking its Proper Place in the Constitutional Canon:* Bolling v. Sharpe*,* Korematsu*, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879 (2006); David E. Bernstein, Bolling*, Equal Protection, Due Process, and* Lochner*phobia*, 93 GEO. L.J. 1253 (2005); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977).

[7] Scholars and journalists have begun forcing the record into public consciousness. *See, e.g.*, DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 54–55 (1993). *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), https://perma.cc/N675-ZKST.

[8] *See* U.S. CONST. art. I, § 8, cl. 1 (empowering Congress "to pay the Debts and provide for the common Defence and general Welfare of the United States"); Steward Mach. Co. v. Davis, 301 U.S. 548, 585–93 (1937) (upholding the Social Security Act's unemployment compensation scheme as use of spending power).

[9] *See* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 864 (2013) ("An enormous amount of the New Deal/Great Society state is built on conditional spending statutes."); ROBERT JAY DILGER & MICHAEL H. CECIRE, CONG. RSCH. SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 15–27 (2019) (tracing the history of federal grants); V.O. KEY, JR., THE ADMINISTRATION OF FEDERAL GRANTS TO STATES, 380–85 (1937) (providing an early study of grants-in-aid).

otherwise discriminatory institutions.[10] If those federal actions involved sweeping violations of the Constitution, that would drastically alter our understanding of the past. If the federal government systematically violated its equal protection obligations, it might face significant legal responsibility to repair the resulting harms.

Black-letter law supports such claims. While the Fourteenth Amendment's Equal Protection Clause governs only state and local governments, the Fifth Amendment's due process guarantee imposes an equivalent nondiscrimination mandate on federal actors.[11] Equal protection doctrine bars not just direct discrimination by state actors but also intentional participation in others' discrimination.[12] Longstanding precedent also requires state actors to undo de jure segregation that they have constructed—an obligation that continues until the remaining effects of that segregation have been remedied.[13]

Why, then, are Fifth Amendment claims like those in *Thompson* so rare? How is the modern constitutional record so sparse if federal constitutional responsibility might be so extensive?

In this Article, I probe that constitutional silence, revealing an overlooked and unsettling constitutional history. Throughout the twentieth century, civil rights activists fought to stop federal agencies from approving and subsidizing Jim Crow. Eventually, they succeeded in establishing a clear constitutional prohibition

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[10] For documentation across various sectors, see generally U.S. COMM'N ON C.R., EQUAL OPPORTUNITY IN FARM PROGRAMS (1965); CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING (1955); ROBERT C. WEAVER, THE NEGRO GHETTO (1948); Memorandum from Roy Wilkins, Chairman, Leadership Conf. on C.R., & Arnold Aronson, Sec'y, Leadership Conf. on C.R., Proposals for Executive Action to End Federally Supported Segregation and Other Forms of Racial Discrimination (Aug. 29, 1961) (on file with National Archives and Records Administration, College Park, Md., RG 235, Box 133, Secretary's Correspondence). *See also* DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT 172–202 (1995).

[11] Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); *Bolling*, 347 U.S. at 499.

[12] Norwood v. Harrison, 413 U.S. 455, 466–67 (1973). In *Norwood*, the Court ruled that intentional funding of segregation violates the Constitution, even if the funding is not motivated by racial animus. On the relationship of *Norwood* with the Court's later decisions in *Washington v. Davis*, 426 U.S. 229 (1976), and *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), see *infra* notes 316–26 and accompanying text.

[13] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–61 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 537 (1979); *Swann*, 402 U.S. at 15; *Green*, 391 U.S. at 438; Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). Though the Supreme Court indicated in the 1990s that the remedial obligation ends once remedies have been implemented for "a reasonable period," it did not question the obligation itself. Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991).

on federal support for racial segregation and other forms of discrimination: a no-aid principle.[14]

However, advocates soon saw their legal successes fade away. No court ever overruled the Fifth Amendment norm on the merits. Instead, from the late 1970s onward, courts erected a series of procedural obstacles, making it nearly impossible to litigate such Fifth Amendment claims against the federal government. Conservative and liberal judges both signed off on the relevant doctrines. As the constitutional claim became unenforceable, the Fifth Amendment norm faded from the judicial record.[15]

I argue that silencing the Fifth Amendment via procedural means has been extremely costly. As a practical matter, past and present federal investments in discrimination are nearly impossible to challenge or remedy in any systemic way. The less visible costs are still more fundamental: Doing away with a key equal protection principle without a substantive reckoning has distorted our historical understandings and shortchanged our constitutional deliberations. It is rarely argued that the federal government long violated the Constitution, or that federal authorities might bear significant legal responsibility to remedy our racially segregated and unequal society in the present.[16]

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In the Baltimore litigation, the district court avoided a clear answer on the federal government's constitutional obligations. Following a decade of litigation in *Thompson*, the court issued a 127-page opinion on liability in January 2005.[17] Finding

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[14] *See, e.g.*, DONA COOPER HAMILTON & CHARLES V. HAMILTON, THE DUAL AGENDA: RACE AND SOCIAL WELFARE POLICIES OF CIVIL RIGHTS ORGANIZATIONS 90–108 (1997). I employ the phrase "no-aid" in this Article as a shorthand for the theory that the Constitution bars the federal government from knowingly aiding others in carrying out racial discrimination. That usage differs from the phrase's meaning in the Establishment Clause context, though the two ideas are arguably similar. For more on the comparisons between the race and religion-based contexts, see *infra* notes 194–97, 283–85, 330 and accompanying text; Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 403–58 (2012) (contrasting the historical arcs of race and religion doctrine under the Constitution).

[15] In Professor Lawrence Sager's famous terminology, the Fifth Amendment no-aid mandate has become a judicially "underenforced norm." Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978).

[16] *See* Olatunde C.A. Johnson, *"Social Engineering": Notes on the Law and Political Economy of Integration*, 40 CARDOZO L. REV. 1149, 1155–56 (2019) (noting amnesia regarding the federal government's role in producing segregation).

[17] *Thompson*, 348 F. Supp. 2d 398. For further background on the *Thompson* litigation, see john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 808–09 (2008) (describing author's role as expert witness in the

HUD liable under the Fair Housing Act[18] for "fail[ing] to consider regionally-oriented desegregation and integration policies" to undo the segregation that it had helped create, Judge Sidney Garbis addressed but did not fully resolve the underlying constitutional questions.[19]

The court held that the plaintiffs' Fifth Amendment claims against HUD based on the agency's unfulfilled duty to undo past intentional segregation were legally viable and that the plaintiffs could enforce that duty.[20] Until 1954, the city of Baltimore, with the federal government's support, "housed Blacks and Whites in different and separated developments" by law.[21] HUD's authorization and funding had been crucial in constructing those patterns. To date, HUD had "failed to take adequate action to disestablish the vestiges of the discrimination they had participated in imposing."[22] However, the court declined to formally resolve whether HUD had violated the Fifth Amendment, suggesting that its ruling that HUD was liable under the Fair Housing Act might provide sufficient remedies, making it unnecessary to reach the constitutional question.[23] The case was tried on the remaining factual and remedial questions in 2006, but no final ruling was issued. Instead, the *Thompson* plaintiffs and HUD reached a remedial settlement in 2012, designing a set of fair housing remedies for the greater Baltimore region.[24]

Why did the Baltimore court grapple with but ultimately refuse to answer the Fifth Amendment question? It almost certainly did so to avoid addressing issues that appear clear-cut in older

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litigation); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 353–59 (2007) (outlining the court's opinion and supplemental proceedings).

18 Pub. L. No. 90-284, 82 Stat. 73 (1970).

19 *Thompson*, 348 F. Supp. 2d at 462–63.

20 *Id.* at 414, 420. The court explained the continuing duty to remedy past segregation as follows: "[I]f Plaintiffs demonstrate an affirmative and purposeful segregatory action by Defendants in the administration of housing policy that took place prior to the [limitations] Period, such conduct may obligate Defendants to disestablish the vestiges of the discrimination they imposed." *Id.* at 414. Federal officials could be liable for failing to take such remedial steps "regardless of their intent." *Id.* at 415.

21 *Id.* at 443.

22 *Id.*

23 *Thompson*, 348 F. Supp. 2d at 451 & n.106. The court also noted that it was unclear if it would need to find that discriminatory intent drove HUD's remedial failures, ruling that it would hear evidence of discriminatory intent during the litigation's remedial phase. *Id.* at 451. *But see id.* at 415 ("Equal Protection liability lies if Plaintiffs further demonstrate that Defendants, *regardless of their intent*, failed to fulfill [their remedial duties]." (emphasis added)). For a discussion of the discriminatory intent doctrine, see *infra* Part II.C.

24 *See* Alex Wohl, *Court Approves Final Settlement* Thompson v. HUD, HUD ARCHIVES (Nov. 20, 2012), https://perma.cc/TA9Q-WENT.

doctrine but have faded from current case law—an instance of constitutional avoidance that skirted looming, weighty questions of federal responsibility.

Until the late twentieth century, the U.S. government explicitly authorized and invested in segregation and racial inequality. It did so through federal programs authorized under Congress's Spending Clause powers, enabling sweeping improvements in areas like health, education, and housing, while creating enduringly segregated hospitals, schools, and communities. Black leaders challenged the federal government's role in deepening racial inequality, explicitly arguing that such federal acts violated the Constitution.[25] Within the federal government, lawyers and administrators recognized the strength of those arguments but nonetheless authorized continued federal support for Jim Crow. For decades, neither courts nor policymakers were willing to confront the ways in which federal Spending Clause programs conflicted with equal protection ideals. The constitutional question of federal responsibility was too inconvenient; confronting it head-on could have threatened liberals' goal of expanding national social programs, which required southern Democrats' support.[26]

In the 1960s, civil rights leaders finally triumphed. The courts and Congress ventured an answer: Yes, the Fifth Amendment did have something to say on this question. Federal officials were barred from approving and funding segregation and other forms of systemic racial discrimination. The judiciary arrived at this position through direct constitutional interpretation, while Congress enacted a statutory version of the mandate in Title VI of the Civil Rights Act of 1964.[27] Title VI barred race and national origin discrimination in federally funded programs and gave federal officials the power to halt funding to any state, local, or private entity that persisted in discriminating.[28] Later statutes

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[25] *See infra* Part I.B. For detailed accounts of those campaigns in particular areas, see generally Joy Milligan, Plessy *Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020) [hereinafter Plessy *Preserved*]; Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018) [hereinafter *Subsidizing Segregation*].

[26] *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 18–23 (2005); KING, *supra* note 10, at 20–27; 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 (1996); Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 283, 297 & n.32 (1993).

[27] 42 U.S.C. § 2000(d); *see also infra* Part II.B; *infra* Part III.

[28] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 600, 601, 78 Stat. at 252 (codified at 42 U.S.C. §§ 2000(d)).

applied the Title VI approach to other forms of discrimination in federally funded programs, creating a legal framework of civil rights protections across all national programs resting on Spending Clause authority. These are what I term the "Spending Clause civil rights statutes."[29]

It thus became black-letter law that all federal Spending Clause programs—most of the national social welfare state—gave rise to federal constitutional obligations to avoid knowingly supporting others' discrimination. In the same period, courts construed equal protection principles to require government actors to undo de jure segregation that they had created.[30] Through the 1970s, courts often applied the Fifth Amendment and Title VI in parallel to bar federal involvement in systemic discrimination by others and to require federal remediation.[31]

Those legal triumphs proved ephemeral. Beginning in the 1980s, courts made the Fifth Amendment no-aid norm extremely difficult to enforce, while describing the legal framework and its history in ways that erased the substantive norm itself.[32] By then, a conservative legal movement had succeeded in limiting the substantive reach of the Equal Protection Clause, rendering the no-aid principle vulnerable to challenge on the merits. But the federal courts did not explicitly confront the deep tensions that had emerged within constitutional doctrine.

Instead, courts relied on procedural barriers that sharply restricted plaintiffs' ability to enforce the Fifth Amendment principle against federal actors themselves. The Supreme Court sharpened its doctrine around standing, implied private rights of action, and reviewability under the Administrative Procedure Act[33] (APA). The D.C. Circuit, a key site for suits challenging federal involvement in discrimination, constructed further barriers to such litigation, with other federal courts following suit.

Advocates' success in codifying the Fifth Amendment norm in Title VI and its sibling statutes proved double-edged. The very

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29 *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794) (barring disability discrimination in executive branch and federally funded programs); Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373–74 (codified at 20 U.S.C. §§ 1681) (barring sex discrimination in federally funded education programs); *see also* Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 620 n.9 (1983) (Marshall, J., dissenting) (listing eight additional nondiscrimination provisions in other statutes that were modeled upon Title VI).

30 *See infra* Part II.D.

31 *See infra* Part III.A.

32 *See infra* Part IV.

33 5 U.S.C. §§ 551–559; *see also infra* Part IV.A.

existence of those statutes allowed courts and others to ignore the underlying constitutional mandate insofar as it operated against federal officials. Courts interpreted the Spending Clause civil rights statutes to allow litigants to sue only the recipients of federal funds—not to bring claims against federal officials themselves for authorizing and funding systemic discrimination.[34] Those decisions obscured the Fifth Amendment principle, focusing only on the state or local actors that ultimately engaged in discrimination, rather than on federal support for their actions. The net result was that courts allowed federal agencies to decide whether or not to abide by the mandate, giving them discretion to fund known, systemic discrimination as they chose.

Why did the judiciary render the Fifth Amendment principle so difficult to enforce? Multiple, interrelated causes were at work: the growing conservativism of the courts, judicial fatigue with intervention in other institutions, a sense that Congress and the executive had sufficiently addressed the Fifth Amendment norm through statutory codification, and, over time, a failure to recognize or remember the constitutional principle at all.[35] Liberals themselves acquiesced in shutting off Fifth Amendment enforcement, all too aware that constitutional interpretation could just as easily inhibit progressive implementation of civil rights goals as it could propel such reforms.[36]

Constitutional silence regarding the Fifth Amendment has allowed courts to avoid difficult questions of constitutional law, but such avoidance inflicts costs. Silencing debate over the Fifth Amendment's content as it pertains to federal spending authority allows evasion and amnesia regarding key aspects of our nation's past and history.

Specific, troubling consequences result. Most starkly, it is nearly impossible to enforce the Fifth Amendment obligation against the federal government. With the constitutional mandate papered over, the legal regime that persists is one of executive discretion. The Constitution no longer mandates active supervision to ensure that federal funds do not fuel inequality.

Constitutional silence also impedes efforts to undo inequality rooted in longstanding patterns of discrimination. The no-aid principle barred the federal government from intentionally helping to construct a segregated society. Nonetheless, the government did so. The black-letter law of constitutional remedies

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[34] *See infra* Part IV.B; *infra* Part IV.C.

[35] *See infra* Part V.A.

[36] *See infra* Part IV.B; *infra* Part V.A.

suggests that the federal government must dismantle the segregation it helped to install. Thus, the no-aid principle theoretically could be relied upon, along with Fourteenth Amendment remedial principles, as the basis for a constitutional mandate to undo those harms—just as the *Thompson* plaintiffs argued. And if the federal government were to voluntarily attempt to remedy the apartheid it long supported, the Fifth Amendment might protect its actions from constitutional attack. But the obscurity of the constitutional principle, and the history underlying it, leaves those remedial implications largely unexplored.

Constitutional silence also distorts public memory, with troubling implications for law and policy. As constitutional scholars have noted, our memories and the histories we draw upon shape how we interpret our most fundamental legal and moral commitments.[37] The constitutional no-aid principle emerged from a long fight over the conflict between the federal government's expansive use of Spending Clause powers for social goals and the ways in which the resulting programs undermined equal protection principles. That clash—between the New Deal state's promise of improving the general welfare and the Reconstruction Amendments' commitment to racial equality—has never been resolved. Public policy and public memory still do not grasp the federal role in deepening racial apartheid in America, which was inextricably linked to progressive triumphs in creating national programs to aid the poor and working class.

Retracing the struggle to construct a no-aid principle thus reminds us of several key truths about the reality of federal power and its impact upon inequality. First, the federal government was not a bystander to Jim Crow, whether in the North or South, nor is federal spending an unalloyed force for "liberal" outcomes. Building national social programs entailed investing

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[37] *See, e.g.*, Angela P. Harris, *Turning the Angel: The Uses of Critical Legal History*, 1 FREEDOM CTR. J. 45, 59 (2009) (arguing that legal historians should reflect on the past with a forward-looking eye "so that redemption and repair are tied together with the imaginative leaps into the possible"); Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 196 (2006) (concluding that "[w]e all form our notions of the core commitments of constitutional law partly under the influence of thematic conceptions of American history"); Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, *in* HISTORY, MEMORY, AND THE LAW 131, 133 (Austin Sarat & Thomas R. Kearnes eds., 1999) (utilizing the "collective memory" of American gender relations to interpret the Constitution); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1998 (2003) (suggesting that "national narratives . . . regulat[e] the collective memory of a nation's fundamental commitments").

systematically in racial apartheid.[38] The Fifth Amendment no-aid principle was constructed as a challenge to that reality—recovering it should force us to recall the underlying history more accurately. Second, the federal Spending Clause power is too sprawling and massive to allow it to go unmonitored by the Constitution.[39] The historical example highlights that reality.

Presently, the federal courts are unlikely to be sympathetic to attempts to revitalize the Fifth Amendment. Overcoming the current constitutional silence likely has to begin outside the courts.

The act of remembering—of recalling federal complicity in Jim Crow and the constitutional response that civil rights advocates forged—is vital. Shifting activists' and broader society's attention toward that history, and that history's impact on our fundamental law, could help ground a renewed recognition that the Constitution should be read to constrain the Spending Clause power and to require remediation—even now, forty years after the key decisions emerged mandating that duty to dismantle American apartheid.[40] Popular constitutionalism might again breathe life into the Fifth Amendment norm, by shifting public memory and, with it, legal actors' understandings.[41]

The rest of the Article is organized as follows. Part I lays the backdrop, explaining the federal welfare state's deep conflicts with equal protection norms and how activists drew upon the

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[38] *See, e.g.*, KATZNELSON, *supra* note 26, at 42–79, 113–41 (detailing racial exclusion within the Social Security system, the workplace, and veterans' assistance programs); HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 45–53 (1978) (detailing racial discrimination in New Deal programs); *see also supra* notes 10, 14, 26.

[39] Over $700 trillion in federal funds flowed to state and local governments in 2019, well over 3% of GDP and representing almost a third of state government budgets. *See* OFF. OF MGMT. & BUDGET, HIST. TABLES, tbl. 12.1, https://perma.cc/ERZ5-5VMD; NAT'L ASS'N OF STATE BUDGET OFFICERS, 2020 STATE EXPENDITURE REPORT 3, https://perma.cc/56JC-2VZX.

[40] *See Swann*, 402 U.S. at 1; *Green*, 391 U.S. at 438.

[41] On the powerful role of constitutional rhetoric and rights claims in social movements, see generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006). *Cf.* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1445 (2005) (arguing that mass mobilization is a prerequisite to constitutional change in the courts).

Fifth Amendment as a source of constitutional constraint. Part II shows courts' reluctance to police federal involvement in racial discrimination through the early 1960s and then examines the statutory and doctrinal breakthroughs that laid the foundation for the no-aid principle to emerge as black-letter law. Part III describes the roughly two-decade period from the late 1960s through the 1980s, when the gates burst open and the courts began to enforce a robust understanding of the Fifth Amendment as a bar on federal subsidies for discrimination. Part IV probes how the Supreme Court, D.C. Circuit, and other courts developed procedural doctrines effectively stymieing further litigation. Part V considers why the Fifth Amendment no-aid principle went silent and details the consequences. It suggests paths toward reopening the constitutional debate and reviving the norm.

I. FEDERALLY FUNDED APARTHEID

In 1961, Reverend Martin Luther King, Jr., issued a sharp indictment: "We must face the tragic fact that the federal government is the nation's highest investor in segregation," he wrote in *The Nation*.[42] Officials were "Constitutionally obligated to use [tax funds] for the benefit of all," but instead systematically funded local institutions practicing "open and notorious" racial exclusion.[43] King proposed "a rigorous program to wipe out immediately every vestige of federal support and sponsorship of discrimination."[44] This Part details the scope of federal support and funding for racial discrimination, which stretched back nearly a century, then turns to the constitutional arguments civil rights lawyers crafted to challenge that longstanding pattern.

A. Social Welfare, Spending Clause Authority, and Jim Crow

Two years after King's editorial, President John F. Kennedy acknowledged the point: federal funds should not subsidize discrimination. "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination," he explained to Congress as he called for forceful

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42 Martin Luther King, Jr., *Equality Now: The President Has the Power*, THE NATION, Feb. 4, 1961, at 91–92.

43 *Id.*

44 *Id.* at 92.

new civil rights legislation.[45] That purportedly "simple" principle was not yet reflected in federal statutes or regulations.

The underlying problem was severe and well understood by 1963. Presidents, legislators, and federal administrators had publicly debated for decades the various ways in which the federal authority and funding that gave rise to myriad, well-intentioned social and regulatory programs—the sweep of the New Deal state itself—also supported racial discrimination and segregation.[46]

From the late 1930s onward, to resolve a New Deal constitutional dilemma over federal power to create such programs, the Supreme Court had blessed a framework in which Congress would create, regulate, and fund such programs using its Spending Clause powers, without federal officials themselves running schools, housing, job training, farm, or other programs.[47] A federal welfare state could be created, so long as federal officials stood in the background and framed state and local participation as voluntary acceptance of federal funds.[48] That overcame the basic objection that the Constitution entrusted all such areas of social life to states, not the federal government.[49]

However, the work-around gave rise to a different constitutional problem. Did the federal government, in creating such Spending Clause programs, incur constitutional obligations to oversee how federally funded schools, housing, job programs, or farm supports operated? In particular, did the Constitution have anything to say about federal taxpayer dollars underwriting Jim Crow?

Black leaders and their allies consistently argued that the Constitution barred federal authorities from supporting racial subordination, even as they also consistently supported extending national social programs to assist the vulnerable.[50] In effect, they

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45 JOHN F. KENNEDY, SPECIAL MESSAGE TO THE CONGRESS ON CIVIL RIGHTS & JOB OPPORTUNITIES (1963), *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY 483, 492 (1964).

46 *See* Plessy *Preserved*, *supra* note 25, at 951–1003; *Subsidizing Segregation*, *supra* note 25, at 876–913; Linda R. Singer, Janet R. Altman, John W. Blouch, Robert A.W. Boraks, Richard O. Cunningham, Gordan W. Hatheway, Jr., Carol P. Kelley, Robert Lewis & Daniel C. Schwartz, Comment, *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 827–28 (1968).

47 *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 585–93 (1937); Helvering v. Davis, 301 U.S. 619, 641–45 (1937).

48 *See* Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 142–44 (1947); United States v. Bekins, 304 U.S. 27, 51–54 (1938).

49 *See* U.S. CONST. amend. X.

50 *See generally* HAMILTON & HAMILTON, *supra* note 14 (describing civil rights organizations' simultaneous pursuit of a "civil rights agenda" and a "social welfare agenda").

called for the burgeoning New Deal state to comply with the Reconstruction Amendments.

But national policymakers did not want the constitutional issue resolved—nor did the courts, through at least the first two-thirds of the twentieth century. Doing so might have scuttled national policy goals for decades. Key parts of the legislative coalition supporting such programs (most notably, southern Democrats) vehemently opposed attempts to mandate equal treatment.[51] Whether the Constitution required federal agencies to ensure nondiscrimination was thus a politically inconvenient—if constitutionally glaring—question. Instead, federal officials authorized (and federal dollars fueled) segregated and unequal school, housing, job, and farm programs, among other institutions.[52]

In 1961, the Leadership Conference on Civil Rights directed a lengthy memo to President Kennedy describing the results.[53] The memo outlined "the massive involvement of the federal government in programs and activities that make it a silent, but none the less full partner in the perpetuation of discriminatory practices."[54] In the prior year, for example, the nation had invested more than $1 billion in the eleven former Confederate states (all of which overtly practiced segregation), with states like Alabama and Mississippi receiving more than 20% of their budget from federal funds.[55]

The Leadership Conference memo painstakingly detailed vast federal investment in systemic race discrimination by states, localities, and private actors in military affairs, education, employment, housing, health services, and agriculture.[56] The military provided a glaring example, as integrating the armed forces had been a core federal civil rights effort since the Truman administration.[57] Yet well over a decade later sixteen states and the District of Columbia practiced racial discrimination in their federally funded National Guards.[58] In some southern states, the Reserve Officers Training Corps, the key pipeline for commissioned officers in the federal military, excluded all Black students from

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51 *See supra* note 26.

52 *See supra* notes 10, 25–26.

53 Memorandum from Roy Wilkins, *supra* note 10.

54 *Id.* at 2.

55 *Id.* at 8–9.

56 Memorandum from Roy Wilkins, *supra* note 10.

57 *See* Exec. Order No. 9981, 13 Fed. Reg. 4,311, 4,313 (July 28, 1948) (ordering an end to racial discrimination in the armed forces).

58 Memorandum from Roy Wilkins, *supra* note 10, at 18.

participation because of its administration through the segregated land grant colleges.[59]

Southern states received significant funding under the "impact aid" program for educating the children of federal employees, including military members' children, yet the schools receiving those federal funds remained overwhelmingly segregated.[60] Many millions were paid annually for segregated vocational education and libraries in southern states as well.[61] The federally supported land grant colleges remained segregated in six southern states, and National Science Foundation grants flowed to segregated institutions as well.[62]

In the program of public employment services helping job seekers (a program that was 100% federally funded while being state administered), offices, waiting rooms, and job lists remained separated by race in the South.[63] Federal highway funds fueled up to 90% of road building without imposing any nondiscrimination requirements for the jobs carrying out those projects.[64]

Local public housing authorities were required by federal contract to achieve "racial equity" in providing housing for low-income tenants but permitted to maintain de jure segregation in that housing, leaving 80% of all such housing segregated nationwide—in a densely regulated program predominantly resting on federal subsidies.[65] The Federal Housing Administration's (FHA) mortgage guarantees fueled private housing construction in great quantities (up to 25% of all private housing constructed in prior years), contributing to the massive expansion of the suburbs. The FHA once pushed developers to adopt racially restrictive covenants and enforce segregation; now it continued to willingly back private housing that was openly whites only.[66] Veterans Administration guarantees and loans also flowed without regard to the recipient's racial practices, no matter how racially exclusionary.[67] Cities used urban renewal funds to displace Black residents and tear down

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59 *Id.* at 19.
60 *Id.* at 28–29.
61 *Id.* at 31–32.
62 *Id.* at 34–35.
63 Memorandum from Roy Wilkins, *supra* note 10, at 40–41.
64 *Id.* at 38.
65 *Id.* at 46.
66 *Id.* at 47.
67 *Id.* at 48.

integrated neighborhoods in favor of segregated ones.[68] Federal subsidies even backed segregated college dorms.[69]

Public health funds for diverse goals from controlling water pollution to heart disease flowed to states, without regard to their racial practices. The Hill-Burton Act[70] funded more than a billion dollars in hospital construction, while requiring only that states ensure "equitable provision" for all should they choose to segregate the facilities they built.[71]

Within the far-reaching network of farm supports operated by the Agriculture Department via state and local partners, segregation reigned, and nonwhite farmers were left with little. In the Farmers Home Administration, all-white committees of local farmers determined who would be eligible for loans, with predictable results.[72] The Extension Service operated on a segregated basis, with separate branches serving white and Black farmers—though, in many places, no Black agents were available to serve Black farmers at all.[73] Even the federally backed Four-H clubs for rural youth were separated.[74]

The Leadership Conference urged immediate executive action to halt federal support for all such discriminatory programs. The principle that the federal government "should in no way be a party to discrimination" had been argued by the Justice Department over a decade earlier in *Shelley v. Kraemer*[75] and its federal companion case.[76] Subsequent presidents and the Supreme Court had affirmed this principle.[77] It was time to fully implement the Fifth Amendment's equal protection requirements. Because Congress refused to act and procedural barriers had stymied resolution in the courts, the civil rights coalition called on the President himself

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68 Memorandum from Roy Wilkins, *supra* note 10, at 49–50.

69 *Id.* at 48.

70 Pub. L. No. 79-725, 60 Stat. 1040 (1946).

71 Memorandum from Roy Wilkins, *supra* note 10, at 52–53.

72 *Id.* at 59.

73 *Id.* at 60–61; *see also* Bazemore v. Friday, 478 U.S. 385, 390–91 (1986) (Brennan, J., concurring in part) (describing the formal segregation of North Carolina Extension Service until 1965).

74 Memorandum from Roy Wilkins, *supra* note 10, at 61.

75 334 U.S. 1 (1948).

76 Memorandum from Roy Wilkins, *supra* note 10, at 11–12; *see also* Brief for the United States as Amicus Curiae at 1–2, 52, 59–60 & n.31, *Shelley*, 334 U.S. 1 (No. 72).

77 Memorandum from Roy Wilkins, *supra* note 10, at 11–12 (first citing James Reston, *President Rejects Inquiry on Clergy*, N.Y. TIMES, Mar. 20, 1953, at 11; then quoting Exec. Order No. 10,925, 26 Fed. Reg. 1975, 1977 (Mar. 8, 1961); and then citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)) (referencing statements made by Presidents Dwight Eisenhower and Kennedy and the Supreme Court's decision in *Bolling*).

to order the executive branch to comply with the Constitution.[78] The Leadership Conference proposed that President Kennedy direct federal administrators to ensure "non-discrimination in all programs, services and facilities . . . which receive the benefit of any subsidy, loan, guarantee, or other form of federal assistance."[79]

B. Opposing Federal Aid for Jim Crow

Civil rights advocates had honed the underlying legal claim for decades: federal authority and funding should not support racial discrimination. To make their argument, they gathered support from preexisting threads of political rhetoric and constitutional doctrine. Eventually, the claim came to be framed as a Fifth Amendment principle.

To undergird that constitutional claim, the NAACP worked tenaciously to establish a series of interconnected principles: The federal government was barred from discriminating on the grounds of race, just as states and localities were, even though the Fifth Amendment's text did not contain an equal protection guarantee as the Fourteenth Amendment's did.[80] That nondiscrimination mandate itself barred not just unequal treatment in a material sense but stigmatizing racial subordination in the form of segregation. Government actors could not contribute indirectly to such forms of discrimination, either.

Though the national government, unlike the states, was not subject to a Fourteenth Amendment equal protection mandate, courts and other legal actors gradually came to agree that the Fifth Amendment's Due Process Clause imposed at least some nondiscrimination constraints on federal actors. In the Japanese American internment cases of the 1940s, the Court assumed without deciding that the Fifth Amendment barred invidious race discrimination, and, by the time of *Brown v. Board of Education*,[81] it was finally willing to so hold.[82] By 1954, the Supreme Court endorsed two of the NAACP's key claims in *Brown* and its federal companion case, *Bolling v. Sharpe*:[83] (1) that equal protection barred government-imposed segregation and (2) that federal

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78 *Id.* at 11–13.

79 *Id.* at 4.

80 *Compare* U.S. CONST. amend. V, *with* U.S. CONST. amend. XIV, § 1.

81 347 U.S. 483 (1954).

82 *See Bolling*, 347 U.S. at 499–500; Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

83 347 U.S. 497 (1954).

actors were subject to similar equal protection constraints under the Fifth Amendment.[84]

Nondiscrimination law also increasingly came to bar governments from accomplishing indirectly what they were barred from seeking directly. In some instances, the logic was that private actors, by performing governmental functions or otherwise becoming intertwined with government, could become "state actors" subject to constitutional mandates.[85] Seeking to use the Constitution to restrain private actors was a key strategy for civil rights advocacy in an era when few effective civil rights statutes governed the private sphere, hence the push to expand the parameters of "state action."[86]

Related but distinct arguments underlay challenges to the government actions supporting others' discrimination. For example, in *Shelley*, also labeled a "state action" case,[87] the Court ruled that courts could not use their power to enforce racially restrictive private agreements, indirectly ensuring widespread racial segregation that government could not mandate directly.[88] That principle readily transferred to prohibit indirect federal involvement in others' discrimination—no matter whether the actor in question was a state, locality, or private entity. The key was that the federal government should not, even from the background, support discrimination.

Given that so much federal activity occurred through delegating authority and funding to others, the no-indirect-discrimination principle came to be expressed as a bar on using federal resources to support racially exclusionary programs. Seeds of such a principle could be found in nineteenth-century decisions barring the use of public tax dollars on a segregated or racially exclusive basis.[89] Moreover, NAACP leaders had long pressed the federal government to require nondiscrimination in the programs or activities it

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84 *Id.* at 499–500; *Brown*, 347 U.S. at 493–95.

85 *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299 (1966) (noting that the conduct of a private entity, if sufficiently entwined with state action, may be subject to the Fourteenth Amendment). *But see* Civil Rights Cases, 109 U.S. 3, 10–11 (1883) (ruling that the Fourteenth Amendment's equal protection guarantee applies only to government actors).

86 *See* Will Maslow & Joseph B. Robison, *Civil Rights Legislation and the Fight for Equality, 1862–1952*, 20 U. CHI. L. REV. 363, 365, 373–75, 404–08 (1953).

87 *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 524 (1985) (discussing *Shelley* in the context of state action cases more generally).

88 *Shelley*, 334 U.S. at 20–21.

89 *See, e.g.*, Puitt v. Comm'rs of Gaston Cnty., 94 N.C. 709, 714 (1886); Claybrook v. City of Owensboro, 16 F. 297, 302 (D. Ky. 1883).

supported,[90] as when they fought to include a nondiscrimination mandate in federal agricultural programs[91] or excoriated early 1930s Mississippi River flood control projects as "a system of peonage organized by the federal government and paid for with American tax dollars."[92]

Over time, those attacks on the use of federal tax resources for Jim Crow increasingly came in constitutional form. The NAACP lawyers' constitutional theories emerged in early memos that they distributed to federal administrators challenging federal aid for segregated housing, whether it was low-income public housing or privately built suburban subdivisions. In 1938, they argued that public funds were being misused to support racial discrimination and squarely challenged the legality of such action under the Constitution.[93] Twenty years earlier, in *Buchanan v. Warley*,[94] the Court had held that the Fourteenth Amendment barred government actors from enacting residential segregation ordinances.[95] Several years later, the NAACP relied on *Buchanan* in another memorandum to the President: If it was illegal for government actors to impose segregation directly, then "using Government power to crystallize current residential segregation

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90 ROY WILKINS & TOM MATHEWS, STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS 213 (1982) (describing how the NAACP used the recommendations laid out in the Kerner Commission report—including nondiscrimination requirements for federal funding—as a "blueprint" in a decades-long political campaign).

91 *See, e.g.*, Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WIS. MAG. HIST. 30, 42–45 (1970) (discussing the congressional debate surrounding the Smith-Lever Act and the proposal of amendments to ensure nondiscriminatory funding).

92 Richard M. Mizelle, Jr., *Black Levee Camp Workers, the NAACP, and the Mississippi Flood Control Project, 1927–1933*, 98 J. AFR. AMER. HIST. 511, 513 (2013) (describing the NAACP's pressure on flood control projects).

93 Roy Wilkins wrote to the FHA head in October 1939: "We do not believe that the federal government . . . should use the public tax money to restrict instead of extend opportunities for home ownership and to enforce patterns of racial segregation." Letter from Roy Wilkins, Assistant Sec'y, NAACP, to Stewart McDonald, Dir., Fed. Hous. Admin. (Oct. 12, 1938) (on file at II:L17, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.); *see also* Letter from Walter White, Exec. Sec'y, NAACP, to Stewart McDonald, Dir., Fed. Hous. Admin. (Dec. 23, 1938) (on file at II:L17, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.); Memorandum from the NAACP to President Franklin D. Roosevelt (Jan. 14, 1939) (on file at II:L17, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.).

94 245 U.S. 60 (1917).

95 *Id.* at 60, 82.

patterns" must be unconstitutional as well, they reasoned.[96] "[T]he funds and power of all the citizenry" were at stake.[97]

It would take decades to convince courts of these principles. But the basic logic made headway in other spheres. By the 1940s, leading liberals began to understand federal funds as a key mechanism for securing constitutional mandates.[98] In 1946, President Harry Truman established the President's Committee on Civil Rights, charging it to report on how existing laws and authority might be strengthened to protect civil rights.[99] In its landmark 1947 report, the Committee recommended that all federal financial assistance be conditioned on the absence of racial segregation and discrimination.[100] The Committee's sweeping recommendation impressed even civil rights leaders—prominent organizations like the NAACP had not yet gone that far in their demands.[101] Southerners reacted angrily, grasping the stakes.[102]

Civil rights leaders also understood the power of a no-aid mandate. By the early 1950s, anticipating ultimate victory in *Brown*, an NAACP internal document posited that the no-aid principle was a constitutional one that had to be implemented across the full range of federal action.[103] The authors proposed that a memo be written to the president, which would be a "monumental work" that would "include, in addition to housing, . . . all other federal programs and projects."[104] The core argument would be that "the Supreme Court's decisions in the school cases . . . opens up a new era on the problem of racial segregation in America," one in which "the new administration is duty bound to implement

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96 Memorandum Prepared by the Nat. Assoc. for the Advancement of Colored People, Concerning the Present Discriminatory Policies of the Federal House Administration 3–4, 7, 9 (Oct. 28, 1944) (on file at II:A268, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.).

97 *Id.* at 10.

98 *See, e.g.*, Interview with Dr. Will Alexander, President's Committee on Civil Rights (May 15, 1947).

99 Exec. Order No. 9808, 11 Fed. Reg. 14,153, 14,153 (Dec. 7, 1946).

100 TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 166 (1947).

101 *See* HAMILTON & HAMILTON, *supra* note 14, at 99.

102 *See, e.g.*, 94 CONG. REC. 1,448–49 (1948) (reproducing Sen. Harry Byrd's speech of Feb. 19, 1948); 94 CONG. REC. app. at 2,337–38 (1948) (reproducing Mississippi Sen. James Eastland's Apr. 15, 1947 speech attacking President Truman's civil rights program).

103 *Compare* Memorandum at 10 (undated, c. 1953) (on file at II:A312, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.), *with* MAR. 1953 CONF. COMM., NAACP LEGAL DEF. & EDUC. FUND INC., RACIAL DISCRIMINATION IN HOUSING 57–58 (1953) (on file at II:B76, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.).

104 *See* Memorandum, *supra* note 103, at 10.

these decisions in every area touched by federal governmental action."[105]

The NAACP and its allies made those Fifth Amendment arguments explicitly to all three branches.[106] In the ensuing years, though, federal lawyers within the executive branch considered and rejected the NAACP's constitutional arguments that they should halt federal aid to discriminatory institutions.

Federal agencies explicitly refused to condition federal funding on nondiscrimination at the very moment when *Brown* upended constitutional law by deeming "separate but equal" segregation unlawful.[107] In 1954, lawyers within the government immediately rejected the idea that *Brown* required their agencies to halt funding for state or local segregated institutions. For example, Department of Health, Education, and Welfare (HEW) lawyers examined *Brown*'s impact on their funding of segregated schools, hospitals, and other institutions. The lawyers acknowledged "the probable legal responsibility of the Department to avoid the use of Federal monies for an unconstitutional purpose which it can do by construing the [acts in question] consistent with the Federal Constitution."[108] Yet they advocated that the agency maintain the status quo, noting that the Supreme Court had indicated its intent to postpone implementing *Brown*.[109] In the HEW Secretary's words, the Department determined that it would "follow the course we have always taken"—i.e., to fund segregation without objection.[110]

The Public Housing Administration (PHA) took an even harder line. Its legal staff concluded that, despite *Brown*, "[l]ocal housing authorities may continue to follow the laws and decisions of their own states [mandating segregation]."[111] Further, even if the agency's organic statutes were silent or ambiguous, the

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105 *Id.*

106 *See* note 25.

107 *Brown*, 347 U.S. at 495.

108 Memorandum from A.D. Smith, Assistant Gen. Couns., Welfare & Educ. Div., to Parke Banta, Gen. Couns. at 6 (June 9, 1954) (on file with National Archives and Records Administration, College Park, Md., RG 235, Box 3, Off. of the Gen. Couns. Div. and Reg'l Legal Precedent Op. Files, 1944–1974 [hereinafter OGC Opinion Files]).

109 Memorandum from A.D. Smith, *supra* note 108, at 7.

110 Memorandum from Parke Banta, Gen. Couns., Dep't of Health, Educ., & Welfare, to Oveta Culp Hobby, Sec'y, Dep't of Health, Educ., & Welfare, 2 (June 22, 1954) (on file with National Archives and Records Administration, College Park, Md., RG 235, Box 3, OGC Op. Files) (quoting minutes of the June 7, 1954, staff meeting).

111 Memorandum from Joseph Burstein, Legal Div., Pub. Hous. Admin., to John L. McIntire, Gen. Couns. Pub. Hous. Admin. 1 (June 2, 1954) (on file with National Archives and Records Administration, College Park, Md., RG 196, Box 9, Gen. Legal Op. Files, 1936–70).

lawyers thought Congress's refusal to adopt anti-segregation amendments in prior housing legislation meant the agency was bound by legislative will to continue backing segregation. They drew upon the housing statutes' principle of "local autonomy" as further support for their position.[112]

Federal agencies thus explicitly decided to continue approving and subsidizing segregated institutions in the 1950s. They persisted in this approach through the 1960s and beyond. As the next Part shows, the courts initially took a similar stance. Yet within two decades, the federal judiciary changed course and sharply rejected the executive branch's actions, eventually fully embracing the NAACP's Fifth Amendment reading. In the same period, Congress codified the nascent constitutional principle in Title VI of the Civil Rights Act of 1964, charging all federal agencies with ensuring nondiscrimination in the programs they funded.

II. CONSTRUCTING A CONSTITUTIONAL NO-AID PRINCIPLE

From the 1940s through the 1960s, civil rights lawyers protested federal approval and financial support for racial discrimination across multiple spheres. While they argued on many grounds, they consistently called on the Fifth Amendment as the fundamental mandate barring such federal aid for Jim Crow.

Advocates' initial progress in establishing a no-aid mandate was uneven, with only intermittent, partial victories in the courts and halting policy changes by the executive branch. It was Congress—previously the most immovable of the branches—that took the clearest initial step to embrace the norm, enacting a sweeping rule against federal aid for racially discriminatory institutions in the Civil Rights Act of 1964. Subsequently, the Fifth Amendment principle drew strength from developments in Fourteenth Amendment case law. As the federal courts increasingly cracked down on southern attempts to skirt the *Brown* mandate, they developed an equal protection jurisprudence that barred even indirect aid to segregation and that required government actors to fully undo the consequences of prior intentional segregation. All those developments laid the foundation for a robust Fifth Amendment norm by the early 1970s. This Part details those legal changes.

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[112] *Id.* at 8.

A. Early Litigation

For early litigants, the ongoing challenge was to state why federal authority and funds could not be used to support others' discrimination—and why this implicated the Constitution.[113] The most difficult question for courts was whether federal action authorizing or supporting discrimination was unlawful if federal officials did not directly carry out the discrimination themselves. Those questions loomed large in fields where federal financing of state, local, or private actors played a significant role, as with housing, hospitals, employment assistance, schools, and other areas. Similar questions arose in fields where federal regulation was pervasive and endowed private actors with federal authority or approval, such as labor law and interstate transportation.

Such challenges provoked two separate inquiries, sometimes collapsed under the single "state action" label. First, was the link to federal actors robust enough that the other parties could be viewed as essentially acting on federal officials' behalf? That was the critical question if the discriminatory actors were private entities and the litigants sought to directly halt their discrimination, because the Constitution would not come into play unless they were deemed state actors.

However, if litigants only sought to halt government support for the other parties' discrimination, state action was clearly at issue. The real question then was whether the act of providing federal approval or aid itself violated the Constitution. The implicit assumption was that some forms of federal involvement might be so minimal, arm's-length, or widely distributed as to evade scrutiny.

In the initial decades, courts did not always carefully distinguish between the two questions, terming both state action problems. But they did haltingly begin to indicate, along a variety of fronts, that the Fifth Amendment limited the federal government's support for discrimination by others.

1. Federal authority.

Several early challenges took place not in the context of Spending Clause programs but rather in contexts where federal law seemingly authorized private entities' discrimination, such as in labor law and interstate transit. Unions and railroads both practiced overt racial segregation and exclusion through the

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[113] *See, e.g.*, MAR. 1953 CONF. COMM., *supra* note 103, at 3–4.

mid-twentieth century, even while being extensively empowered and regulated by federal authorities.[114]

The arguments took the same basic form as in the Spending Clause context—that the Fifth Amendment prevented federal actors from lending support to discrimination. In the labor and transit contexts, those constitutional arguments did not prevail, instead reemerging as equivalent statutory constraints. The Supreme Court read federal labor law and the Interstate Commerce Act[115] to include equal protection–like restrictions on unions' and railways' discrimination.

In the labor context, courts sometimes asked whether unions themselves became state actors insofar as they were "clothed with [ ] governmental power" by federal labor law (given that it allowed unions to bind even nonconsenting workers to the terms they negotiated in labor contracts).[116] But there was also a distinct question at stake: whether Congress itself could constitutionally enact a statute delegating such power while implicitly authorizing racial discrimination in its use. Congress's act condoning discrimination—the statute—might violate the Fifth Amendment, even if the unions' discrimination remained beyond the reach of the Constitution.

The NAACP and ACLU made the latter arguments to the Court in the 1940s, arguing that the Fifth Amendment constrained any delegation of federal power.[117] If federal labor law were not interpreted to contain such prohibitions, then the statute would be unconstitutional as written because it would illegitimately sanction discrimination.

For example, in *Steele v. Louisville & Nashville Railroad Co.*,[118] a whites-only union had overtly discriminated against Black employees in its position as exclusive bargaining representative under the Railway Labor Act.[119] The NAACP argued (as amicus) that if the federal statute were read to permit a whites-only union to act as exclusive bargaining representative, the Act would be unconstitutional—"a denial of due process and equal

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114 *See generally* Herbert Hill, *Racial Inequality in Employment: The Patterns of Discrimination*, 357 ANNALS AM. ACAD. POL. & SOC. SCI. 30 (1965); Barbara Y. Welke, *Beyond* Plessy*: Space, Status, and Race in the Era of Jim Crow*, 2000 UTAH L. REV. 267 (2000).

115 Pub. L. No. 49-104, 24 Stat. 379 (1887).

116 *See* Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 355 (1963).

117 For an extensive examination of the constitutional arguments in the labor context, see generally LEE, *supra* note 6.

118 323 U.S. 192 (1944).

119 45 U.S.C. §§ 151–165; *Steele*, 323 U.S. at 193–97. The union had attempted to push all Black railroad firemen out of their positions in favor of whites. *Id.*

protection to vest such powers over a Negro minority in a hostile white majority."[120] Even if that were not accepted, "[t]he statutory grant of the powers of majority rule to a labor organization must be subject to the limitations of the Fifth Amendment."[121] A whites-only union could not openly discriminate in its representation of Black employees, or else the Act's delegation of authority would be unconstitutional.[122]

Instead of addressing the underlying constitutional arguments, the *Steele* Court interpreted the Railway Labor Act to require nondiscrimination in representation from a union acting as exclusive bargaining agent for white and Black workers. Insofar as the union "is clothed with power not unlike that of a legislature," the Court read the Act to impose "at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates"—a rule that barred "discriminations based on race alone [as] obviously irrelevant and invidious."[123] Justice Frank Murphy, concurring, argued that any other interpretation would render the statute invalid under the Fifth Amendment.[124]

In the 1940s, advocates also used the federal government's constitutional obligations as a basis for challenging segregation of interstate railroad passengers. To do so, they made express Fifth Amendment arguments regarding the federally regulated field of interstate transit, relying on expansive understandings of both state action and federal constitutional responsibility. In 1950, both the NAACP and the Department of Justice (DOJ) argued to the Supreme Court in *Henderson v. United States*[125] that the Fifth Amendment governed—and made unlawful—the Interstate Commerce Commission (ICC)'s actions in approving railroads'

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120 Motion & Brief for the National Ass'n for the Advancement of Colored People as Amicus Curiae at 10, Tunstall v. Bhd. of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (No. 37).

121 *Id.* at 11.

122 *Id.*; *see also* Motion for Leave to File Brief as Amicus Curiae & Brief in Support Thereof at 15–17, *Tunstall*, 323 U.S. 210 (No. 37).

123 *Steele*, 323 U.S. at 198, 202–03.

124 *Id.* at 208 (Murphy, J., concurring). The lawfulness of labor union segregation, under the Constitution or the statutory framework, remained unresolved. *See* Oliphant v. Bhd. of Locomotive Firemen & Enginemen, 262 F.2d 359, 361–63 (6th Cir. 1958) (ruling that there was insufficient federal action to find a Fifth Amendment violation and that the union was rather "a private association, whose membership policies are its own"). *See generally* Betts v. Easley, 169 P.2d 831 (Kan. 1946) (ruling union's segregation unconstitutional); Nat'l Fed'n of Ry. Workers v. Nat'l Mediation Bd., 110 F.2d 529 (D.C. Cir. 1940) (declining to invalidate union's segregation).

125 339 U.S. 816 (1950).

segregation policies.[126] DOJ lawyers wrote that "basic constitutional doctrine [ ] condemns racial discriminations having the sanction of law or the support of an agency of government."[127] The railroad's regulations requiring segregation, "which carry the endorsement of an agency of government," constituted "legally-enforced racial segregation" in violation of the Constitution as well as the statute.[128]

As in the labor context, the Court sidestepped the constitutional questions and ruled on statutory duties instead. The Court had previously interpreted the Interstate Commerce Act's[129] prohibition of "undue or unreasonable prejudice or disadvantage" to parallel the Constitution's bars on discrimination.[130] Now, in *Henderson*, the Court ruled that the failure to provide an open dining car seat to a Black passenger on request violated the Act's mandate of "equality of treatment."[131] Again, the Court read the equality guarantee into the statute itself.

2. Federal financial backing.

The argument that federal taxpayers' funds should not support racial discrimination emerged even earlier. NAACP leaders honed their Fifth Amendment arguments in the housing context, where the Depression's damage to the housing industry had led the federal government to enact a wide-reaching web of supports, administered by agencies like the FHA and the PHA.

However, such claims did not fare well in initial litigation. In particular, early state and federal decisions refused both to restrict private real estate developers from discrimination (even if they received substantial public backing) and to bar government actors from supporting discriminatory home builders.

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126 The Justice Department filed separately from the ICC, explaining that "the United States is of the view [ ] that the order of the Interstate Commerce Commission is invalid." Brief for the United States at 1, *Henderson*, 339 U.S. 816 (No. 25). Henderson had filed an administrative complaint with the ICC, which denied relief, finding the railroad's segregation regulations valid under the Act. *Id.* at 3–9.

127 *Id.* at 14. The Fifth Amendment specifically prohibited "[r]acial discriminations effected by action of the Federal Government, or any agency thereof." *Id.* at 15. The National Association for the Advancement of Colored People similarly argued that "[i]t is [ ] now clear . . . that the government cannot be a party to the enforcement of racial distinctions and classifications which are privately promulgated." Motion & Brief for the NAACP as Amicus Curiae at 22 & n.29, *Henderson*, 339 U.S. 816 (No. 25).

128 Brief for the United States, *supra* note 126, at 23–24.

129 Pub. L. No. 49-104, 24 Stat. 379 (1887) (codified at 49 U.S.C. §§ 301–354).

130 Mitchell v. United States, 313 U.S. 80, 94–95 (1941) (quoting Interstate Commerce Act § 3, 24 Stat. at 380) (ruling that the Interstate Commerce Act imposed a *Plessy*-like duty of "equality of treatment" for segregated railroad passengers).

131 *Henderson*, 339 U.S. at 825.

In a key early challenge, *Dorsey v. Stuyvesant Town Corp.*,[132] New York's highest court refused to apply constitutional constraints to a discriminatory private developer, despite its receipt of multiple forms of significant state aid. The court held that the new development of Stuyvesant Town in New York City (housing 25,000 tenants across many city blocks) could exclude African Americans, despite the city's use of eminent domain and closure of existing streets to assemble the parcel on the developers' behalf, along with its grant of a 25-year tax exemption.[133]

The *Dorsey* majority acknowledged that the city officials providing all these benefits could not have similarly excluded Black tenants, had they acted directly.[134] But to the majority, a ruling that government subsidies entailed similar legal restraints on private developers would come "perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment."[135] Decades later, as it struggled to halt overt resistance to *Brown*, the U.S. Supreme Court would endorse that proposition—but it was too radical in 1949.[136]

Six years later, a federal district court similarly rejected the related argument for halting government supports to such discriminatory developers, even if the developers themselves could not be restrained by the Constitution. In *Johnson v. Levitt & Sons*,[137] the court reasoned that the FHA's financial guarantees and regulatory conditions for private developers did not obligate the FHA to bar discrimination by those same developers.[138] Indirect government involvement—even crucial financial support for known discrimination—did not trigger constitutional duties, in that court's view.

However, the very next year, the Fifth Circuit took a different stance. In *Heyward v. Public Housing Administration*,[139] the court deemed viable the argument that federal financial support and involvement placed constitutional duties on federal administrators.[140] Relying on the plaintiffs' contention that federal and local officials had "jointly planned, constructed, operated, and maintained"

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132 87 N.E.2d 541 (N.Y. 1949).
133 *Dorsey*, 87 N.E.2d at 547–48, 550–51.
134 *Id.* at 550.
135 *Id.* at 551.
136 *See infra* Part IV.C.
137 131 F. Supp 114 (E.D. Pa. 1955).
138 *Id.* at 116.
139 238 F.2d 689 (5th Cir. 1956).
140 *Id.* at 689.

segregated public housing in Savannah, the court reversed summary judgment for the federal defendants on the Fifth Amendment claims against them.[141] Perhaps the fact that government-owned housing was at issue (hence subject to Fourteenth Amendment constraints on its operation) made the judges more receptive to extending the constitutional mandate to federal actors as well. Or perhaps they viewed public housing's receipt of substantial, direct federal subsidies as more significant than the indirect subsidy of FHA mortgage insurance.

At least one court had no doubt that FHA mortgage guarantees constituted sufficient federal involvement to subject the builders benefiting from them to constitutional scrutiny. In 1958 a California state appellate court ruled that private builders' reliance upon federal mortgage insurance subjected them to constitutional prohibitions.[142] Citing the FHA's creation of an intricate system aimed at "making [ ] adequate housing more readily available," and the federal government's own responsibility to not "play favorites as to race, color, or creed," the court in *Ming v. Horgan*[143] found real estate developers and brokers of FHA-backed subdivision to be bound by equal protection requirements.[144] The court vividly explained the plaintiff's theory of liability: "[W]hen one dips one's hand into the Federal Treasury, a little democracy necessarily clings to whatever is withdrawn."[145]

Litigated challenges to federal backing for discrimination thus bore mixed results through the 1950s. But by the early 1960s, even executive branch lawyers themselves began to rely on federal funding as a basis to challenge segregation. Prior to the 1964 Civil Rights Act, the Justice Department lacked express statutory authority to challenge systemic violations of constitutional rights, so federal attorneys needed other bases for suit.[146] Federal funding—which created a contractual relationship between the recipient and the federal government—offered a potential basis.

In fall 1962, with the Kennedy administration under significant pressure to take long-promised action on civil rights issues, the DOJ began challenging segregation in schools supported by

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141 *Id.* at 692, 696–97.

142 Ming v. Horgan, 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958).

143 3 Race Rel. L. Rep. 693 (Cal. Super. Ct. 1958).

144 *Id.* at 695, 698–99.

145 *Id.* at 697.

146 *See* William L. Taylor, *Actions in Equity by the U.S. to Enforce School Desegregation*, 29 GEO. WASH. L. REV. 539, 541–42 (1961) (describing failed attempts in 1957 and 1960 to enact statutory authority).

federal impact aid.[147] Such schools enrolled significant numbers of federal military members' or other federal employees' children; the federal subsidies were justified on the ground that federal installations did not pay local property taxes, depriving the district of part of its tax base, even as federal children filled local schools.[148]

DOJ lawyers did not go so far as to argue that federal officials themselves, by providing federal funding to segregated schools, were violating the Fifth Amendment. However, the DOJ relied upon the Fifth Amendment in its statutory construction, arguing that the federal impact aid statute would violate the Constitution if it purported to authorize segregation.[149] The DOJ's impact aid litigation brought only limited success, with several district courts dismissing the suits on procedural grounds, and a single court upholding the statutory and contractual arguments.[150]

A clear victory for the Fifth Amendment principle finally came in a suit the DOJ joined in a different context—private litigants' challenge to segregation in nonprofit hospitals constructed and supported with federal and state funds under the Hill-Burton Act.[151] Hill-Burton, enacted in 1946, merely required states to assure "equitable provision" for any groups excluded from local healthcare facilities based on "race, creed, or color."[152] In effect, Hill-Burton codified a "separate but equal" approach. After NAACP lawyers brought suit in *Simkins v. Moses H. Cone Memorial Hospital*,[153] the United States intervened, agreeing with the plaintiffs that the Hill-Burton Act's explicit approval of "racial discrimination by state-connected institutions" violated the Fifth Amendment.[154] "What the Constitution forbids, Congress may not sanction," the DOJ lawyers wrote.[155]

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147 Anthony Lewis, *U.S. Suit Attacks School Race Bars*, N.Y. TIMES, Sept. 18, 1962, at 1.

148 *See* U.S. COMM'N ON C.R., CIVIL RIGHTS 198–99 (1963).

149 Plaintiff's Pre-trial Memorandum of Law at 27–28, United States v. Cnty. Sch. Bd., 221 F. Supp. 93 (E.D. Va. 1963) (No. 3536).

150 *Cnty. Sch. Bd.*, 221 F. Supp. at 99–101; United States v. Bossier Par. Sch. Bd., 220 F. Supp. 243, 247 (W.D. La. 1963), *aff'd* 336 F.2d 197 (5th Cir. 1964); United States v. Madison Cnty. Bd. of Educ., 219 F. Supp. 60, 61 (N.D. Ala. 1963), *aff'd* 326 F.2d 237 (5th Cir. 1964); United States v. Biloxi Mun. Sch. Dist., 219 F. Supp. 691, 694–95 (S.D. Miss. 1963), *aff'd* 326 F.2d 237 (5th Cir. 1964).

151 Pub. L. No. 79-725, 60 Stat. 1040 (1946).

152 Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 965 (4th Cir. 1963) (citing Hospital Survey and Construction Act, Pub. L. No. 79-725, 60 Stat. 1040 (1946) (codified as amended at 42 U.S.C. § 291e(f))).

153 211 F. Supp. 628 (M.D.N.C. 1962).

154 Memorandum of the United States at 14, *Simkins*, 211 F. Supp. 628 (No. C-57-G-62).

155 *Id.* at 21.

In 1963, the Fourth Circuit upheld that view. The court ruled that two North Carolina hospitals' exclusion of Black doctors and patients represented "state action" unlawful under the Fourteenth Amendment, relying on the hospitals' role in "comprehensive joint or intermeshing state and federal . . . programs designed . . . for the best possible promotion and maintenance of public health."[156] Separately, the court went on to specifically rule the "separate-but-equal" clause in the federal statute (and its implementing regulations) invalid on Fifth Amendment grounds, describing it as "an affirmative sanction of the unconstitutional practice" of racial segregation.[157]

Simkins was the first decision expressly striking down federal support for segregation on constitutional grounds. But the Fourth Circuit did not provide a framework for determining when federal action in support of discrimination would run afoul of the Fifth Amendment. Apparently, nearly a decade after *Brown*, a federal statute explicitly authorizing segregation so clearly violated the Fifth Amendment that further elaboration was unnecessary.[158]

B. Statutory Adoption

As the courts considered the Fifth Amendment's reach, advocates also sought to embed the principle in legislation.

For decades, liberals had attempted to enact provisions barring discrimination in particular federal programs. By the 1950s, those proposals came to be known as "Powell Amendments," named for their usual sponsor in the House, Representative Adam Clayton Powell.[159] Advocates and legislators clearly articulated the constitutional principle behind such amendments—that federal actors could not lawfully provide support to Jim Crow institutions.[160] Such nondiscrimination amendments invariably went down in defeat, with nay votes coming from northern Democrats who deemed themselves civil rights supporters, but who believed

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156 *Simkins*, 323 F.2d at 967–69.

157 *Id.* at 969.

158 *Cf.* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) ("Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause.").

159 *See* Singer et al., *supra* note 46, at 826; HAMILTON & HAMILTON, *supra* note 14, at 102.

160 *See, e.g.*, Letter from Frances Levenson, Exec. Dir., Nat'l Comm. Against Disc. in Hous., to Sen. Prescott Bush (July 23, 1956) (on file at II:A162, Records of the NAACP, Manuscript Div., Libr. of Cong., Washington, D.C.); *see also Federally Assisted Public Education Programs, Hearing Before the H. Comm. on Educ. & Lab.*, 87th Cong. 431 (1962) (statement of Sen. Kenneth Keating). *See generally* 107 CONG. REC. 8,530 (1961); 109 CONG. REC. 12,090 (1963).

that adding the provisions would sacrifice southern legislators' support—and thereby defeat the underlying social programs.[161] Finally, in 1963, President Kennedy included in his proposed civil rights legislation a provision that would authorize (but not require) federal agencies to halt funding for discriminatory programs.[162]

When legislators considered the provision that would become Title VI of the Civil Rights Act of 1964, its constitutional roots were clear to all. Some supporters pointed to—but did not fully endorse—the argument that the Constitution required the federal government to halt its financial support for segregation. For example, when Representative Emanuel Celler told the House in January 1964 that Congress had the constitutional authority to use Title VI to condition federal funding on nondiscrimination, he noted: "[A] strong argument can be made that the Constitution requires that programs and activities receiving significant financial assistance from the United States refrain from racial segregation or discrimination."[163] Others were more emphatic, emphasizing that the statute "would do no more than recognize the requirements of the Constitution which impose a mandate of equality on all governmental action."[164]

Title VI, as ultimately enacted, was framed as a direct bar on race and national origin discrimination within any program receiving federal assistance.[165] Additional provisions required federal agencies to enforce the principle through rulemaking and voluntary negotiation in cases of noncompliance—and, if that failed, by moving to terminate federal funding or "any other means authorized by law."[166]

Congress intentionally crafted Title VI to be mandatory. Legislators rejected a weaker version proposed by the Kennedy administration, which clarified that executive officials could choose to cut off funding in response to discrimination but left to their discretion whether to take action.[167]

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161 HAMILTON & HAMILTON, *supra* note 14, at 101–07.

162 *See* H.R. 7152, 88th Cong. (1st Sess. 1963).

163 110 CONG. REC. 1527 (1964) (statement of Rep. Celler).

164 *Hearings Before Subcomm. No. 5 of the Comm. on the Judiciary*, 88th Cong. 1367 (1963) (statement of Will Maslow, Exec. Dir., Am. Jewish Cong.).

165 Title VI barred race and national origin discrimination in "any program or activity receiving Federal financial assistance" and directed federal agencies to achieve compliance by terminating funding or "any other means authorized by law." Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601, 602, 78 Stat. 241, 252–53 (codified at 42 U.S.C. §§ 2000d, 2000d-1).

166 Civil Rights Act of 1964 § 602, 78 Stat. at 253.

167 *See* Singer et al., *supra* note 46, at 831–35.

The statute thus embodied the Fifth Amendment no-aid principle that NAACP leaders and other civil rights activists had advocated for decades. Title VI would be replicated in two famous successor statutes: Title IX of the Education Amendments of 1972[168] (barring sex discrimination in federally assisted education programs) and Section 504 of the Rehabilitation Act of 1973[169] (barring disability discrimination in both federal and federally assisted programs). Similar but lesser known discrimination bans were, and continue to be, inserted in many specific statutes.[170] Collectively, these "Spending Clause civil rights statutes"[171] implement the constitutional bar on federal involvement in discrimination across the landscape of federally funded programs.

Another landmark civil rights statute of the 1960s—not premised on Spending Clause authority—also figured in subsequent attempts to enforce the no-aid principle. The Fair Housing Act of 1968 barred discrimination in housing and created an explicit, distinctive duty for federal officials, an obligation "affirmatively to further the policies" of the Act—i.e., to pursue fair housing itself.[172] The Act's "affirmatively further" mandate[173] created an obligation for federal actors to actively combat existing segregation, rather than simply refrain from future discrimination.[174]

Both Title VI and the Fair Housing Act would become key tools for litigants attempting to stop continued federal backing for segregationist projects across the country. By the late 1960s, lower federal courts would begin to adopt these statutory arguments to find federal officials liable, often in the most emphatic terms.

C. A Clear No-Aid Principle

For constitutional claims, though, the clearest legal framework for addressing indirect government participation in discrimination

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168 Title IX of the Education Amendments of 1972, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681–1688).

169 Rehabilitation Act, § 504, Pub L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. § 794).

170 *See, e.g.*, Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 620 n.9 (1983) (Marshall, J., dissenting) (listing eight additional nondiscrimination provisions in other statutes that were modeled upon Title VI).

171 I use this term as a shorthand for this overall complex of statutes prohibiting discrimination in programs based on Spending Clause authority.

172 Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 804–806, 808, 82 Stat. 73, 83–85.

173 Fair Housing Act, § 808(e)(5), 82 Stat. at 85.

174 *See* N.A.A.C.P. v. Sec'y of HUD, 817 F.2d 149, 155 (1st Cir. 1987) (holding that the provision was intended to ensure that "HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases").

emerged in a different context altogether—that of state and local action, rather than federal activity.

Post-*Brown*, the federal courts had confronted the flagrant defiance of those determined to preserve Jim Crow in the South. Eventually, federal judges began pushing back strongly against state and local attempts to skirt constitutional mandates. By the early 1970s they had created a doctrine that disallowed any financial support for segregation by government, regardless of motive—the strongest version of the no-aid principle. No apparent reason prevented those decisions from applying to federal action as well, given the courts' congruent application of the equal protection mandate to state and federal actors in that era.

The starting point for these cases involving defiance to *Brown* came in *Cooper v. Aaron*,[175] when the Supreme Court ruled against Little Rock's attempt to postpone school desegregation.[176] After Arkansas state officials moved to block desegregation in Little Rock using the state's national guard in fall 1957, white violence ensued, controlled only by federal troops.[177] The following fall, the Supreme Court denounced the state's defiance in strong terms: the students' equal protection rights "can neither be nullified openly and directly by state [officials] . . . nor nullified indirectly by them through evasive schemes for segregation."[178] Under *Brown*, the Court wrote, "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with" the Equal Protection Clause.[179]

While the Court's primary focus in *Cooper* was the Arkansas governor's defiance of the federal courts, the decision's broad language swept in the various measures the Arkansas legislature had taken to avoid desegregation, which included laws authorizing school closures in case of desegregation and government tuition vouchers for affected white students to attend private whites-only schools.[180]

In subsequent years, many southern states and localities followed Arkansas's example, attempting to replace segregated white schools with a parallel "private" system of whites-only schools that actually rested on public funds (often referred to as

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[175] 358 U.S. 1 (1958).

[176] *Id.* at 17.

[177] *Id.* at 7–13.

[178] *Id.* at 17.

[179] *Id.* at 19.

[180] *See* Sondra Gordy, *Empty Classrooms, Empty Hearts: Little Rock Secondary Teachers, 1958–1959*, 56 ARK. HIST. Q. 427, 429 (1997).

"segregation academies").[181] In response, the lower federal courts struck down tuition grants and related subsidies for such schools—decisions readily affirmed by the Supreme Court in per curiam rulings.[182] In 1969, a federal district court distilled those tuition voucher decisions into the sweeping principle that any "arrangement [that] in *any* measure, no matter how slight, contributes to or permits continuance of segregated public school education" was invalid.[183]

In the tuition voucher cases, the lower federal courts clarified that whether the private schools' discrimination amounted to state action was not the key issue, but rather the legality of governmental aid itself. Litigants were not attempting to regulate the actions of the school themselves, but simply to halt the flow of aid. Judges reasoned that "[t]he payment of public funds in any amount through a state commission under authority of a state law is undeniably state action."[184] In suits challenging the governmental aid on its own terms (and not attempting to restrain the private entity), they concluded that there was no need to consider whether the private actor itself could be regulated as a state actor.[185]

Instead, the real issue was whether governmental aid, even if it seemed benign in motivation or insignificant in its impact, violated constitutional requirements. At first, lower courts emphasized "the State's affirmative, purposeful policy of fostering

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[181] For example, in 1967, a three-judge panel wrote that "it is now becoming apparent that the State of Alabama is attempting to make a concerted effort to establish and support a separate and private school system for white students." Lee v. Macon Cnty. Bd. of Educ., 267 F. Supp. 458, 477 (M.D. Ala. 1967), *aff'd sub nom*. Wallace v. United States, 389 U.S. 215 (1967) (per curiam).

[182] *See generally* Coffey v. State Educ. Fin. Comm'n, 296 F. Supp. 1389 (S.D. Miss. 1969); Brown v. S.C. State Bd. of Educ., 296 F. Supp. 199 (D.S.C. 1968), *aff'd*, 393 U.S. 222 (1968) (per curiam); Poindexter v. La. Fin. Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968) (per curiam); *Lee*, 267 F. Supp. 458.

[183] Griffin v. State Bd. of Educ., 296 F. Supp. 1178, 1181 (E.D. Va. 1969) (emphasis in original).

[184] *Poindexter*, 275 F. Supp. at 854.

[185] *Cf. Lee*, 267 F. Supp. at 478 (threatening that, if the court were forced to continue striking down state attempts to support segregated whites-only private schools, the court would have to extend its ruling, deem the private schools themselves state actors, and include them in the court's statewide desegregation order).

segregated schools."[186] But later decisions focused only on the aid itself, regardless of motive.[187]

By 1973, the Supreme Court was willing to sign off on this principle, though it had already begun to articulate limits to the state action doctrine itself.[188] The Court endorsed the no-aid rule in a case arising in Mississippi, where defiance of *Brown* was arguably most pronounced.[189]

In Mississippi, during the seven years after the first school desegregation orders, the number of students in nonreligious private schools had grown nearly twentyfold.[190] In Tunica County, after a district court ordered desegregation of the public schools, every white student in the county withdrew. They entered a newly formed private academy, and the local high school's principal and eighteen white teachers followed them, resigning at midyear. The school board voted to pay those teachers their full salary for the year nonetheless, even as they taught in the whites-only school. The white children's state-owned textbooks went with them to the new school.[191]

In *Norwood v. Harrison*,[192] parents of Black children attending public schools in Tunica County challenged Mississippi's provision of free textbooks to students enrolled in private segregation academies, on the ground that it "impeded the establishment of racially integrated public schools in violation of plaintiffs' [Fourteenth Amendment] rights."[193]

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[186] *Poindexter*, 275 F. Supp. at 854 (looking for "significant state involvement in private discrimination" as the threshold for a constitutional violation); *see also* Lee v. Macon Cnty. Bd. of Educ., 231 F. Supp. 743, 754 (M.D. Ala. 1964) (ruling that state tuition grants "would be unconstitutional where they are designed to further or have the effect of furthering [ ] segregation in the public schools").

[187] *Griffin*, 296 F. Supp. at 1181 (stating that "*any* assist *whatever* by the State towards provision of a racially segregated education, exceeds the pale of tolerance demarked by the Constitution. . . . [N]either motive nor purpose is an indispensable element of the breach." (emphasis in original)).

[188] *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175–77 (1972) (ruling that a discriminatory private club was not rendered a state actor by virtue of its licensing by the state's Liquor Control Board).

[189] *See, e.g.*, 7 U.S. COMM'N ON C.R., THE MISSISSIPPI DELTA REPORT 44 (2001) (describing a state official's account that "no state fought harder than Mississippi after *Brown* to thwart integration").

[190] Norwood v. Harrison, 413 U.S. 455, 457 (1973).

[191] Appellants' Brief at 3–4, *Norwood*, 413 U.S. 455 (No. 72-77).

[192] 413 U.S. 455 (1973).

[193] Appellants' Brief, *supra* note 191, at 6; *see also* Norwood v. Harrison, 340 F. Supp. 1003, 1005 (N.D. Miss. 1972) (describing the complaint). The books went to "34,000 students . . . attending 107 all-white, nonsectarian private schools . . . formed throughout the state since the inception of public school desegregation." *Id.* at 1011.

A three-judge district court initially rejected the challenge, noting that the First Amendment did not bar provision of textbooks to religious schools, and reasoning that the equal protection mandate should not reach further than the Establishment Clause.[194] Further, the underlying facially neutral state textbook program was not originally created to evade integration mandates; it had existed since 1940, providing books to all children in the state, at both public and private schools.[195] The court therefore upheld the "benevolent and racially neutral" program, noting that it was unclear whether withdrawing the aid would have any impact on students' enrollment decisions.[196]

Reversing, the Supreme Court wrote, "it is [ ] axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[197] Textbooks could not be distinguished from tuition grants or loans, as "the economic consequence is to give aid to the enterprise."[198] The *Norwood* Court also rejected the premise that discriminatory intent had to be shown: "The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal."[199]

Nor was ambiguity regarding the textbooks' causal impact a significant obstacle. The Court indicated that it was unnecessary for the plaintiffs to prove that the loaned textbooks played any particular causal role in driving white students to withdraw from public schools (and thus in causing the plaintiffs' ultimate injury by reinforcing racial segregation).[200] The difficulty of offering a clear causal link—proving that government aid played a specific role in generating plaintiffs' injuries from segregation itself—would prove to be a stumbling block for plaintiffs' ability to establish standing in later cases. But, in this earlier era, the *Norwood* Court indicated that the threshold for showing a constitutional violation was simply that the government aid had a "significant

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194 *Norwood*, 340 F. Supp. at 1011.

195 *Id.* at 1007, 1013.

196 *Id.* at 1013.

197 *Norwood*, 413 U.S. at 465 (quoting *Lee*, 267 F. Supp. at 475–76).

198 *Id.* at 464. Unlike "electricity, water, and police and fire protection," textbooks were provided only to schools and could be obtained from other sources. *Id.* at 465.

199 *Id.* at 466–67.

200 *Id.* at 465–66 ("[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school.").

tendency to facilitate" discrimination, a test facially met for most subsidies.[201]

Thus, *Norwood* articulated a clear constitutional bar on government support for discrimination, even if well-intentioned or ambiguous in its causal impact. In focusing on Mississippi and other southern states' flagrant attempts to subvert the judiciary's mandates, the Court may not have dwelled upon the implications of its ruling for federal actors supporting discrimination in other settings. By 1975, the Court was stating in other contexts that the Fifth Amendment's nondiscrimination mandate was identical to that imposed on the states by the Fourteenth Amendment's Equal Protection Clause.[202] *Norwood*, then, fully governed federal officials.

D. Remedying All Vestiges of State-Sponsored Segregation

In the same period, the federal judiciary announced a robust, ongoing constitutional duty for government actors to affirmatively undo segregation that they had constructed. Along with attempts to recreate segregation in private whites-only schools, state and local officials also defied *Brown*'s mandate by enacting formally race-neutral public school assignment policies that preserved prior segregated systems.[203] "Freedom of choice" plans maintained existing school assignments, but authorized students to "choose" to attend schools with children of other races. In practice, officials discouraged or denied such transfers and Black families faced economic reprisal and violence for attempting to enroll their children in white schools.[204] Unsurprisingly, freedom of choice policies produced very little desegregation.

The Supreme Court eventually signaled that such paper compliance with *Brown* was insufficient.[205] Districts had to actively reconstruct the segregated institutions they had created.

Immediately after *Brown*, the Court had called for "transition to a racially nondiscriminatory school system" yet simultaneously

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201 *Id.* at 466.

202 *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

203 *See* Singer et al., *supra* note 46, at 897–98.

204 *See id.* at 899–900.

205 In so doing, the Court affirmed the approach taken by HEW's Office for Civil Rights and the Fifth Circuit, the appellate court presiding over most of the South, which eventually rejected paper compliance and called for actual desegregation. *See* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 42–80 (1995).

endorsed gradualism by calling for the shift to occur with "all deliberate speed."[206] Progress was halting until the late 1960s, when the executive branch began using the newly enacted Title VI as a means to prod school districts to start desegregation by threatening to terminate federal funds if the districts did not begin complying with *Brown*.[207]

At that point, the federal courts also began shaping more demanding constitutional remedies.[208] In 1968, in *Green v. County School Board*,[209] the Supreme Court resoundingly affirmed that approach, writing that *Brown II* was "a call for the dismantling of well-entrenched dual systems" of segregated schools.[210] School officials had the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[211] Courts were to "retain jurisdiction until it is clear that state-imposed segregation has been completely removed."[212] Several years later, in *Swann v. Charlotte-Mecklenburg Board of Education*,[213] the Court confirmed that "[t]he objective [ ] remains to eliminate from the public schools all vestiges of state-imposed segregation."[214]

In 1979, the Court emphasized that the remedial mandate of *Green* and *Swann* did not dissipate with time; failure to repair one's past discrimination constituted an ongoing constitutional violation. Any school district engaging in past intentional segregation had a "continuing 'affirmative duty to disestablish the dual school system.'"[215] Moreover, the test for whether schools had met

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206 *Brown II*, 349 U.S. 294, 301 (1955).

207 HALPERN, *supra* note 205, at 42–80.

208 *See, e.g.*, United States v. Jefferson Cnty. Bd. of Educ., 372 F.2d 836, 845–47, 861–69 (5th Cir. 1966) ("The United States Constitution, as construed in *Brown*, requires public school systems to integrate students, faculties, facilities, and activities.").

209 391 U.S. 430 (1968).

210 *Id.* at 437.

211 *Id.* at 437–38.

212 *Id.* at 439.

213 402 U.S. 1 (1971).

214 *Id.* at 15; *see also id.* at 18–31 (endorsing aggressive, race-based measures to achieve that goal).

215 Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 460 (1979) (quoting McDaniel v. Barresi, 402 U.S. 39, 41 (1971)); *see also* Dayton Bd. of Educ. v. Brinkman (*Dayton II*), 443 U.S. 526, 537 (1979) (ruling that any school district engaging in past intentional segregation faced "a continuing duty to eradicate the effects of that [segregated] system"). Though later decisions by a more conservative Court weakened the standard for deeming a district successful in remedying desegregation, calling for the "vestiges of past discrimination [to be] eliminated to the extent practicable," the basic mandate did not change. Bd. of Educ. v. Dowell, 498 U.S. 237, 250 (1991); *see also* Freeman v. Pitts, 503 U.S. 467, 485 (1992) (allowing for incremental withdrawal of supervision as compliance with desegregation orders increased); Missouri v. Jenkins, 495 U.S. 33, 50 (1990) (limiting courts' equitable

that duty was "the effectiveness, not the purpose, of the[ir] actions in decreasing or increasing the segregation caused by the dual system."[216]

Like *Norwood*'s bar on governmental support for segregation, the *Green*/*Swann* mandate to eliminate "all vestiges" of segregation transferred intact to federal officials under the Fifth Amendment. If federal officials had participated in entrenching racial segregation, then they had the ongoing, affirmative duty to dismantle the dual systems they had created; benign intent would not shield them from liability. Thus, by the 1970s, clear equal protection principles required federal officials to avoid knowingly aiding discrimination, and to repair discriminatory systems that federal actors had helped construct.

III. THE ENFORCEABLE FIFTH AMENDMENT

Over the next dozen years, civil rights lawyers found that they could enforce the Fifth Amendment in new and sweeping ways using those principles. Arguments that the federal government could not constitutionally participate in discrimination—even indirectly through its Spending Clause authority—moved from the realm of optimistic rhetoric to enforceable, black-letter law.

The lower courts consolidated a simple syllogism, citing just three Supreme Court decisions for a clear no-aid principle. It ran as follows: The Fifth Amendment bars discrimination by federal officials, just as the Fourteenth Amendment does for state officials.[217] Further, the Constitution bars "not just [ ] direct involvement, but also [ ] government 'support' of discrimination 'through any arrangement, management, funds or property.'"[218] Finally, knowing government support of discrimination is invalid, even if motivated by "benign" ends.[219] Hence federal aid to discriminatory institutions violated the Fifth Amendment, regardless of motive.

Relying on those principles, courts in the late 1960s and 1970s repeatedly found the federal government to be inextricably and unconstitutionally intertwined with other actors' discrimination.

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discretion in ordering remedies); Goodwin Liu, Brown*,* Bollinger*, and Beyond*, 47 HOW. L.J. 705, 728–30 (2004) (assessing *Dowell*, *Freeman*, and *Jenkins*); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 300–03 (2013) (same).

216 *Dayton II*, 443 U.S. at 538.

217 *Bolling*, 347 U.S. at 499–500.

218 Nat'l Black Police Ass'n, Inc. v. Velde, 712 F.2d 569, 580 (D.C. Cir. 1983) (quoting *Cooper*, 358 U.S. at 19).

219 *Norwood*, 413 U.S. at 467.

They also referenced the government's duty to undo the harms of the segregation it had helped construct.

But even as the no-aid principle appeared fully realized, doubts surfaced. The syllogism had been constructed to respond to the historically specific circumstances of southern defiance and was buttressed by apparent congressional approval in the form of parallel statutory mandates.

As lawyers tried to push the no-aid principle to its logical limits, its substance came into tension with other areas of constitutional jurisprudence. First, in the context of government financial support for religious institutions (such as schools), the Court had allowed some forms of subsidy to occur, despite the strictures of the First Amendment's Establishment Clause. Establishment Clause principles also permitted some "neutral" forms of aid to flow, such as tax exemptions. Why should the Constitution constrain government subsidies or support differently for one purpose versus another?

Second, to the extent that purposeful discrimination was required to violate the Equal Protection Clause—an interpretation that did not emerge as black-letter law until the late 1970s—then how could government financial aid to segregated programs or institutions be unlawful, if federal actors themselves acted to further benign goals (such as improving schools, expanding healthcare, or offering decent housing for the poor)? As litigation emerged challenging federal tax exemptions for racially discriminatory institutions that operated as nonprofits in the private sphere, those questions grew acute.

This Part first details the consolidation of the no-aid principle in lower court cases involving housing, employment, and schools, then it shows how the tax subsidy cases pressed the doctrine toward its logical limits—just as the executive branch and courts began moving decisively to the right.

A. Newly Powerful Federal Constraints

After 1964, litigants pressed their Fifth Amendment claims alongside claims under Title VI of the Civil Rights Act or similar statutes, thus signaling Congress's implied blessing. Sometimes the statutory claims themselves stood in place of constitutional ones, acting as near-perfect equivalents. In this new wave of opinions, courts did not carefully distinguish among the various ways in which federal agencies supported others' discrimination, such as by the extent of federal funding, the level of federal involvement, or the degree of explicit federal encouragement or approval

for discrimination. If courts had focused on such distinctions, they might have calibrated more refined tests for determining when federal action went too far in aiding segregation or discrimination. Instead, federal judges articulated a near-absolute rule against federal support for discrimination.

1. Housing.

At times, courts enforced the no-aid principle by relying solely on the new civil rights statutes and without resolving Fifth Amendment claims. Beginning in 1969, federal courts in Louisiana, Philadelphia, and Texas had no trouble finding illegality by HUD when it authorized local officials to construct and operate public housing in ways intended "to perpetuate segregation of the races."[220]

In *Hicks v. Weaver*,[221] the district court emphasized that federal officials not only authorized federal funding for segregated housing projects in Bogalusa, Louisiana, but also "directed every detail of the development and construction of the proposed units, even down to . . . the location of the plumbing fixtures in the kitchens."[222] HUD thus was an "active participant" in the discrimination.[223] Yet the court ultimately rested on Title VI alone, without addressing the Fifth Amendment claim.[224] The Third Circuit ruled similarly in *Shannon v. HUD*,[225] finding that HUD had failed to consider the effect on racial segregation in approving more low-income housing in a Philadelphia urban renewal district, thereby violating Title VI and the Fair Housing Act.[226] A year later, a district court in Texas concluded that "HUD was a knowing and willing partner with the [Austin] Housing Authority in pursuing a policy of racial segregation from 1938 through October 1967."[227] The court followed *Hicks* and *Shannon* in enjoining the use of a currently selected site for new public housing on Title VI and Fair Housing Act grounds rather than constitutional ones.[228]

In contrast, the Seventh Circuit did not avoid the constitutional claim in considering HUD's liability for the segregation of

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220 Hicks v. Weaver, 302 F. Supp. 619, 623 (E.D. La. 1969).

221 302 F. Supp. 619 (E.D. La. 1969).

222 *Id.* at 622.

223 *Id.* at 623.

224 *Id.*; *cf.* Primus, *supra* note 6, at 991 n.74 (concluding that "the opinion in its entirety can be read to find a constitutional violation").

225 436 F.2d 809 (3d Cir. 1970).

226 *Id.* at 817–21.

227 Blackshear Residents Org. v. Hous. Auth., 347 F. Supp. 1138, 1143 (W.D. Tex. 1971).

228 *Id.* at 1145–46.

Chicago public housing in 1971. In *Gautreaux v. Romney*,[229] the court wrote that HUD's Secretary "exercised the [agency's] . . . powers in a manner which perpetuated a racially discriminatory housing system in Chicago, and [ ] the Secretary and other HUD officials were aware of that fact."[230] Federal officials' benign motives could not stave off liability: the agency's "approval and funding of segregated [ ] housing sites cannot be excused as an attempted accommodation of an admittedly urgent need for housing with the reality of community and City Council resistance."[231] Knowing support for racial segregation, no matter how benign the federal officials' ultimate motive, violated both the Fifth Amendment and Title VI.[232]

Several years later, the Sixth Circuit relied on *Hicks*, *Shannon*, and *Gautreaux* in upholding federal liability for an urban renewal project in Hamtramck, Michigan, in which city officials intended to achieve "planned population loss of Black citizens"—by razing their homes without providing any possibility of replacement housing within the city.[233] HUD had violated both the Fifth Amendment's and Title VI's bans on race discrimination: "By failing to halt a city program where discrimination in housing was being practiced and encouraged, HUD perpetuated segregation . . . and participated in denial to the plaintiffs of their constitutional rights."[234] Moreover, HUD was responsible for remedying the ongoing effects of those violations, through "an affirmative program to eliminate discrimination" from the city's Wyandotte Project.[235] The court cited the Court's school desegregation jurisprudence in discussing HUD's obligation to affirmatively undo the segregation it had helped to create.[236]

In the early 1980s, the Eighth Circuit considered the federal government's involvement in the long-term segregation of public housing in Texarkana, Arkansas.[237] After recounting years of HUD decisions to continue providing funding in the face of known intentional discrimination by the local housing authorities, the panel concluded that federal officials' actions themselves also

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229 448 F.2d 731 (7th Cir. 1971).
230 *Id.* at 739.
231 *Id.* at 737.
232 *Id.* at 740.
233 Garrett v. City of Hamtramck, 503 F.2d 1236, 1242, 1247 (6th Cir. 1974).
234 *Id.* at 1247.
235 *Id.*
236 *Id.* (citing *Swann*, 402 U.S. at 16).
237 Clients' Council v. Pierce, 711 F.2d 1406 (8th Cir. 1983).

reflected intentional race discrimination.[238] They may have deemed that conclusion necessary to their ruling, given that the Court had ruled in *Washington v. Davis*[239] that equal protection violations required a showing of discriminatory intent.[240]

Rejecting the argument that HUD simply acted simply out of benign desire to provide housing for the poor, the court wrote that "the agency did not have to approve, support, and lobby in favor of [the Texarkana Housing Authority]'s discrimination."[241] The court concluded that HUD was at least partially motivated by "a discriminatory purpose" as it was "inconceivable that HUD would have so frequently acted to approve the Texarkana Housing Authority's actions for so long unless its officials held the view that segregation and discrimination were acceptable."[242] HUD's Fifth Amendment liability was so clear that the court deemed it unnecessary to even consider the parallel Title VI claim.[243]

2. Employment.

Courts began to read the Fifth Amendment to give federal officials authority to stamp out discrimination throughout federally funded programs, including vis-à-vis such programs' employees. Thus, in a 1968 DOJ suit against Alabama state agencies to enforce a federal statutory requirement that federally financed programs operate under a merit system of employment (and therefore halt race discrimination), Judge Frank Johnson of the Middle District of Alabama found that the Constitution itself militated in favor of the Attorney General's authority to bring suit.[244] "[T]he interest of the United States in these Federally financed programs may be so considerable that the Government, through its duly constituted officials, including the Attorney General of the United States, has a constitutional obligation to eliminate racial discrimination in their administration."[245]

The federal government also had the constitutional obligation to avoid fueling employment discrimination through its efforts to support job seekers. In *NAACP v. Brennan*,[246] farmworkers had challenged federal approval and full funding of state employment

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238 *Id.* at 1410–23.
239 426 U.S. 229 (1976).
240 *Id.* at 238–41.
241 *Clients' Council*, 711 F.2d at 1423.
242 *Id.* ("We do not suggest that HUD officials were motivated by malice.").
243 *Id.* at 1424–25.
244 United States *ex. rel.* Clark v. Frazer, 297 F. Supp. 319, 323 (M.D. Ala. 1968).
245 *Id.* at 323.
246 360 F. Supp. 1006 (D.D.C. 1973).

services offices engaging in discrimination.[247] In 1972, the Department of Labor's investigation had documented widespread discrimination in the state offices, yet the secretary had funded the state services without protest for the subsequent year.[248]

The U.S. District Court for the District of Columbia elegantly summarized the black-letter law underpinning the federal constitutional obligation: Fifth Amendment violations "may arise when Federal officials provide financial assistance to, and exercise some degree of control over, State agencies that discriminate."[249] Title VI "implements [those] fundamental Fifth and Fourteenth Amendment prohibitions on government support to institutions which practice racial or national origin discrimination."[250] Both the Constitution and Title VI imposed on federal officials "not only the duty to refrain from participating in discriminatory practices, but the affirmative duty to police the operations of and prevent such discrimination by State or local agencies funded by them."[251] By extending uninterrupted funding in the face of documented discrimination, the agency had "knowingly acquiesced in and helped to perpetuate" the states' discrimination, in violation of its constitutional and statutory duties.[252]

The Eighth Circuit emphasized that same year that "any recognition or enforcement of illegal racial policies by a federal agency is proscribed by the Due Process Clause of the Fifth Amendment."[253] For the National Labor Relations Board to recognize a discriminatory union as an exclusive bargaining representative, was for it to "become[ ] a willing participant in the union's discriminatory practices."[254] Moreover, even if active discrimination had ceased, the union had to remedy the racial imbalances persisting in its membership; "the remedial machinery of the National Labor Relations Act cannot be available to a union which is unwilling to correct past practices of racial discrimination."[255] The constitutional duty to undo the harms of the past extended beyond government-imposed segregation and required

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[247] *Id.* at 1008; *see also* Donald Janson, *Seasonal Farm Workers Suing Labor Department on Job Rights*, N.Y. TIMES, Oct. 7, 1972, at 36.

[248] *Brennan*, 360 F. Supp. at 1014–15.

[249] *Id.* at 1011 (first citing *Simkins*, 323 F.2d at 963–70; then citing *Gautreaux*, 448 F.2d at 740; and then citing *Hicks*, 302 F. Supp. at 622–23).

[250] *Id.* at 1012.

[251] *Id.*

[252] *Id.* at 1015.

[253] NLRB v. Mansion House Ctr. Mgmt. Corp., 473 F.2d 471, 473 (8th Cir. 1973).

[254] *Id.* at 473.

[255] *Id.* at 477.

federal officials to ensure that those wielding federally delegated power remedied past discrimination.

By 1975, a district court could examine existing precedent and conclude: "Where recipients of federal funds have engaged in unlawful discrimination, courts have been quick to require that federal agencies refrain from participating in the discriminatory practices, and exercise affirmative duties to police compliance and prevent constitutionally and statutorily proscribed discrimination."[256] Black Chicago police officers had challenged the provision of federal revenue-sharing funds to finance the Chicago police department, which engaged in racially discriminatory employment practices.[257] Under the Fifth Amendment, "public funds or benefits may not be extended to governmental agencies which practice racial discrimination."[258] The court therefore sustained an existing injunction against payment of federal revenue-sharing funds to the City.[259]

Eight years later, a D.C. Circuit majority affirmed that the no-aid principle was "a clearly established principle of constitutional law."[260] The Fifth Amendment requirement was simple: "[T]he federal government may not fund local agencies known to be unconstitutionally discriminating."[261] In *National Black Police Association v. Velde*,[262] twelve individuals and the National Black Police Association sued the DOJ's Law Enforcement Assistance Administration for knowingly funding state and local police departments that engaged in intentional race and sex discrimination.[263] The D.C. Circuit panel found that both the Crime Control Act of 1973[264] and the Fifth Amendment created sufficiently clear no-aid duties to overcome the individual defendants' qualified immunity.[265]

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256 United States v. City of Chicago, 395 F. Supp. 329, 342–43 (N.D. Ill. 1975) (discussing *Brennan*, *Adams*, and the Mississippi tax exemption rulings discussed in Part III.B).

257 *Id.* at 332–33, 343.

258 *Id.* at 343 (first citing *Norwood*, 413 U.S. 455; then citing *Gilmore*, 417 U.S. 556; then citing *Bolling*, 347 U.S. 497; and then citing *Brennan*, 360 F. Supp. at 1011).

259 *Id.* at 344–45.

260 *Velde*, 712 F.2d at 580.

261 *Id.*

262 712 F.2d 569 (D.C. Cir. 1983).

263 *Id.* at 572.

264 Pub. L. No. 93-83, 87 Stat. 197 (codified as amended in scattered sections of the U.S. Code).

265 *Velde*, 712 F.2d at 576–83.

3. Schools.

Courts also ruled that federal officials were obliged to ensure the desegregation of the schools they funded. The most far-reaching of these cases, *Adams v. Richardson*,[266] began simply enough, though it would become extremely controversial. After the Nixon administration forced HEW to drastically pare back its enforcement of Title VI's desegregation mandate in the schools and universities it funded,[267] civil rights organizations brought suit to force the agency to return to actively policing racial segregation and discrimination.[268] In *Adams*, the district court found that the agency had shifted almost entirely to "voluntary compliance" rather than initiating fund termination or other enforcement actions against institutions that refused to desegregate.[269] Judge John Pratt ordered HEW to begin enforcement proceedings against the school districts and state higher education systems that the agency had previously deemed out of compliance with Title VI.[270]

When *Adams* first went before the en banc D.C. Circuit in 1973, the court ruled that Title VI enforcement was not a matter of unreviewable agency discretion, thus allowing suit under the APA.[271] The APA provides a general cause of action to challenge unlawful agency action, but it is unavailable if a statute precludes review or "agency action is committed to agency discretion by law."[272] HEW analogized to precedents indicating that prosecutors' decisions not to bring enforcement actions were discretionary and thus insulated from review.[273]

The *Adams* majority rejected HEW's reasoning: unlike instances of ordinary prosecutorial decision-making, the agency was not simply declining to act but "actively supplying segregated institutions with federal funds."[274] Such action implicated Fifth

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266 480 F.2d 1159 (D.C. Cir. 1973).

267 Chinh Q. Le, *Racially Integrated Education and the Role of the Federal Government*, 88 N.C. L. REV. 725, 738–39 (2010) (discussing HEW's policy of "benign neglect" under President Nixon and the NAACP Legal Defense & Educational Fund's subsequent suit challenging the policy).

268 Adams v. Richardson (*Adams II*), 356 F. Supp. 92 (D.D.C. 1973).

269 Adams v. Richardson (*Adams I*), 351 F. Supp. 636, 640 (D.D.C. 1972).

270 *Adams II*, 356 F. Supp. at 96.

271 Adams v. Richardson (*Adams III*), 480 F.2d 1159, 1163 (D.C. Cir. 1973) (en banc).

272 5 U.S.C. § 701(a).

273 *Adams III*, 480 F.2d at 1162 (first citing Georgia v. Mitchell, 450 F.2d 1317 (D.C. Cir. 1971); then citing Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); then citing Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965); and then citing Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965)).

274 *Id.*

Amendment concerns: "It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools."[275]

In a different case a year later, the D.C. Circuit overrode HEW's decision to fund school districts that had failed to fully desegregate, relying on the Fifth Amendment principle that federal agencies operated under a "general obligation not to allow federal funds to be supportive of illegal discrimination."[276] Given those constitutional concerns, the panel interpreted the Emergency School Aid Act of 1972[277] to bar waivers for noncomplying districts.[278] On the panel's view, "the Supreme Court's constitutional decisions virtually mandate adherence to a [statutory] construction which insists upon immediate removal of the effects of educational discrimination based on race, particularly where federal funding is involved."[279]

In one instance, HEW's refusal to fund affirmative remedies to undo prior de jure school segregation violated the Fifth Amendment. A Tennessee district court found that HEW, in 1971, had adopted a policy—contrary to the relevant statutes—of refusing all Emergency School Assistance funds for busing to carry out school desegregation, due in part to President Nixon's announced opposition.[280] HEW officials then refused Nashville school officials' urgent requests for funds to acquire additional buses to carry out court-ordered desegregation.[281] The agency's bar on such funding, the court found, violated both procedural due process and equal protection aspects of the Fifth Amendment and "obstruct[ed] the process of desegregation" mandated after *Brown*.[282]

B. Pushing the No-Aid Logic to Its Limit: Tax Subsidies

As advocates challenged federal support for discrimination in all forms, taxes eventually came to the forefront. Previously, the fact that all taxpayers paid into the federal fisc, regardless of race,

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[275] *Id.*

[276] Kelsey v. Weinberger, 498 F.2d 701, 710 (D.C. Cir. 1974) (quoting *Adams III*, 480 F.2d at 1166).

[277] Pub. L. No. 92-318, §§ 701–720, 86 Stat. 354 (repealed 1978).

[278] *Kelsey*, 498 F.2d at 711; *see also id.* at 708 ("Appellees' reading of the Act's waiver provision as a license to fund school districts in which the evils of discriminatory teacher assignments remain uneradicated generates concern of constitutional proportions.").

[279] *Id.* at 711.

[280] Kelley v. Metro. Cnty. Bd. of Educ., 372 F. Supp. 540, 553–54 (M.D. Tenn. 1973).

[281] *Id.* at 546.

[282] *Id.* at 559–60.

underlay moral and legal claims that the government must distribute its funds fairly.[283] Eventually, activists also turned their attention to the ways in which the tax system itself distributed resources—as subsidies to nonprofit organizations in the form of tax exemptions and income tax deductions for contributions to such organizations.

Taxes pushed the argument challenging federal subsidies for discrimination closer to its limits. Did any type of support—no matter its form or how widely offered—violate the Constitution? Establishment Clause cases had already confronted this question, in considering what sorts of government aid would constitute an unlawful "establishment of religion."[284] In 1947, the Court indicated that government could supply "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks" to religious bodies without violating the bar on compelled taxation to support religion.[285] Tax exemptions for nonprofit organizations appeared to be just a few steps beyond police and fire protection in the spectrum of governmental support.[286] The Court thus upheld local property tax exemptions for churches in 1970.[287]

Legal actors' drive to address thinly veiled defiance of *Brown* led to different outcomes in the context of racial segregation. As the civil rights conflicts of the 1960s escalated, activists' attention turned to the role of tax exemptions as public subsidies. Early on, groups like the Congress of Racial Equality denounced investment houses' participation in selling tax-exempt bonds to finance southern states and localities practicing segregation.[288]

As segregation academies took root in the South, advocates then turned to fighting tax exemptions for those private schools.[289]

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[283] *See supra* notes 89, 97, 142.

[284] *See* U.S. CONST. amend. I.

[285] Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947) (upholding reimbursement of public bus fare for transportation to religious schools, under general statute authorizing reimbursement of such transportation expenses for all school children).

[286] *Cf.* Jackson v. Statler Found., 496 F.2d 623, 638 (2d Cir. 1973) (Friendly, J., dissenting from denial of rehearing en banc) ("An exemption or other tax benefit, available to a wide range of institutions, has always been regarded as the least possible form of government support, except for the police and fire protection provided all citizens.").

[287] Walz v. Tax Comm'n, 397 U.S. 664, 672–80 (1970).

[288] *See Childs Securities to Shun Alabama Bonds; Several Big Dealers Call Move Ill-Conceived*, WALL ST. J., Apr. 1, 1965, at 4; *Firm Picketed for Buying Segregated Schools' Bonds*, WALL ST. J., Feb. 26, 1963, at 25; H.J. Maidenberg, *CORE Attacking Southern Bonds*, N.Y. TIMES, Dec. 6, 1962, at 52.

[289] *See* Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 378 (1979) ("Beginning shortly after *Brown*, segregationists attempted to reduce the budgets of public schools while simultaneously

The U.S. Commission on Civil Rights' (USCCR) July 1967 report on southern school desegregation flagged the rapidly growing flight to segregation academies as a serious obstacle to integration. Hundreds of whites-only private schools had been established in response to integration orders.[290] For example, in Lowndes County, Alabama, the public high school's white enrollment fell from 178 to 3 in a single year, after the first Black students enrolled and a new private school, Lowndes County Christian Academy, simultaneously opened in the facilities of a former public school, receiving $100,000 in tax-exempt donations.[291]

USCCR staff lawyers argued that the federal government should interpret Title VI and the Internal Revenue Code to bar tax exemptions for racially segregated private schools.[292] They also posited that "serious constitutional questions" were at stake under the Fifth Amendment as to whether the federal government could constitutionally provide nonprofit tax subsidies to racially discriminatory schools.[293]

However, the IRS disagreed a month later. After initially freezing tax exemptions for segregated schools in 1965, the IRS announced, in August 1967, that it would continue allowing tax exemptions for private, racially discriminatory schools, so long as states' involvement did not render the schools themselves state actors.[294]

Advocates began challenging the IRS policy in the courts, and in 1970, a suit brought by the Lawyers' Committee for Civil Rights Under Law, *Green v. Kennedy*,[295] bore fruit.[296] *Green* was a class action filed by Black families of public schoolchildren in Mississippi. A three-judge panel of the D.C. district court preliminarily enjoined the IRS from issuing tax-exemption rulings for private segregation academies in Mississippi.[297] The judges reasoned

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developing programs of public tuition assistance and textbook loans to newly-founded private schools.").

290 U.S. COMM'N ON C.R., SOUTHERN SCHOOL DESEGREGATION 1966–67, at 143 (1967) (citing information obtained by other federal agencies).

291 *Id.* at 78, 145.

292 *Id.* at 143–52.

293 *Id.* at 153–56 (emphasis omitted).

294 *See* Jean F. Rydstrom, *Allowability of Federal Tax Benefits to a Private, Racially Segregated School or College*, 7 A.L.R. Fed. 548 (1971) (describing IRS freeze and citing a 1967 IRS press release); *see also* Green v. Kennedy, 309 F. Supp. 1127, 1130 (D.D.C 1970).

295 309 F. Supp. 1127 (D.D.C 1970).

296 *See The Lawyers Committee for Civil Rights Under Law*, 24 WASH. STATE BAR NEWS, May 1970, at 11–12 (describing the formation of the Lawyers' Committee for Civil Rights Under Law and the group's legal efforts, including its move to challenge tax subsidies for segregated schools).

297 *Green*, 309 F. Supp. at 1131.

that the plaintiffs had presented "Grave Constitutional Issues" as to whether the Fifth Amendment barred federal support for such schools, even if the support were indirect via tax exemption.[298] Emphasizing that benign goals could not insulate the federal policies, the panel noted that the federal government was not simply subsidizing private discrimination—but rather supporting an effort to recreate the former Jim Crow system in the private sphere.[299]

After the first *Green* decision, in "a complete policy reversal," the IRS announced that it would no longer grant exemptions to discriminatory private schools.[300] A year later, the same three-judge panel granted a declaratory judgment and permanent injunction to the plaintiffs in *Green*.[301] The panel relied on the Internal Revenue Code to bar tax exemptions for segregation academies, noting that the Constitution strongly favored this result.[302] The Supreme Court affirmed without opinion later that year.

Unsurprisingly, the law in action differed from that announced. The new IRS policy induced by *Green* was a paper tiger. Soon after its announcement, advocates questioned its efficacy.[303] The new policy required schools simply to certify their own nondiscrimination. Three southern schools approved in the very first set of decisions under the new policy appeared to be segregation academies.[304]

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[298] *Id.* at 1133; *see also id.* at 1134–36 (concluding that "the tax benefits . . . mean a substantial and significant support by the Government to the segregated private school pattern").

[299] *Id.* at 1137.

[300] Linda Mathews, *'Racist' Schools to Lose Tax Break*, L.A. TIMES, July 11, 1970, at 1.

[301] Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[302] *Green*, 330 F. Supp. at 1157, 1164; *see also id.* at 1164–65 (reasoning that "[c]learly the Federal Government could not under the Constitution give direct financial aid to schools practicing racial discrimination" and that indirect tax subsidies were nearly indistinguishable from such financial aid).

[303] *See* Note, *supra* note 289, at 381 ("Skeptics maintained that the formal requirements resulted in a presumption that 'a private school [is] nondiscriminatory just because it says it is.'" (alteration in original) (quoting *Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools: Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 96th Cong. 479, 483 (1979) (statement of E. Richard Larson, Nat'l Staff Couns., ACLU)).

[304] Gayle Tunnell, *Tax Exemption for 3 Schools Opposed*, WASH. POST, Aug. 5, 1970, at A6. The Carter administration later met serious backlash in Congress when it announced policies aimed at actually enforcing the policy, rather than simply accepting paper certifications. *See* Olatunde C. Johnson, *The Story of* Bob Jones University v. United States*: Race, Religion, and Congress' Extraordinary Acquiescence*, *in* STATUTORY INTERPRETATION STORIES 133, 135–38 (William N. Eskridge, Jr., et al. eds., 2011).

Meanwhile, litigators had already pressed the tax subsidy question beyond schools. In 1972, a different three-judge panel in the D.C. district court went beyond the *Green* rulings, extending Green's logic from schools to private social organizations.[305] In *McGlotten v. Connally*,[306] a Black plaintiff rejected from membership by an Elks lodge in Portland, Oregon, sued the Treasury Department to challenge the tax-exempt status of the Elks organization, along with all other discriminatory fraternal orders and clubs.[307] The three-judge court held that the federal government's authorization of tax-exempt status and deductibility of contributions for discriminatory fraternal orders did "aid, perpetuate or encourage" racial discrimination and involved the government to such a degree as to violate the Fifth Amendment.[308]

Commentators worried over *McGlotten*'s sweeping implications. Yale tax law professor Boris Bittker and Kenneth Kaufman critiqued all aspects of the court's ruling, but especially its attempt "to avoid the conclusion that everyone is subject to constitutional obligations" due to the wide dispersion of tax benefits of varying forms to the public.[309] Avoiding universal application of the Constitution led the court to rely upon "ambiguous and unsatisfactory distinctions" between different types of tax treatment and subsidies, the authors argued.[310] Their critique suggested that a no-aid principle had no real stopping point once applied to the tax system.

A decade later, the issue of tax exemptions for discriminatory organizations reached the Supreme Court. The case centered on the IRS's denial of tax-exempt status to Bob Jones University, a university with a long history of discrimination against Black students and interracial couples.[311] When *Bob Jones v. United States*[312] came before the Court, it engendered upheaval in the

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305 *See generally* McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972).

306 338 F. Supp. 448 (D.D.C. 1972).

307 The Elks' constitution restricted its membership to "white male citizen[s]." *Id.* at 450 n.1.

308 *Id.* at 455–57, 459. The court also concluded that the Internal Revenue Code and Title VI barred the tax exemption for fraternal orders on grounds independent of its constitutional holding. *Id.* at 460, 462.

309 *See* Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 68–69 (1972).

310 *Id.* at 68, 74.

311 *See generally* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). A companion case involved Goldsboro Christian Schools, another private school (serving K–12 students) with a racially discriminatory admissions policy.

312 461 U.S. 574 (1983).

Reagan Administration.[313] Conservative pressure led the administration to withdraw its prior support for the IRS interpretation, and the DOJ subsequently filed a merits brief arguing against the government's prior policy.[314] The Supreme Court instead appointed William Coleman, a prominent Washington lawyer and chair of the NAACP Legal Defense & Educational Fund's board, to argue that the IRS had been correct in interpreting the Code to bar such exemptions.[315]

The Fifth Amendment backdrop for the case was clear. The Fourth Circuit had upheld the IRS view of the statute, citing "the clearly defined public policy, rooted in our Constitution, condemning racial discrimination and, more specifically, the government policy against subsidizing racial discrimination in education, public or private."[316] But the DOJ's lawyers now posited that equal protection norms simply did not apply. In *Washington v. Davis*, the Court had ruled that disproportionate race-based harms could not establish an equal protection violation standing alone, absent evidence that government officials acted with discriminatory intent.[317]

Now, the Justice Department argued that *Davis* shielded federal tax exemptions from equal protection scrutiny so long as the federal officials adopting and implementing them did not *intend* to discriminate.[318] *Norwood*, they suggested, had been overtaken by subsequent decisions if it indicated otherwise.[319] Moreover, the federal government's involvement was not significant enough to render the university's discrimination a "joint venture[ ]" under state action doctrine.[320] They also posited that tax exemptions differed from affirmative subsidies, as simply a negative "decision by Congress to refrain from collecting taxes"—mere inaction rather than active support.[321]

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313 For a detailed recounting, see Johnson, *supra* note 304, at 147–48.

314 *See* Brief for the United States at 11–13, *Bob Jones*, 461 U.S. 574 (No. 81-1) (arguing that lower courts correctly upheld IRS position denying the tax exemptions).

315 *See* William T. Coleman, Jr., Brief of Amicus Curiae in Support of the Judgments Below, *Bob Jones*, 461 U.S. 574 (No. 81-1); Matt Schudel, *William T. Coleman Jr., Barrier-Breaking Civil Rights Lawyer, Cabinet Officer, Dies at 96*, WASH. POST. (Mar. 31, 2017), https://www.washingtonpost.com/national/william-t-coleman-jr-transportation-secretary-and-civil-rights-lawyer-dies-at-96/2017/03/31/94c21ce6-1624-11e7-833c-503e1f6394c9_story.html.

316 Bob Jones Univ. v. United States, 639 F.2d 147, 151 (4th Cir. 1980), *aff'd*, 461 U.S. 574 (1983). In a footnote, the court emphasized *Norwood*'s constitutional holding: "The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race." *Id.* at 152 n.7.

317 426 U.S. 229, 238–41 (1976).

318 Brief for the United States, *supra* note 314, at 39.

319 *Id.* at 39 n.36.

320 *Id.* at 40 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77).

321 *Id.* at 40.

William Coleman and civil rights groups drew on the Fifth Amendment to defend the IRS's statutory interpretation.[322] Citing *Norwood*, Coleman wrote: "The Government has an affirmative constitutional duty to steer clear of providing significant aid to such schools."[323] He rejected the DOJ argument that *Davis* had silently overruled the no-aid principle, given that the case had addressed a situation in which *no actor* had engaged in intentional discrimination—unlike the present context, which involved overt, intentional discrimination by the beneficiaries of federal tax subsidies.[324] The Lawyers' Committee and the NAACP Legal Defense Fund went further, arguing that the Court should explicitly adopt a constitutional principle barring tax subsidies for discriminatory schools. *Norwood* required that result: "[A]ny tangible state assistance . . . is constitutionally prohibited if it has a 'significant tendency to facilitate, reinforce, and support private discrimination.'"[325] Tax exemptions could not help but fall under this principle.

The Fifth Amendment arguments alarmed certain observers, even if they agreed with the "growing consensus that the Government should not subsidize discrimination."[326] Over four hundred organizations, including some of America's largest corporations and nonprofit groups, filed an amicus brief as the "Independent Sector" coalition.[327] They argued for affirming on statutory grounds alone, concerned that a Fifth Amendment ruling might "blur the distinction between private charitable activity and government action," and thereby "imperil the very independence of the independent sector."[328] The specter of universal application of the Constitution worried others too, including a prominent *New York Times* legal affairs columnist who wrote that "all private tax-exempt groups

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[322] *See* Brief of Amicus Curiae in Support of the Judgments Below, *supra* note 315, at 9, 57–62.

[323] *Id.* at 9.

[324] *Id.* at 58.

[325] Brief of the National Ass'n for the Advancement of Colored People, et al., Amici Curiae, in Support of Affirmance at 27–28, *Bob Jones*, 461 U.S. 574 (No. 81-1) (quoting Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974)); *see also* Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae in Support of the United States at 10, *Bob Jones*, 461 U.S. 574 (No. 81-1).

[326] Stuart Taylor, Jr., *Bias and Tax Exemptions*, N.Y. TIMES, Oct. 16, 1982, at 7.

[327] Motion of Independent Sector for Leave to File Brief Amicus Curiae at 1, *Bob Jones*, 461 U.S. 574 (No. 81-1).

[328] Brief Amicus Curiae of Independent Sector in Support of Affirmance at 3, *Bob Jones*, 461 U.S. 574 (No. 81-1); Motion of Independent Sector for Leave to File Brief Amicus Curiae, *supra* note 327, at 3.

could come under the complex web of regulations and legal obligations that accompany direct Government subsidies."[329]

The *Bob Jones* Court did not take up the constitutional invitation, perhaps convinced that applying a constitutional no-aid rule to tax subsidies would go too far. Instead, the Court ruled that the Internal Revenue Code was best interpreted to deny tax-exempt status to racially discriminatory institutions. The Court thus read the constitutional argument into the statutory framework, as it had done decades earlier in cases like *Steele* and *Henderson*.

But the *Bob Jones* ruling—a statutory no-tax-aid principle—would soon be undercut by procedural restrictions. As the Court weighed in, another case was already proceeding through the courts that highlighted the precarious nature of the tax-subsidy challenges. Then captioned *Wright v. Regan*,[330] the litigation would eventually foreground the Court's concerns with permitting litigants to challenge the government's beneficence toward others—even when that beneficence meant providing federal subsidies for Jim Crow institutions. The next Part turns to that decision and similar ones limiting the reach of the newly crystallized Fifth Amendment no-aid mandate.

IV. THE EVANESCENT FIFTH AMENDMENT

The enforceable Fifth Amendment began to dissipate in the 1980s. Substantive principles did not markedly shift, despite the tensions with "intent" doctrine and Establishment Clause jurisprudence. Federal courts were unwilling to explicitly jettison the rule prohibiting the federal government from knowingly aiding intentional, systemic discrimination.

Instead, newly tightened doctrines around standing, causes of action, and related litigation hurdles undermined litigants' ability to sue the federal government for supporting discrimination, whether under the Fifth Amendment or its statutory proxies. A procedural veil fell over the constitutional debates, stifling them before deeper substantive questions could be addressed.

Several key Supreme Court rulings proved difficult to overcome: *Cannon v. University of Chicago*,[331] *Allen v. Wright*,[332] and *Heckler v. Chaney*.[333] The D.C. Circuit built upon the Court's doctrine in those cases in ways that further limited the viability of

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329 Taylor, *supra* note 326, at 1.

330 656 F.2d 820 (D.C. Cir. 1981), *rev'd sub nom.* Allen v. Wright, 468 U.S. 737 (1984).

331 441 U.S. 677 (1979).

332 468 U.S. 737 (1984).

333 470 U.S. 821 (1985).

suits enforcing the no-aid principle. Ironically, where once the modern Spending Clause civil rights statutes lent force to the Fifth Amendment arguments, now those statutes were read to insulate the federal government from direct liability for its own constitutional transgressions.

Litigants who chose to rely solely on Title VI or similar statutory claims to challenge federal support for discrimination contributed to the dynamic. Once the Fifth Amendment "illegal subsidies" claim was translated into statutory terms, it readily morphed into an argument for the federal government to do a better job of enforcing its own civil right statutes, like Title VI, against others (instead of one for the federal government to itself comply with the Constitution). Such suits were easily recharacterized as generalized attempts to force the federal government to pursue stronger civil rights enforcement, triggering courts' reluctance to interfere with administrators' decisions about how to allocate limited enforcement resources.

A. The Supreme Court Constructs New Procedural Limits

During the 1970s, the Supreme Court began restricting access to the courts using a variety of tools. Leading scholars have charted how the Court's tightening of procedural doctrines has curtailed rights enforcement.[334] While the Court's decisions formed part of a broader movement to tamp down litigation, several of those precedents made it particularly difficult for plaintiffs to challenge federal agencies' support for others' systemic discrimination.

1. Standing.

Standing doctrine, premised on Article III's limits on the federal judiciary's powers, requires a plaintiff to "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[335] In the mid-1970s, the Court began to tighten standing requirements, making it increasingly difficult for plaintiffs to challenge government's actions vis-à-vis others, even when such official acts seemed to directly bolster illegal acts.

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[334] *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

[335] *Allen*, 468 U.S. at 751.

Prior decades had seen the federal courts loosen standing requirements—now the tide shifted.[336] Of particular significance, the Court began to scrutinize the causal connection between a plaintiff's injury and the defendant's alleged illegality. Illegality that simply increased the plaintiff's risk of harm—and that was mediated by others' responses to government actions—became harder to challenge.[337] The paradigm example lay in plaintiffs' attempts to challenge lax or nonexistent regulation or enforcement by government—a recurring dispute across all fields of administrative law.[338] The question now was: Did the government's actions or inaction truly cause the plaintiff's harm, or would the plaintiff have suffered the same injury in any case, regardless of what the government did? If the latter, then a judicial remedy could not redress the plaintiff's injury.

For the Fifth Amendment no-aid principle, this newly restrictive standing doctrine suggested that plaintiffs who wished to challenge government subsidies for discriminatory institutions would have to show that absent the subsidies, the funding recipients would not have engaged in the discrimination at all. That, of course, was a demanding, inherently speculative inquiry.[339] In *Norwood*, the Court had not required any precise parsing of the role that government textbook loans played in increasing white exodus to segregation academies.[340] Now, however, such causal questions came to the forefront.

A civil rights suit provided an inroad for the Court to begin tightening causation requirements. In 1975, the Court rejected a fair housing challenge to Rochester's zoning law in *Warth v. Seldin*[341] on the grounds that the plaintiffs had failed to show that the city's restrictions on builders were linked to their own inability to find affordable housing there.[342] In the majority's view, the plaintiffs offered only "the remote possibility . . . that their situation might have been better had [Rochester officials] acted otherwise."[343]

The following year, the Court reaffirmed that "indirectness of [an] injury . . . 'may make it substantially more difficult'" to

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[336] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 227–28 (1988); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1432–33, 1441–46, 1451–55 (1988).

[337] Sunstein, *supra* note 336, at 1452, 1458.

[338] *Id.*

[339] *Id.* at 1458.

[340] *Norwood*, 413 U.S. at 465–66.

[341] 422 U.S. 490 (1975).

[342] *Id.* at 502–08.

[343] *Id.* at 507.

satisfy standing requirements, particularly causation and redressability.[344] In *Simon v. Eastern Kentucky Welfare Rights Organization*,[345] the Court ruled that indigent plaintiffs lacked standing to challenge the IRS's loosening of its rules requiring nonprofit hospitals to care for the poor; they failed to show that the weakened policy had any direct impact on their own inability to obtain care at particular hospitals.[346] Concurring only in the judgment, Justices William Brennan and Thurgood Marshall sharply disagreed. Justice Brennan pointed out where the decision might lead—specifically, to overruling precedents sustaining challenges to tax exemptions for racially segregated schools and clubs, like *Green* and *McGlotten*.[347] Justice Brennan proved prescient.

Plaintiffs' standing to challenge tax exemptions for segregated schools came before the Court less than a decade later, only a year after the *Bob Jones* decision. In *Allen v. Wright*, the Court sharply limited plaintiffs' ability to sue the federal government to ensure that the no-tax-aid principle was enforced in practice.[348] Parents of Black schoolchildren in desegregating districts had challenged the IRS's failure to strictly enforce the nondiscrimination mandate against private, tax-exempt schools; in effect, the government was helping fund segregation academies.[349]

The *Allen* majority acknowledged the illegality of federal subsidies for discriminatory private schools, citing *Bob Jones* multiple times. But Justice Sandra Day O'Connor, writing for the Court, held that the plaintiffs' pleadings did not sufficiently indicate that federal tax subsidies reduced their own ability to attend desegregated public schools.[350] Plaintiffs had not met the requirement that their injury be "fairly traceable" to the government's unlawful conduct or be redressable by a shift in that conduct because the specific impact of the tax benefits on such schools' existence, enrollment, or racial policies could not be precisely known.[351] While the Internal Revenue Code might prohibit tax subsidies for discriminatory schools, *Allen*'s outcome indicated

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344 Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 44–45 (1976) (quoting *Warth*, 422 U.S. at 505).

345 426 U.S. 26 (1976).

346 *Id.* at 32–34, 41–44.

347 *Id.* at 63–64 (Brennan, J., concurring in judgment).

348 468 U.S. 737 (1984).

349 Congress itself had blocked the agency from adopting stricter policies during the Carter administration. *See* Johnson, *supra* note 304, at 135–38.

350 *Allen*, 468 U.S. at 743–45.

351 *Id.* at 746, 757–59.

that actual enforcement of the prohibition would be left largely to executive branch discretion.

The dissenting Justices could not fathom the difference between *Allen* and prior cases like *Norwood*. Those past decisions, they argued, held that standing's causation requirement was amply satisfied in the situation of "subsidies given [to] private schools that practice racial discrimination."[352] No deference was due to the IRS's enforcement decisions when the plaintiffs alleged that the agency was "violating a specific constitutional limitation on its enforcement discretion."[353] No agency had the discretion to violate the Fifth Amendment.[354]

Justice Brennan had correctly predicted the outcome of *Allen* years earlier when the Court began to tighten plaintiffs' ability to challenge government's action or inaction directly impacting third parties. Now the Court confirmed that standing doctrine's causation and redressability requirements would limit plaintiffs' ability to sue over federal actions subsidizing discrimination.[355]

2. Private rights of action.

As the 1970s wore on, the Court also demonstrated its increasing unwillingness to recognize implied private rights of action. Even explicit legal directives are unenforceable by individuals, unless the law's text or judicial interpretation also supplies what is known as a "private right of action." Such a cause of action enables private litigants to sue to enforce constitutional or statutory rights.[356] If a law's text does not explicitly create a right of action, courts have sometimes been willing to "imply" one through interpretation.[357]

Two of the major Spending Clause civil rights statutes—Title VI and Title IX—did not expressly create private rights of action, leading to the preliminary question of whether litigants could sue to enforce them at all. In 1979, the Court affirmed in

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352 *Id.* at 786–89 (Stevens, J., dissenting); *see also id.* at 773–78 (Brennan, J., dissenting).

353 *Id.* at 793 (Stevens, J., dissenting).

354 *Id.* at 793–94 (first quoting *Norwood*, 413 U.S. at 467; and then quoting *Gilmore*, 417 U.S. at 568–69).

355 The Court later continued down the path that it started in *Allen*. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992) ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." (quoting *Allen*, 468 U.S. at 758)).

356 *See generally* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) (discussing the historical development of private rights of action as well as their purpose).

357 *See* Cort v. Ash, 422 U.S. 66, 78 (1975) (providing a four-factor framework for discerning whether "a private remedy is implicit in a statute not expressly providing one").

Cannon v. University of Chicago that private individuals could enforce both statutes against federal funding recipients.[358] In other words, individuals could sue institutions receiving federal funding over their discrimination, rather than waiting for federal agencies themselves to enforce the statutes.

However, while *Cannon* upheld the ability of those experiencing discrimination to sue *recipients* of federal funding under Title VI and Title IX, the decision came down in a period when the Court had begun to drastically limit its willingness to read such causes of action into other federal regulatory schemes.[359] Further, *Cannon*'s logic indicated that private rights of action should be recognized in part because such suits against funding recipients were preferable to litigation against the federal government itself. Those rationales subsequently led many lower courts to reject rights of action running directly against the federal government under Title VI or its analogues.[360]

As with *Allen*'s restrictions on standing, the lower courts' failure to find an implied private right of action against the federal government under the Spending Clause Civil Rights statutes meant that the executive branch would be largely free to enforce Title VI and Title IX—or not—as it chose. The statutory no-aid principle existed, but the federal government could not be required to implement it, insofar as no individual could challenge federal funding of discrimination in court.

3. Review of agency inaction.

For plaintiffs challenging federal funding for discrimination but blocked from relying upon Title VI or similar statutes, the APA offers a potential alternative. The APA supplies a default, generalized cause of action for suits alleging that federal agencies are violating the law. Suit may be brought by any "person suffering legal wrong . . . or adversely affected or aggrieved by agency action," unless a relevant statute precludes judicial review or

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358 441 U.S. 677, 688–89 (1979); *see also* Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (acknowledging *Cannon*'s holding while limiting the scope of Title VI's private right of action to challenges to intentional discrimination).

359 *See, e.g.*, Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15–16 (1979) (stating that the judicial role is limited to discerning whether Congress intended to authorize such rights of action); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (same); *see also Cort*, 422 U.S. at 80–85 (refusing to find an implied right of action under a federal criminal statute governing corporate expenditures for political campaigns).

360 *See, e.g.*, Women's Equity Action League v. Cavazos (*WEAL II*), 906 F.2d 742 (D.C. Cir. 1990). In fact, the majority opinion in *Cannon* assumed that such suits were possible while acknowledging that they might be intrusive.

"agency action is committed to agency discretion by law."[361] The agency action at issue must either be "made reviewable by statute" or represent "final agency action for which there is no other adequate remedy in a court."[362]

In 1985, the Supreme Court significantly expanded the category of agency action deemed unreviewable under the APA in a decision boding poorly for plaintiffs seeking to bring no-aid claims. In *Heckler v. Chaney*, the Court ruled that agency decisions to refuse to bring enforcement actions would be presumed unreviewable, as determinations "committed to agency discretion by law."[363] Such decisions were uniquely within administrators' competence, the majority reasoned; further, inaction did not involve coercive government interference with liberty or property.[364] Overcoming the presumption against review would be possible only if Congress indicated that it intended to allow suit and supplied meaningful standards limiting the agency's enforcement discretion.

Yet *Heckler* left open the possibility that enforcing the Fifth Amendment's no-aid principle remained viable under the APA. Then-Justice William Rehnquist, writing for the majority, acknowledged that the presumption against judicial review might not apply "where . . . the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[365] The Court cited *Adams v. Richardson*, the litigation challenging federal education officials' failure to enforce Title VI against segregated schools, as an example of such "abdication."[366] Further, the majority noted that the *Heckler* ruling did not address situations where an agency's nonenforcement itself violated constitutional rights.[367] Claims that a federal agency had violated the Fifth Amendment by willfully ignoring systemic discrimination by its funding recipients might therefore survive.

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361 5 U.S.C. §§ 701(a), 702.

362 5 U.S.C. § 704.

363 *Heckler*, 470 U.S. at 823–24, 832–35 (1985) (interpreting 5 U.S.C. § 701(a)(2)); *see also* Cass R. Sunstein, *Reviewing Agency Inaction after* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 664 (1985).

364 *Heckler*, 470 U.S. at 832.

365 *Id.* at 833 n.4.

366 *Id.*

367 *Id.* at 838.

Justice Marshall alone refused to join the *Heckler* opinion, concurring in the judgment.[368] Decades earlier, as the head of the NAACP's litigation arm, Justice Marshall led the fight against federal agencies' active support for segregation, helping craft the Fifth Amendment no-aid arguments at their origin. Now, he wrote that "the problems and dangers of agency inaction are too important" to evade scrutiny.[369]

B. The D.C. Circuit: Federal Courts Will Not Oversee the Overseer

Together, *Allen*, the post-*Cannon* cases, and *Heckler* established significant roadblocks for plaintiffs wishing to challenge federal funding for others' systemic discrimination. In a crucial series of decisions from the 1980s onward, the D.C. Circuit built upon the barriers erected by the Supreme Court. The court found no need for plaintiffs to directly challenge federal agencies, even if they overtly funded discrimination by others, so long as the plaintiffs could sue the funding recipients themselves.

The D.C. Circuit was the natural court to hear these suits, given its "special responsibility to review legal challenges to the conduct of the national government."[370] And, given the court's changing composition in this period, it was also unsurprising that it moved to constrict enforcement.

Liberal lions like Judges J. Skelly Wright, Harold Leventhal, David Bazelon, and Spottswood Robinson once dominated the court.[371] By the early 1980s, as "the last bastion of liberalism" in a federal judiciary moving steadily rightward, the D.C. Circuit faced dramatically high rates of Supreme Court review and reversal, sometimes with "harsh words of rebuke" from the Justices.[372]

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[368] *Id.* at 840 (Marshall, J., concurring in the judgment). Justice Brennan joined the majority opinion but authored a separate concurrence. *Id.* at 839 (Brennan, J., concurring).

[369] *Heckler*, 470 U.S. at 854 (Marshall, J., concurring in the judgment).

[370] John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006).

[371] *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1185 (2001); Al Kamen, *U.S. Court's Liberal Era Ending*, WASH. POST, Jan. 27, 1985, at A1.

[372] Stuart Taylor, Jr., *A Time of Transition for the No. 2 Court*, N.Y. TIMES (Sept. 8, 1982), https://perma.cc/H47T-XE8Z (quoting leading civil rights lawyer Joseph Rauh, Jr.); Stuart Taylor, Jr., *Washington's Alternate Current Crackles in the 'D.C. Circuit'*, N.Y. TIMES (Jan. 4, 1981), https://perma.cc/T55P-NKDS (referencing then-Justice Rehnquist's opinion overturning the D.C. Circuit decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978)); *see also* Roy W. McLeese III, *Disagreement in D.C.: The Relationship Between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048, 1049–50 (1984) (finding that in the 1980–

But as President Ronald Reagan appointed conservatives like Judges Robert Bork, Antonin Scalia, and Kenneth Starr to the D.C. Circuit, the court's liberals were increasingly at odds not just with the high court but with their colleagues.[373] A key divide within the D.C. Circuit centered on the legitimacy of judicial review of federal agencies' decision-making, which manifested particularly in the courts' decisions about standing. Conservatives pushed to limit standing to challenge agency actions, while liberals favored more expansive interpretations.[374] In 1986, President Reagan achieved a majority on the court, leading an observer to comment that the Republican president had "taken the most liberal court in America and turned it into the most conservative."[375]

Civil rights litigants' attempts to enforce the no-aid principle thus fit within a larger, partisan-tinged struggle over the limits of courts' power to monitor the administrative state. That procedural struggle overlapped with the broader goals of the conservative legal movement, which pushed back against the "rights revolution" of the 1960s and 1970s not just by narrowing the substantive reach of the Constitution and civil rights laws but also by attempting to limit litigation more generally.

The key D.C. Circuit cases played out on the domain of APA reviewability. Rather than rule that suits challenging federal subsidies for discrimination failed for lack of standing or that *Heckler* barred review of such administrative "inaction," the D.C. Circuit instead relied upon the APA's requirement that "no other adequate remedy in a court" be available.[376] Judges reasoned that suits against federal officials to stop the subsidies were unnecessary; so long as individuals could sue the funding recipients directly, the suit against the funding recipient provided the "adequate remedy."

1983 terms, the Court granted certiorari to review D.C. Circuit decisions three times more often than it did for the other circuits, and the Court reversed the D.C Circuit nearly four times more often).

373 *See* Nancy Lewis, *Factions' Squabbling Rocks U.S. Court of Appeals Here*, WASH. POST., Aug. 1, 1987, at A1.

374 *See* McLeese, *supra* note 372, at 1049–57 (discussing disagreement between the Supreme Court and the D.C. Circuit over "the costs and benefits of federal judicial supervision" and "federal judicial protection of the interests of the other branches of the federal government"); Patricia M. Wald, *The D.C. Circuit: Here and Now*, 55 GEO. WASH. L. REV. 718, 719–23 (1987) (discussing constricting standing doctrine).

375 Philip Shenon, *Shift Gives Reagan D.C. Circuit Majority*, N.Y. TIMES, May 24, 1986, at 7 (quoting civil rights lawyer Joseph Rauh, Jr.). Republican appointees made up two-thirds of the court by 1991. Patricia M. Wald, *". . . Doctor, Lawyer, Merchant, Chief"*, 60 GEO. WASH. L. REV. 1127, 1128 (1992).

376 5 U.S.C. § 704.

Thus, the theory that the Fifth Amendment's equal protection mandate constrained federal officials from subsidizing others' discrimination fell away. Instead, the judges characterized the legal problem as one of federal officials enforcing statutory civil rights mandates against others, a framing that suggested officials could use their discretion to decide whether or not to enforce Title VI and its analogues at all.

The D.C. Circuit's movement to halt plaintiff suits attacking federal subsidies for discrimination began with *Council of & for the Blind of Delaware County Valley, Inc. v. Regan*.[377] In 1976, a group of minority organizations and individuals had sued the Treasury for failing to enforce statutory antidiscrimination requirements attached to federal revenue-sharing funds.[378] In this new suit, originally captioned *Committee for Full Employment v. Blumenthal*,[379] the plaintiffs argued that the Treasury Department's Office of Revenue Sharing had refused to act on their complaints alleging discrimination by the recipient local governments, thereby defaulting on Treasury's statutory obligations to ensure nondiscrimination in the programs it funded.[380] The plaintiffs appeared to model their suit on *Adams v. Richardson*, the NAACP litigation challenging federal education officials' refusal to enforce Title VI desegregation mandates against southern schools, which remained ongoing.

The D.C. Circuit initially gave the green light to the suit in 1979, just before the court's composition began to shift. The district court had refused to find standing, emphasizing *Simon*'s constraints on third-party challenges to governmental failures to enforce legal mandates against others.[381] But the D.C. Circuit reversed, ruling that the plaintiffs had sufficiently alleged injury via violations of their procedural rights, as the agency failed to follow its own regulations regarding the required investigations.[382] Further, the panel suggested that plaintiffs might well be able to show that termination of federal funds would in fact force the recipient governments to halt their discrimination, satisfying the causation and redressability requirements for their substantive injuries.[383] The precedents of the 1970s weighed in their

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377 709 F.2d 1521 (D.C. Cir. 1983) (en banc).

378 *Id.* at 1524.

379 606 F.2d 1062 (D.C. Cir. 1979).

380 Comm. for Full Emp. v. Blumenthal, 606 F.2d 1062, 1065 (D.C. Cir. 1979) *aff'd sub nom. Council of & for the Blind*, 709 F.2d 1521.

381 *Blumenthal*, 606 F.2d at 1063–65.

382 *Id.* at 1065.

383 *Id.* at 1066.

favor—after all, the plaintiffs' theory was just another iteration of suits like *Adams* and *Gautreaux* challenging federal government support for unconstitutional discrimination.[384]

Three years later, however, a sharply divided en banc majority viewed matters differently, with a single vote from then-Judge Ruth Bader Ginsburg deciding the outcome.[385] After the first decision in the suit, Congress had amended the Revenue Sharing Act to include an explicit private right of action against the funding recipients but not federal agencies themselves.[386] That legislative move now the cast plaintiffs' efforts in a distinct light.

The *Council of & for the Blind* majority held that neither the Revenue Sharing Act nor the APA gave the plaintiffs the right to sue the federal agencies providing funding. As to the Revenue Sharing Act, the majority cited evidence that Congress feared that subjecting the federal government to suit would render it "a defendant in every civil rights case involving revenue sharing funds," straining its enforcement capacity.[387] Further, the APA's general cause of action was available only where "no other adequate remedy in a court" could be had.[388] The majority concluded that litigation against the funding recipients sufficed.[389] No suit need lie against the federal agencies, even if they knowingly funded others' discrimination.

In fact, the en banc majority warned against allowing individuals to sue over an agency's nationwide civil rights policy. That could "empower one district judge to act as supreme supervisor of the [agency]'s enforcement activities—a role more appropriately reserved for the Executive under the oversight of Congress."[390] Finally, the majority characterized the plaintiffs' Fifth Amendment claim as simply a procedural challenge to the agency's "failure to process their discrimination complaints in the manner required by the Revenue Sharing Act," which did not involve any cognizable constitutional claim at all.[391]

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384 Citing *Adams* and *Gautreaux*, the court noted that "[c]ourts on several occasions have granted relief to plaintiffs who sought to compel administrative fund termination or other civil rights enforcement activities under [similar] statutes." *Id.* at 1066 n.19.

385 *Council of & for the Blind*, 709 F.2d at 1521. Then-Judge Ruth Bader Ginsburg provided the key vote to a bloc of conservatives, including then-Judge Antonin Scalia and Judge Robert Bork.

386 *Id.* at 1524.

387 *Id.* at 1529 (emphasis omitted) (quoting H.R. REP. NO. 94-1165, pt. 1, at 112 (1976).

388 *Id.* at 1531 (emphasis omitted) (citing 5 U.S.C. § 704).

389 *Id.* at 1531–33.

390 *Council of & for the Blind*, 709 F.2d at 1532.

391 *Id.* at 1533.

Judge Spottswood Robinson wrote for the dissenters. Decades earlier as an NAACP lawyer, Judge Robinson had argued before the Supreme Court in *Brown*.[392] He knew the stakes of holding the national government accountable for funding discrimination. Judge Robinson argued that APA review should be available if the plaintiffs successfully certified a class. Individual suits against "the many thousands of" funding recipients would not adequately substitute for litigation challenging the agency's "cho[ice] to dispense huge sums in flagrant violation of statutory procedures implementing the nondiscrimination commands of the Act."[393] It was that ability to shift nationwide policy that was key to civil rights' groups strategy in enacting Title VI and its analogues in the first instance, as well as in suing to force federal agencies to implement them.

To Judge Robinson, the majority's decision left the agency "completely free to ignore the requirements of the Act" and "wholly insulated from judicial review; indeed, it may close its eyes to allegations of discrimination, and dispense vast sums of shared revenues to the very entities about which citizens complain."[394] The court had turned its back on holding federal agencies accountable for their role in fueling discrimination, a sharp divergence from cases like *Adams* and *Green* in which the judiciary had "unhesitantly"[395] enforced the no-aid principle.

Seven years later, another D.C. Circuit panel affirmed *Council of & for the Blind* in a similarly structured suit. The case, *Coker v. Sullivan*,[396] did not involve civil rights or the background Fifth Amendment principle barring federal support for discrimination. Instead, homeless families sued to force the Department of Health and Human Services to properly monitor states' denials of emergency assistance within programs relying upon federal funding.[397]

Then-Judge Ruth Bader Ginsburg wrote for the panel, rejecting the claims for lack of standing and the absence of an APA cause of action. The court's prior decision in *Council of & for the Blind*, she explained, reflected federal judges' desire to avoid monitoring all federal agency enforcement.[398] The APA mandated that "if other remedies are adequate, federal courts will not

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[392] *See Brown*, 347 U.S. at 484 (listing then-attorney Robinson as counsel in cases numbered 1, 2, 4, and 10).

[393] 709 F.2d at 1548–49 (Robinson, C.J., concurring in part and dissenting in part).

[394] *Id.* at 1550–1552, 1552 n.85.

[395] *Id.* at 1552.

[396] 902 F.2d 84 (D.C. Cir. 1990).

[397] *Id.* at 85–87.

[398] *Id.* at 89.

oversee the overseer."[399] *Heckler* buttressed their conclusion that "judges are not well positioned to guide agency enforcement" of such statutory mandates.[400]

A month later, then-Judge Ruth Bader Ginsburg again wrote for a D.C. Circuit panel to kill off the sprawling, decades-long *Adams* litigation on similar grounds.[401] Now captioned as *Women's Equity Action League v. Cavazos* (*WEAL II*),[402] the *Adams* litigation had "expanded to colossal proportions."[403] By the late 1970s, the suit had grown to cover not just Title VI and race discrimination, but also sex discrimination under Title IX and disability discrimination under Section 504. A 1977 consent decree put the D.C. District Court in the position of overseeing the Department of Education's civil rights enforcement across the entire nation.[404]

An earlier *WEAL*[405] panel in 1989 had upheld standing, distinguishing *Allen v. Wright* on the ground that the student plaintiffs in the present litigation alleged "direct injury" from being enrolled in discriminatory institutions receiving federal funding.[406] Then-Judge Ruth Bader Ginsburg, writing for that *WEAL I* panel, cited prior D.C. Circuit decisions like *Committee for Full Employment*, *Velde*, and *Adams* for the proposition that "federal funding of facilities that engage in proscribed discrimination is in part causative of the perpetuation of such discrimination."[407]

But now the *WEAL II* court ruled that even if the plaintiffs had standing, neither Congress nor the Constitution had authorized such suits. No cause of action existed under the civil rights statutes, the APA, the Mandamus Act,[408] or the Constitution for what the court described as an attempt to obtain "across-the-board continuing federal court supervision of the process by which the agencies ensure compliance with the antidiscrimination

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399 *Id.*

400 *Id.* at 88–90.

401 *See generally WEAL II*, 906 F.2d 742. Then-Judge Ruth Bader Ginsburg's vote in *WEAL II* proved politically controversial. *See* Martin D. Ginsburg, *Some Reflections on Imperfection*, 39 ARIZ. ST. L.J. 949, 953–54 (2007) (describing women's organizations' original antipathy toward Justice Ginsburg's nomination to the Supreme Court and linking it to her *WEAL II* decision).

402 906 F.2d 742 (D.C. Cir. 1990).

403 *Id.* at 744.

404 *Id.* at 745.

405 Women's Equity Action League v. Cavazos (*WEAL I*), 879 F.2d 880 (D.C. Cir. 1989).

406 *Id.* at 884–85.

407 *Id.* at 885–86.

408 Pub. L. No. 87-748, 76 Stat. 744 (1962) (codified at 28 U.S.C. § 1361).

mandates."[409] In contrast to the plaintiffs' sweeping allegations, key 1970s decisions like *Gautreaux* and *Shannon* had involved only "situation-specific suits against the federal agency based on federal funding of a particular project or district."[410]

Cannon, the panel wrote, expressed disapproval of "suit[s] against the government to terminate federal funding"—even as it approved an implied private right of action against the discriminating fund recipients.[411] None of the court's own decisions recognized an implied right of action under Title VI that could run against federal agencies.[412] Possibly leaving a small opening for future suits, the court seemed to distinguish instances where the federal agency was charged "as provider of financial assistance, with facilitating or encouraging a specific fund recipient's discrimination."[413] Perhaps litigation that did not challenge a federal agency's entire civil rights enforcement wholesale, but instead focused on specific recipients and suggested active federal "facilitation" of discrimination could still squeeze through.

In the *WEAL II* panel's view, *Council of & for the Blind* controlled the question of an APA cause of action. None existed because an adequate remedy existed in suits against the funding recipients themselves. Again, the court relied on *Cannon* as indicating that Congress preferred to authorize only such suits, not suits against federal agencies themselves.[414] It did not matter that piecemeal suits against individual recipients of federal funding would likely "be more arduous" and "less effective" as a means to challenge overall national policy.[415]

Regarding the Fifth Amendment claim, the *WEAL II* panel reasoned that no substantive Fifth Amendment equal protection principle was at stake, simply a right to adequate procedure: "[A]n agency's failure to process discrimination complaints in the manner required by federal statutes and regulations does not deprive complainants of constitutional rights."[416]

In subsequent years, the barriers hardened with a trilogy of D.C. Circuit decisions that confronted moves to enforce the no-aid principle from the right. Liberal judges now wrote for the court, citing *Council of & for the Blind* to shut down such litigation.

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409 *WEAL II*, 906 F.2d at 748.
410 *Id.* at 749.
411 *Id.* at 749–50.
412 *Id.* at 748–49 (discussing *Council of & for the Blind* and *Coker*).
413 *Id.* at 750.
414 *WEAL II*, 906 F.2d at 751.
415 *Id.*
416 *Id.* at 752.

Conservatives and liberals seemingly agreed that there was no place for the judiciary in monitoring federal agencies' compliance with the no-aid principle.

In 1993, in *Washington Legal Foundation v. Alexander*,[417] white students brought suit to force the Department of Education to issue regulations prohibiting federally funded institutions from offering scholarships demarcated for racial minorities, arguing that such scholarships were a form of unlawful discrimination under Title VI.[418] For those who argued that a supposedly colorblind Constitution barred any form of affirmative action, Title VI would also bar any institution receiving federal funds from operating such programs.

Judge Harry Edwards, once a dissenter in *Council of & for the Blind*, now wrote for the panel to reject the suit, reasoning that *Council of & for the Blind* and *WEAL II* doomed the plaintiffs' claims. The *Washington Legal Foundation* plaintiffs tried to evade those decisions' force by relying on *Adams v. Richardson* (and *Heckler*'s saving reference to it). Their claim was distinct, they posited, because they had alleged the Department of Education's express abdication of its statutory duties.[419] In response, the D.C. Circuit panel narrowed *Adams*' significance still further. Judge Edwards noted that *Adams* had involved the department's refusal to take enforcement action after its own express findings of discrimination.[420] Without such express agency findings, *Adams* simply had no force—meaning that such suits would be possible in only the rare instance when an agency was transparent enough to explicitly find violations of Title VI while nonetheless refusing to do anything in response.

Adams suffered another blow the next year, when another liberal D.C. Circuit judge authored a panel decision rejecting a right-of-center group's attempt to challenge federal Title VI policy. In *Freedom Republicans v. Federal Election Commission*,[421] the plaintiffs argued that the Republican National Party's

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417 984 F.2d 483 (D.C. Cir. 1993).

418 *Id.* at 484–85.

419 *Id.* at 487.

420 *Id.* at 487–88. The decision exemplifies a prevailing approach to the *Heckler* "abdication exception" in which courts refuse to find APA review available unless the agency has explicitly stated a general policy of nonenforcement in a formal guidance or rule. *See* Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994); Andrew Shi, Comment, *Reviewing Refusal: Lethal Injection, the FDA, and the Courts*, 168 U. PA. L. REV. 245, 259–61 (2019). Other courts refuse to find abdication where any level of enforcement occurs, no matter how slight. *See* Jentry Lanza, Comment, *Agency Underenforcement as Reviewable Abdication*, 112 NW. U. L. REV. 1171, 1179–80 (2018).

421 13 F.3d 412 (D.C. Cir. 1994).

delegate allocation scheme discriminated against racial minorities.[422] Because the Federal Election Commission helped fund the Republican National Convention, the plaintiffs argued that the agency must enforce Title VI, halt the funding, and issue regulations governing the political parties it funded.[423] Judge Wald relied on *Simon* and *Allen* to conclude that the plaintiffs had failed to show that the federal funding had any impact on the Republicans' delegation-selection system, or that threatening to withhold funding would lead the party to change the selection system. Thus, standing was foreclosed.[424] Distinguishing *WEAL I*, *Velde*, and *Adams*, which allowed such litigation to proceed, Judge Wald wrote that the Supreme Court's more recent standing decisions had undermined them.[425]

A decade later, Judge Edwards again rejected conservatives' attempt to rely upon the no-aid principle in *National Wrestling Coaches Ass'n v. Department of Education*.[426] Organizations of men's college wrestling coaches, athletes, and alumni had sued the Department of Education to challenge the agency's Title IX guidance, which they argued led colleges to cut men's wrestling programs to achieve greater gender parity in athletics. They claimed that the Department's interpretation amounted to reverse discrimination against men, conflicting with Title IX and the Fifth Amendment's equal protection guarantee as well as reflecting an *Adams*-style abdication of the agency's Title IX enforcement responsibilities.[427] Citing *Warth*, *Simon*, and *Allen*, Judge Edwards ruled that the plaintiffs lacked standing.[428] Colleges might still cut men's wrestling even if the agency were to withdraw its guidance.[429]

Judge Edwards also ruled that APA review was unavailable under *Washington Legal Foundation*, *WEAL II*, and *Council of & for the Blind*. Under *Washington Legal Foundation*, the decision that he had authored a decade earlier, suit was "plainly barred": no APA cause of action was available, and the *Adams* abdication

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422 *Id.* at 412.

423 *Id.* at 414–15.

424 *Id.* at 418–19.

425 *Id.* at 416–17 (emphasizing that *Lujan* required "more exacting scrutiny" of causation).

426 366 F.3d 930 (D.C. Cir. 2004), *abrogated on other grounds by* Perry Cap. LLC v. Mnuchin, 864 F.3d 591 (D.C. Cir. 2017).

427 *Nat'l Wrestling Coaches Ass'n*, 366 F. 3d at at 934–36.

428 *Id.* at 938.

429 *Id.* Prior D.C. Circuit decisions, like *Freedom Republicans*, required "formidable evidence" of causation in challenges to government treatment of third parties. *Id.* at 942.

claim was viable only when the agency had continued funding after expressly finding discrimination by the funding recipient.[430]

Reversing the usual ideological divide, Judge Stephen Williams, a prominent conservative jurist, dissented, arguing that the plaintiffs had met standing's causation and redressability requirements. Judge Williams argued that *Warth*, *Simon*, and *Allen* turned only on the plaintiffs' failure to plead adequate facts supporting those requirements, rather than on "the theoretically speculative nature of their claims."[431] Moreover, suits against the individual colleges did not provide a remedy sufficient to preclude APA review, as the plaintiffs wanted the Department of Education to engage in new rulemaking, revising its interpretation of Title IX for the nation as a whole.[432] Judge Williams thereby recognized what civil rights plaintiffs had long understood: forcing federal agencies to comply with the Fifth Amendment as a matter of broad national policy was a much more important goal (and of distinct constitutional significance) than halting discrimination by a single funding recipient.

Thus, Democratic appointees like Judges Edwards and Wald emphatically shut the door to litigants seeking colorblindness in federally funded programs,[433] contesting policies surrounding the selection of delegates,[434] or challenging "gender proportionality" in federally funded universities' athletics.[435] By the time of *National Wrestling Coaches Ass'n*, conservative and liberal judges had nearly switched stances, with Judge Williams, a Reagan appointee, arguing in dissent for a more lenient application of standing doctrine.[436]

With this final set of D.C. Circuit decisions, *Adams* also lost most of its remaining practical power as a precedent for litigants to challenge the federal government's application of the no-aid principle. Many observers probably did not mourn the demise of the *Adams* litigation. The litigation had been characterized as spinning out of control, permitting a court to micromanage an agency's entire federal civil rights enforcement over many years and leading even Democratic appointees to complain of its burdens.[437]

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[430] *Id.* at 945–47.

[431] *Nat'l Wrestling Coaches Ass'n*, 366 F. 3d at 955–56 (Williams, J., dissenting).

[432] *Id.* at 958.

[433] *Wash. Legal Found.*, 984 F.2d at 487–88.

[434] *Freedom Republicans*, 13 F.3d at 419.

[435] *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 942.

[436] *See id.* at 951 (Williams, J., dissenting).

[437] *See, e.g.*, HALPERN, *supra* note 205, at 94–153, 308–09; JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 148–81 (1989); Kenyon D.

C. Title VI in Other Courts

Across the country, other courts also confronted the question of whether Title VI and its sibling statutes authorized private rights of action against federal agencies to challenge agency funding of discrimination. Two general approaches emerged. The less restrictive position recognized a cause of action against federal agencies in instances "where plaintiffs allege that the agency itself has violated the federal statute."[438] Or, as the Second Circuit put it, quoting *Adams*:

> [I]n narrow circumstances involving allegations that the agency has "consciously and expressly" abdicated its enforcement duties, that the agency is using improper procedures for approving funded programs, that it acquiesced or actively participated in discriminatory practices, or that it has wrongly refused to pursue further action when efforts to achieve voluntary compliance have failed.[439]

Others took a harder line, similar to that of the D.C. Circuit in *WEAL II*, rejecting the right of action as a general matter. In some of those instances, the courts confronted an individual litigant seeking to challenge the federal agency's resolution of its complaint against a funding recipient for a particular incident of discrimination—rather than confronting allegations of intentional federal support for known, systemic discrimination throughout a funded program.[440] In those less-compelling, one-off circumstances, it is unsurprising that courts rejected the claim. But other courts flatly rejected the cause of action even in cases involving more systemic discrimination by the funding recipient.[441]

Thus, in a few places, precedent might allow for a suit alleging that the federal government had violated Title VI or other

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Bunch & Grant B. Mindle, *Judicial Activism and the Administration of Civil Rights Policy*, 1993 BYU EDUC. & L.J. 76, 77–78.

438 Little Earth of United Tribes v. HUD, 584 F. Supp. 1292, 1297 (D. Minn. 1983).

439 Marlow v. U.S. Dep't of Educ., 820 F.2d 581, 583 (2d Cir. 1987) (per curiam) (first citing *Adams*, 480 F.2d at 1162; then citing *Shannon*, 436 F.2d at 820; then citing *Gautreaux*, 448 F.2d at 740; and then citing Hardy v. Leonard, 377 F. Supp. 831 (N.D. Cal. 1974)); *see also* Davis v. Ball Mem'l Hosp. Ass'n, 640 F.2d 30, 46–47 (7th Cir. 1980) (noting that a right of action is available when "federal agencies not only failed to meet an enforcement obligation, but actually declined to act in the face of clear wrongdoing at the state level").

440 *See, e.g.*, Salvador v. Bennett, 800 F.2d 97, 98–99 (7th Cir. 1986); Scherer v. United States, 241 F. Supp. 2d 1270, 1286–88 (D. Kan. 2003).

441 *See, e.g.*, Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 191 (4th Cir. 1999); NAACP v. Med. Ctr., Inc., 599 F.2d 1247, 1254 n.27 (3d Cir. 1979); Cmty. Bhd. of Lynn, Inc. v. Lynn Redevelopment Auth., 523 F. Supp. 779, 780–82 (D. Mass. 1981).

Spending Clause civil rights statutes by knowingly funding discrimination. But that opening for litigation is slim at best.

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Civil rights advocates had labored for decades to establish a key constitutional principle: the federal government should not use its vast Spending Clause powers to entrench apartheid in the United States. That ideal represented the advocates' attempt to harmonize the New Deal state's signature set of social programs (backed by federal dollars but implemented by state and local officials) with the Reconstruction Amendments' promise of racial equality. In doctrinal terms, it meant that the Fifth Amendment barred federal approval of, participation in, and subsidies for racial segregation and other forms of discrimination—a no-aid principle.

Despite initial skepticism, federal courts and policymakers embraced this proposition as black-letter law by the end of the 1970s. Over the next decade, though, procedural obstacles proliferated. Some obstacles represented a broader trend toward restricting litigation access—as with the Supreme Court's limitations on standing and the availability of statutory review under the APA—while other decisions focused specifically on limiting review under the Spending Clause civil rights statutes. The D.C. Circuit amplified the obstacles to Fifth Amendment enforcement, and other courts ruled similarly.

In the present, that procedural gauntlet means that plaintiffs generally cannot use the APA or Spending Clause civil rights statutes to challenge the federal government's funding of discrimination by others, even when that discrimination is systemic, intentional, and well-known to federal officials. Federal civil rights policy across the scope of federally funded programs is largely immune to judicial oversight. The primary exception may be for the constitutional claim itself. Litigants might be able to bring a Fifth Amendment no-aid claim for injunctive relief against federal officials themselves, under the doctrine of *Larson v. Domestic & Foreign Commerce Corp.*[442] However, plaintiffs would still need to

[442] 337 U.S. 682 (1949). Shortly after its decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court endorsed a similar action for Fifth Amendment equal protection claims. *See* Davis v. Passman, 442 U.S. 228, 248–49 (1979). It is highly unlikely, though, that courts would sanction a *Bivens*-type damages action against officials for Fifth Amendment no-aid claims, given the Court's more recent trend of rejecting *Bivens* claims in new contexts. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1857–63 (2017) ("[T]he Court has made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009))).

overcome the standing hurdles created by *Allen*, and the available relief would be limited.

Profound substantive questions persist regarding how far the Constitution goes in limiting federal Spending Clause programs from aiding discrimination. Still more questions remain open regarding the federal government's remedial responsibilities for funding past discrimination. Yet procedural barriers have prevented those debates from occurring. The substantive law itself remains frozen—preserved in decades-old decisions that suggest strong constitutional restraints and responsibilities but have yet to be seriously tested. The next Part probes the reasons for that constitutional silence and its significance for the United States in the present.

V. CONSTITUTIONAL SILENCE

Why did courts stop enforcing the Fifth Amendment no-aid principle, and why does it matter? This Part argues that the federal courts withdrew from enforcing the no-aid principle for multiple, interrelated reasons.

First, as conservatives moved to restrict equal protection jurisprudence, courts faced an increasingly challenging set of doctrinal concerns regarding the no-aid principle. Dismissing such claims on procedural grounds allowed judges of all ideological stripes to avoid looming, difficult questions of constitutional substance.

Second, by the 1980s, sustained backlash to judicial "activism" left courts fatigued and doubtful about their capacity to monitor other governmental institutions. The scope of the federal government's sweeping Spending Clause programs added to courts' reluctance to intervene.

Third, judges and other legal actors seemed to have forgotten—or repressed—the ways in which the federal government had actively aided Jim Crow as well as civil rights advocates' long-term struggle to use the Constitution to block that aid. In fact, the enactment of Title VI and its analogues seems to have aided the process of forgetting, allowing the federal government to be framed as an enforcer of civil rights—not a potential violator in its own right.

Together, those factors made it easy for courts to withdraw and for the no-aid principle to slip into disuse. But the resulting constitutional silence is costly. Some costs are inflicted on the law itself, by preventing litigants from challenging federal agencies' past and present use of federal funds to support systemic discrimination. Obscuring the Fifth Amendment claims also damages our

nation's ability to debate key constitutional principles on the merits. It makes it easier to forget the federal government's long history of involvement in racial apartheid and the civil rights campaigns that challenged that federal complicity. The idea that our fundamental law might require federal action to repair those harms goes undiscussed.

Reckoning with the Fifth Amendment would be difficult and fraught. For liberals in particular, engaging with the Fifth Amendment no-aid principle would lay bare significant tensions within some of legal liberalism's proudest twentieth-century accomplishments: the New Deal state, the Warren Court's constitutional revolution, and the Civil Rights Act of 1964. Liberals have no easy path to resolve those tensions.

But the costs of silence are even greater. At the very least, the principle should be considered and debated on the merits, rather than left to wither on procedural grounds. Even if the courts again decide that they are incapable of actively enforcing the Fifth Amendment norm, they should leave space for the political branches and the polity as a whole to engage with the norm. It behooves all of us to consider how best to constrain the Spending Clause power and how the nation might begin to remedy the long history of federal aid for discrimination.

A. Why the Courts Withdrew

For a brief period of time, courts emphatically announced and enforced a Fifth Amendment principle that constrained the federal government. When they stopped, it does not seem that federal judges had come to believe that subsidizing others' discrimination was lawful; nor had the federal government stopped such subsidies. Rather, a multitude of other dynamics came into play, as I discuss below.

1. Substantive doubts.

By the late 1980s, courts faced an increasingly challenging set of doctrinal concerns regarding the no-aid principle. Procedure allowed an alternative route to resolve those looming constitutional problems, enabling courts to squelch the Fifth Amendment principle without needing to say so.

In the prior decade, the conservative legal movement—with support from centrist and right-leaning jurists—successfully

restricted the scope of equal protection doctrine.[443] In *Washington v. Davis* and subsequent decisions, the Supreme Court limited equal protection doctrine to instances of "intentional" discrimination, suggesting that proof of intent would require a showing that the actor affirmatively wished to harm racial minorities or other protected groups.[444] Conservatives used *Davis* to argue that even knowing federal support for intentional segregation or discrimination—if it did not reflect malevolent intent by federal officials themselves—did not violate equal protection.[445] That position threatened to vitiate the no-aid principle by insulating any federal subsidy that rested on benign programmatic goals, so long as federal officials did not manifest overtly racist purposes in allowing federal funds to flow to discriminatory programs.

Another strand of equal protection doctrine restricted the Court's previous generous reading of state action doctrine. While the *Norwood* Court had no difficulty identifying the provision of free textbooks as a form of state action supporting segregation academies, lurking in the background of the no-aid rule was whether programs of general aid might not qualify as state action at all. In *Bob Jones*, DOJ attorneys raised this objection, suggesting that tax subsidies did not enlist the government as a "joint venturer" in the taxpayer's discrimination.[446] Though the Court did not adopt this reasoning, its ongoing restriction of state action doctrine in other cases boded poorly for the no-aid rule, just as *Davis* did.

But no court ever drew upon intent doctrine, or state action principles, to reject the no-aid rule outright. Even for conservative courts, ruling that the Constitution allows the national government to fund systemic discrimination might have gone too far. That would amount to stating that it had been perfectly legitimate for the federal government to help build and operate Jim Crow housing, schools, universities, and hospitals. At a visceral level, such a declaration would be shocking—at odds with the canonization of *Brown* and its formal equality mandate.

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443 On the movement's emergence, see generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

444 *Davis*, 426 U.S. at 238–41 (1976); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279–80 (1979).

445 *See* Brief of the United States, *supra* note 314, at 40.

446 *Id.* Years earlier, in the tuition voucher cases, lower courts clarified that actions seeking to challenge government subsidies are, of course, challenges to government action. Therefore, the state action puzzle should arise only when the litigant seeks to constrain private actors themselves, rather than simply stop the government from providing funding. *See supra* notes 184–86 and accompanying text.

Nonetheless, judges that subscribed to the core idea that the Constitution barred the government from funding de jure segregation likely questioned the broader implications of the no-aid principle. The courts that initially shaped the no-aid principle did not necessarily consider how far such a principle might reach, preoccupied as they were with a singular dilemma—how to transition away from Jim Crow and overcome overt defiance of *Brown* by states like Mississippi.[447] Later, the no-aid principle's potential scope became clear—that it could reach as far as the entire tax system and make the federal courts responsible for monitoring civil rights enforcement across the entire executive branch.[448]

The potential sweep of the no-aid principle made it less likely that conservatives and centrists would simply find a way to reconcile the doctrine with cases like *Davis*. Nor would it have been easy to address the principle's outer reaches without vitiating the entire principle. That would require finding defensible stopping points—either a point at which financial aid is too neutral or de minimis to police or a point at which knowing funding of systemic discrimination would equate to intentional discrimination. The courts' Establishment Clause jurisprudence had already demonstrated how difficult it was to define clear lines to use in restricting government funding.

As conservatives reshaped substantive equal protection doctrine, liberals, for their part, must have read the writing on the wall. Why engage in constitutional battles over the Fifth Amendment if the direction of equal protection doctrine indicated that they would almost certainly lose? Given deep ideological disputes over the nature of discrimination itself, some may have concluded that enforcing the principle would be counterproductive in a judiciary moving rightward. When conservatives sued to bar federal support for minority-targeted college scholarships in *Washington Legal Foundation*, or to prevent enforcement of gender equity in college sports in *National Wrestling Coaches Ass'n*, it became clear that a mandate to halt federal aid for discrimination could be used to block progressive initiatives.[449] Procedural avoidance offered a means to stem liberal losses without wholesale defeat.

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447 *See supra* Part II.C; *supra* Part III.A. For one account of that resistance, see generally ERLE JOHNSTON, MISSISSIPPI'S DEFIANT YEARS, 1953-1973: AN INTERPRETIVE DOCUMENTARY WITH PERSONAL EXPERIENCES (1990).

448 *See supra* Part III.B (discussing tax subsidy cases and critical responses); *supra* Part IV.B (discussing D.C. Circuit cases expressing fear of sweeping judicial oversight).

449 *See Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 933–36; *Wash. Legal Found.*, 984 F.2d at 484–85.

2. Backlash and judicial fatigue.

In the 1980s, courts embraced procedural doctrines restricting access to litigation—reflecting a widespread sense that the courts had taken too prominent a role in social reform—with equivocal results. Backlash to "activist" judicial interventions had built for decades. The Warren Court's jurisprudence had inspired courts increasingly to issue orders overhauling how major institutions operated, in order to redress and prevent rights violations, in what were known as "structural injunction[s]."[450] Over time, political attacks, along with disappointment regarding the outcomes of structural reform litigation, fueled legal observers' doubts about sweeping judicial interventions and oversight of executive officials. Critiques came from the left as well as the right, challenging whether courts could or should attempt to mandate social reforms.[451]

As more conservative judges populated the federal courts, they led the retreat from active judicial oversight of other institutions.[452] And as critique grew of judicial intervention via injunction, conservative figures were particularly likely to take this view.[453] That pattern describes the trajectory of decisions in the Supreme Court and the D.C. Circuit regarding issues such as standing. By the 1980s, both the Supreme Court and the D.C. Circuit were moving rightward.[454] The Supreme Court moved right first, producing conflict with the D.C. Circuit for a period, often over federal courts' intervention in administrative decisionmaking.[455] Withdrawal from active oversight of federal agencies' compliance with the no-aid principle fit within the larger

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450 *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 9 (1978). *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

451 *See generally* ALEXANDER M BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). *See also* Liu, *supra* note 215, at 718, 732 (discussing the Court's apparent "impatience with remedial intervention" and "impatience and exasperation with the decades-long project of school desegregation" by the early 1990s).

452 *See* Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319, 327 (1989) (noting that President Reagan had appointed 47% of active federal judges and sought judges who shared his skepticism toward "judicial legislation of new rights").

453 *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 421 (2d ed. 1977) (critiquing the Supreme Court for revising the Constitution "under the guise of interpretation").

454 *See* Wald, *supra* note 375, at 1150.

455 *See* McLeese, *supra* note 372, at 1059–60, 1060 n.72; Kamen, *supra* note 371; Shenon, *supra* note 375.

dynamic, as the D.C. Circuit gradually aligned itself with the Supreme Court in restricting judicial oversight of administrators.[456]

Even some less conservative judges who might have been sympathetic to the Fifth Amendment norm probably perceived the difficulty of overseeing the entire executive branch's compliance with the norm to be inordinate, likely to wield only uncertain benefits, and, hence, a misguided use of the courts' political capital. The D.C. Circuit took great pains to emphasize that it would not "oversee the overseer," suggesting that some federal judges saw the task of addressing federal agencies' compliance with the no-aid mandate as one of unmanageable scope.[457] The *Council of & for the Blind* en banc majority warned that plaintiffs sought "the broadest possible continuing supervision of an Executive agency by a court . . . the type of judicial activity which has produced condemnation of the courts for overstepping their proper role."[458] As Professors Cristina Ceballos, David Engstrom, and Daniel Ho point out, then-Judge Ruth Bader Ginsburg herself in *WEAL II* heavily emphasized the "metastatic tendencies" of such litigation.[459]

3. Forgetting—and reframing—the federal government's role.

As the courts increasingly cited procedural obstacles to enforcing the no-aid norm, judges and other legal actors seemed to have forgotten, or repressed, the ways in which the federal government had actively aided Jim Crow. They also lost sight of civil rights advocates' long-term struggle to use the Constitution to block that aid.

Statutory success in enacting Title VI and subsequent statutes barring discrimination in programs enacted under Spending Clause authority fueled that amnesia. In cases falling within the Spending Clause civil rights statutes' scope, judges stopped referencing the underlying constitutional norm.[460] At a minimum, in cases

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[456] *See* Patricia M. Wald, *Harold Leventhal Talk: Thirty Years of Administrative Law in the D.C. Circuit*, DC BAR (July 1, 1997), https://perma.cc/4RU2-EULW; Wald, *supra* note 374, at 719–23.

[457] *Coker*, 902 F.2d at 89; *see also WEAL II*, 906 F.2d at 748 (quoting same phrase from *Coker*); Sunstein, *supra* note 363, at 660–61 (describing Supreme Court's "skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries" as manifested in decisions like *Allen* and *Heckler*).

[458] *Council of & for the Blind*, 709 F.2d at 1533.

[459] Ceballos et al., *supra* note 6, at 48.

[460] *See, e.g.*, *WEAL II*, 906 F.2d at 752 (characterizing the constitutional issue as simply a procedural failing by the agency); *Council of & for the Blind*, 709 F.2d at 1533–34 (same).

involving intentional race and national origin discrimination in federally funded programs, existing Fifth Amendment jurisprudence formally barred federal aid. But courts viewed attempts to force the federal government to implement Title VI as if they had nothing to do with the Constitution's substance. Instead, they described these statutes as simply another tool for the federal government to use in enforcing civil rights.[461] They do not seem to have understood the federal government as a longstanding violator of civil rights with constitutional obligations of its own. And it is quite likely, as Ceballos, Engstrom, and Ho suggest, that many judges believed that enforcing the civil rights statutes against funding recipients *did* offer a sufficient remedy—a belief reinforced by their view of the federal government as promoting civil rights rather than violating them.[462]

Some litigants may have contributed to the dynamic by forgoing constitutional claims or characterizing the Fifth Amendment rights at stake as merely procedural ones.[463] They may have emulated earlier litigation without realizing its background or carefully mirroring those suits' substantive Fifth Amendment arguments. The long-running litigation that began as *Adams v. Richardson* and ended in *WEAL II* also played a role in foregrounding procedure, insofar as the district court's long-term oversight of the Department of Education centered on mandating how the agency would process discrimination complaints—fueling the sense that any constitutional issue was simply one of procedure, not substance.[464]

As a result, an oversimplified, sanitized understanding of the federal role took over. That understanding erased the federal government's long-term use of its vast fiscal power to support Jim Crow and the constitutional principle that emerged in response.

Such gaps in memory are understandable. The civil rights movement's struggle against state and local governments was vivid and obvious. However, the hard-fought lobbying and litigation campaign against federal support for segregation—where the Fifth Amendment norm took shape—was less visible, occurring as much in congressional offices and executive agencies as in the

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461 *See, e.g.*, *WEAL II*, 906 F.2d at 747.

462 Ceballos et al., *supra* note 6, at 50.

463 *See, e.g.*, Brief for Appellants at 41, *Council of & for the Blind*, 709 F.2d 1521 (No. 81-13890) (describing the plaintiffs' Fifth Amendment claim as involving the legal right to prompt action on their administrative complaints).

464 *See WEAL II*, 906 F.2d at 744–47 (recounting the history of the litigation and describing it as a "suit[ ] directly against federal enforcement authorities for tardigrade administration of antidiscrimination prescriptions").

courts.[465] In observers' minds, once the federal government became (at least episodically) committed to civil rights enforcement, that role subsumed its actions in supporting segregation. The battle to impose constitutional constraints on federal support for discrimination fell away, and a sense of federal culpability faded.

It is ironic that civil rights groups' triumphs in enacting statutes like Title VI may have helped obscure the underlying constitutional norm. Professors William Eskridge and John Ferejohn have argued that "superstatutes" like the Civil Rights Act of 1964 perform better as a means of implementing fundamental norms than judicial interpretation of the constitutional text.[466] The long-term struggle to establish the Fifth Amendment no-aid principle—and its uneven success as manifested in statutory codification and constitutional slippage—raises questions about the relationship between codification and the Constitution. Should advocates worry that statutes may displace or degrade the status of underlying constitutional norms?

Some might argue that the no-aid principle never truly crystallized as an enforceable, enduring legal constraint on the federal government; rather, only the more limited statutory framework of Title VI and its analogues did. But through the early 1980s, courts universally spoke of the Fifth Amendment mandate as if it had teeth—as real constitutional law. Civil rights lawyers could reasonably understand that they established clear constitutional principles, ones that formally remain good law even now. That the black-letter law has become unenforceable rests on the judiciary's recent evolution toward a more restrictive view of courts' role, an evolution that was politically constructed and thus quite contingent. The no-aid principle might have endured had federal judges not constructed procedural barriers to its enforcement.

The existence of Title VI and its analogues thus seems to have resulted in a type of statutory displacement that facilitated a process of constitutional forgetting. Once the federal government became institutionally committed to civil rights, through the formal statutory framework as well as institutional bodies set up within agencies to enforce Title VI, it was easy to think of any

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[465] *See generally* 4 THE PAPERS OF CLARENCE MITCHELL JR., 1951–1954 (Denton L. Watson et al. eds., 2010) (describing the work of the NAACP's chief lobbyist in urging legislators and administrators to cease support for discrimination); *see also generally* DENTON L. WATSON, LION IN THE LOBBY: CLARENCE MITCHELL, JR.'S STRUGGLE FOR THE PASSAGE OF CIVIL RIGHTS LAWS (1990) (detailing Mitchell's career).

[466] WILLIAM N. ESKRIDGE, JR. & JOHN A. FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 6–9, 16–19 (2010)

underlying constitutional problems as resolved—and eventually to forget that the violations had ever occurred.

B. Avoiding Hard Questions About Liberal Landmarks.

For conservatives, judicial nonenforcement of the Fifth Amendment readily accords with their core principles. However, for liberals, such nonenforcement is more fraught. Relinquishing a constitutional principle that demands nondiscrimination throughout the administrative state seems a difficult choice. But even beyond the reasons for liberal doubt highlighted above, there are reasons to think that engaging the Fifth Amendment principle would present special hurdles for liberals. Doing so could force them to grapple with significant compromises and tensions within legal liberalism's crowning achievements. Now, as in the past, constitutional silence allows such questions to be avoided.

To begin with, liberals have traditionally understood the New Deal as a landmark success that allowed the national government to take a role in regulation and social provision that previously had been reserved to the states. It brought about significant growth in the administrative state and of national capacity to ensure the "general welfare" by protecting the poor and working class from some of the vicissitudes of the market economy. However, that achievement required liberals to shed their theoretical commitment to the Reconstruction Amendments' racial equality norm. With southern Democrats as the lynchpin of the New Deal coalition, many Spending Clause programs were enacted only on the condition that they give free space to racial segregation and discrimination.[467]

Liberals have never sufficiently grappled with the extent to which those compromises taint the accomplishments of the New Deal state. Arguably, the history of federal participation in Jim Crow requires the federal government to redouble its efforts toward ensuring social security for all while making up the racial gaps in wellbeing and wealth that resulted from the programs of the past. That is what the Fifth Amendment norm itself suggests. But in an era when some have questioned the very existence of the administrative state, an attempt to deepen its reach while paying

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[467] *See, e.g.*, KATZNELSON, *supra* note 26, at 18–23; KING, *supra* note 10, at 20–27; LIEBERMAN, *supra* note 26, at 7–9; QUADAGNO, *supra* note 26, at 20–21; Katznelson et al., *supra* note 26, at 283, 297 & n.32.

special attention to the racial inequality it has created might feel especially politically perilous.[468]

Another unsettling issue for liberals relates to the Warren Court's constitutional civil rights and liberties revolution, also a key part of liberalism's advances during the twentieth century. That constitutional campaign of judicial review on behalf of "discrete and insular minorities" has left an equivocal legacy.[469] In subsequent decades, observers questioned whether judicial decisions could provide fundamental or sustainable social reform—and whether decisions like *Brown* were ultimately meaningful.[470] During that time, many liberals turned away from the Constitution as a foundation for legal reforms, instead envisioning legislation or executive action as a surer path toward addressing inequality.[471] It is no accident that liberals changed their stance during a period when the judiciary became conservative and the Warren Court's constitutional innovations were halted or even rolled back.

Liberals remain conflicted about whether to subscribe to the Constitution as an ultimate, unquestionably legitimate framework because they often have seen it used to limit and block their favored initiatives, whether in the early twentieth century's *Lochner* era or under the late twentieth century's Rehnquist Court. Tying themselves to the Fifth Amendment no-aid norm as a judicially enforceable principle would again raise the dilemma: Should liberals be attached to the Constitution itself, or only to its use when it forwards their favored reforms? Are they willing to fully endorse constitutional interpretation and enforcement, on the premise that the best reading of the Constitution will eventually win out, even if they risked seeing conservatives use a no-aid rule to invalidate federal support for progressive initiatives seeking race or gender equity? In the Fifth Amendment context, it has proved simplest to avoid those questions rather than embrace the Constitution regardless of consequences.

Finally, the Fifth Amendment no-aid norm highlights uncomfortable truths regarding the Civil Rights Act of 1964. That Act,

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468 *See generally, e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

469 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

470 *See generally, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1993); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

471 *See, e.g.*, ESKRIDGE & FEREJOHN, *supra* note 466, at 6–9.

along with the Voting Rights Act of 1965[472] and the Fair Housing Act of 1968, secured the "Second Reconstruction" and the civil rights revolution of the 1960s.[473] But it is easy to forget that the Act could only be passed over the objections of an undemocratic South, forcing compromises with conservatives and leaving some of its provisions weaker than they might otherwise have been.[474] On its surface, Title VI of the Act, which embodied the Fifth Amendment no-aid norm, seems to be a provision that did not suffer significant dilution.[475]

But Title VI was equivocal in one key aspect. As discussed above, the proponents suggested that Title VI might embody a Fifth Amendment obligation of the federal government, but they did not unreservedly embrace that theory.[476] That was likely because the courts had not yet coalesced behind such a Fifth Amendment no-aid principle and because doing so could have alienated some legislators.[477] Given that describing Title VI as a constitutional obligation was unnecessary for passage or to ensure its validity, the matter could be left unsettled. However, codifying the statute at a time when the underlying constitutional norm was not crystallized left it malleable: open to revision and open to reimagining as simply a means—rather than an obligation— for federal officials to police others' civil rights compliance.

For liberals, debating the Fifth Amendment no-aid principle on the merits would foreground the uncomfortable truth that the 1964 Act represented only a partial victory, securing some (but not all) of what civil rights advocates sought. Given that the Act now appears as a high-water mark for liberalism, acknowledging how partial its achievements were—in Title VI as in other aspects—is a dispiriting prospect.

Letting the Fifth Amendment no-aid norm remain inert amid procedural barriers allows liberals to avoid these difficult realities. But, as I argue in the next Section, silencing the constitutional norm without a full reckoning has come at a high price.

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472 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10702).

473 *See* J. Skelly Wright, *Promises to Keep*, 3 BLACK L.J. 106, 109 (1973) ("The Second Reconstruction reached its apex with passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965."); John B. Turner & Whitney M. Young, Jr., *Who Has the Revolution or Thoughts on the Second Reconstruction*, 94 DAEDALUS 1148, 1149–54 (1965) (considering the conditions needed for a true civil rights "revolution" to occur).

474 *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 94–128 (2010) (detailing legislative negotiations and compromises written into Title VII of the Act).

475 *See* Singer et al., *supra* note 46, at 832–41 (describing evolution of Title VI).

476 *See supra* note 163.

477 *See supra* Part II.A; *supra* Part III.

C. The Costs of Constitutional Silence.

Some costs have been inflicted on the law itself. Losing sight of the Fifth Amendment has distorted courts' interpretation of the civil rights framework. Current doctrine allows federal agencies unchecked discretion in their use of the Spending Clause powers because it is nearly impossible to sue federal actors directly should they choose to fund discriminatory programs.[478] The procedural impasse also makes it exceedingly difficult to use the Fifth Amendment as a legal basis for demanding structural remedies for past discrimination in Spending Clause programs—as the *Thompson* plaintiffs discovered.

Silencing a constitutional principle through procedural means has additional insidious effects for the polity as a whole. Constitutional debate has been shortchanged. New Deal courts approved the extension of federal powers via Spending Clause programs, but the courts have never adequately addressed how much constitutional responsibility the government bears for those federally authorized and funded programs. Neither legal actors nor the broader public has deliberated over or resolved the fundamental problem of ensuring that sweeping national programs abide by equal protection norms. At the same time, the history of civil rights struggles that produced the Fifth Amendment no-aid principle has been sidelined, and the federal role in producing a racially segregated, unequal nation remains poorly understood.

The reality is that the federal government creates national regimes, institutions, and patterns of life. After the New Deal allowed it to further unlock that power via the Spending Clause, federal authority went unregulated by the Reconstruction Amendments for far too long. The sweep of national social programs helped create the segregated society and the massive racial gap in wealth and wellbeing that continues to rend the nation.[479] Federal authority in the present is still more sweeping, and its ability to underwrite entrenched inequality only greater.

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[478] Ceballos, Engstrom, and Ho identify an important additional cost to the line of D.C. Circuit cases foreclosing APA review: Policies causing disproportionate harms to racial minorities cannot be challenged using the APA's "arbitrary and capricious" standard, even though disproportionate harms to other groups do merit such APA review, creating what they term "disparate limbo" for civil rights plaintiffs. *See* Ceballos et al., *supra* note 6, at 7.

[479] *See supra* notes 7, 10, 25–26; *see also* THOMAS SHAPIRO, TATJANA MESCHEDE & SAM OSORO, INST. ON ASSETS & SOC. POL'Y, THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE (2013), https://perma.cc/A3NP-M4SZ.

The no-aid principle thus offers a needed check on sprawling federal power to remake national patterns of life. Its remedial implications are even more critical. In the present, national attention is again centered on the innumerable ways that the state takes, devalues, and limits Black people's lives.[480] The physical communities and institutions that the federal government helped construct throughout the twentieth century lie at the root of that racial subordination, segregation, and systematic oppression.

The federal government has never been truly called to account for its own culpability in that reality. The brief burst in the late 1960s and 1970s of what officials then called "affirmative action"—meant broadly to encompass any positive acts toward undoing and redressing past racial exclusion—cannot realistically be understood as addressing federal complicity.[481] Such programs were of limited scale and impact and were subsequently curtailed by the conservative movement's success in establishing constitutional colorblindness constraints.[482]

Even as symbolic acts, such steps fall short. Federal remedial actions are almost never grounded in clear truth telling about the federal role in deepening racial inequality and federal actors' own constitutional wrongdoing.[483] Instead, the federal government has enjoyed the benevolent aura of a civil rights ally, assumed to generally be on the right side of history if sometimes late to the struggle.

That narrative reflects the broader public's uneven recall of history, but it also fits the federal courts' treatment of the federal government and its constitutional responsibility. By letting the Fifth Amendment no-aid principle dissipate, while erecting overwhelming obstacles to its enforcement, the judiciary has erased

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480 *See, e.g.*, Jamil Smith, *The Power of Black Lives Matter*, ROLLING STONE (June 16, 2020), https://perma.cc/BUM7-V43G; Mychal Denzel Smith, *Incremental Change Is a Moral Failure*, THE ATLANTIC (Sept. 2020), https://perma.cc/5NCE-3PN6.

481 *See, e.g.*, James R. Dunn, *Title VI, the Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42, 44–45, 73 (1967) (discussing how Southern officials felt "no duty to take affirmative action to desegregate the schools").

482 *See, e.g.*, U.S. COMM'N ON C.R., THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT 3–4 (1973) [hereinafter USCCR, REASSESSMENT]; U.S. COMM'N ON C.R., FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 134, 156–62, 226–40 (1970) [hereinafter USCCR, FEDERAL]; QUADAGNO, *supra* note 26, at 20–21. For colorblindness doctrine, see, for example, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) (ruling that federal race-conscious remedial programs are subject to strict scrutiny).

483 The USDA's historic settlements of lending discrimination claims by Black, Native American, and Latinx farmers offer a rare, but only partial exception. *See generally* Stephen Carpenter, *The USDA Discrimination Cases:* Pigford*,* In re Black Farmers*,* Keepseagle*,* Garcia*, and* Love, 17 DRAKE J. AGRIC. L. 1 (2012).

federal constitutional responsibility for the enduring nature of Jim Crow throughout the nation.

D. Reckoning with the Fifth Amendment

We should remember the forgotten Fifth Amendment struggles and the legal principle they produced and, in doing so, reopen critical questions of federal constitutional responsibility. None of us should be able to skirt the difficult questions that the past misuse of Spending Clause powers provokes or those that persist regarding how to ensure nondiscrimination throughout the extended set of Spending Clause programs.

I do not attempt to resolve those intricate questions of substantive constitutional law, remediation, and institutional capacity here; doing so is the work of a full article in itself. This Article instead has focused on recovering the history of contestation over these questions. Below, I briefly suggest paths toward airing those issues in ways that might trigger robust, transparent consideration.

How could substantive debates on the Fifth Amendment be reopened? How might the history underlying the Fifth Amendment no-aid principle be recalled and potential redress considered?

1. Litigation and legislation.

One way to revive consideration of the constitutional no-aid principle would be for civil rights advocates to raise it in litigation, seeking to overcome the procedural barriers that currently exist. Litigation might seek to challenge any federal policies currently allowing funds to flow to entities engaging in systemic discrimination.[484] Further, one might also bring remedial suits like *Thompson*—alleging that the federal government approved and funded systemic race discrimination in the past and still bears the responsibility to dismantle the vestiges of that segregation.

For advocates, it would be crucial to frame such challenges as enforcing the federal government's own substantive constitutional obligations under the Fifth Amendment so that the challenge is not simply to the federal government's decisions as to how to police the civil rights compliance of others. Rather, the claim would be that the federal government itself runs afoul of its

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[484] One obvious target might be federal funding for local police departments with documented patterns of racial profiling and violence. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 660–67 (S.D.N.Y. 2013) (finding constitutional violations in racial profiling by the New York Police Department); Melendres v. Arpaio, 989 F. Supp. 2d 822, 899–905 (D. Ariz. 2013) (finding constitutional violations in racial profiling by the Maricopa County, Arizona, sheriff's office), *aff'd in relevant part*, 784 F.3d 1254 (9th Cir. 2015).

constitutional duties when it knowingly funds others' discrimination. That framing could help to overcome current procedural barriers, which rest on the theory that the federal government may freely allow discrimination in the programs it authorizes, oversees, and subsidizes as a matter of ordinary "enforcement discretion."[485] Even if such suits proved unsuccessful, they would help to raise consciousness about the significance of the Fifth Amendment for Spending Clause programs, past and present.

Congress itself could help ensure a full airing of such suits if it were to directly codify a private right of action to enforce the no-aid norm against the federal government. It could easily do so within Title VI and the other Spending Clause statutes.[486] A statutory approach would also allow Congress to tailor and limit private enforcement of the no-aid principle, thereby addressing concerns that opening the door to such litigation would overwhelm federal agencies or the federal courts. As with litigation, even the act of introducing and debating such legislation could be a powerful means to break the current silence regarding the Fifth Amendment, regardless of the legislation's ultimate success.

2. Administrative structure.

Congress could go still further to force consideration of the no-aid norm into the mainstream, by restructuring the coordination and implementation of the Spending Clause civil rights statutes across the entire administrative state. A deep literature suggests that structural design is a key means to entrench political

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[485] By showing that the federal government is not simply withholding enforcement action but actively supplying funds enabling discrimination to continue, advocates might overcome the *Heckler* presumption that "inaction" is not reviewable under the APA. As Judge Marvin Garbis reasoned in *Thompson*, rejecting the *Heckler* argument, an agency overseeing its funding recipients often will be "act[ing] affirmatively, funding and providing operational support for [state or local] initiatives," thus becoming "a collaborator in the production and administration of [ ] policy." 348 F. Supp. 2d at 421–22. That is a far cry from an agency's mere decision not to enforce an ordinary civil liability regime. By making clear that it is the federal government's own constitutional obligations that are at issue, plaintiffs could also push back against the theory that there are sufficient remedies to be found by suing those receiving the funding. *Contra Council of & for the Blind*, 709 F.2d at 1534. Suits against funding recipients are not "adequate" and should not preclude APA review because they do not address the legal violation at issue when the federal government chooses to subsidize discrimination as a matter of policy or broad practice.

[486] *Cf. Council of & for the Blind*, 709 F.2d at 1531 n.69 (stating that "by 1976 Congress knew how to create suits directly against a federal agency which failed to carry out its statutorily imposed duties" and citing examples).

designers' goals over the long term.[487] Federal agencies subject to Title VI and its analogues presently all have civil rights offices dedicated to processing discrimination complaints and otherwise assuring compliance. The Justice Department serves in a coordinating role, attempting to bring greater coherence to this federal civil rights machinery.[488] But the DOJ's ability to do this is often characterized as limited.[489] In fact, the most notable feature of civil rights enforcement in the national government is how fragmented it is.

A structural goal for the Fifth Amendment no-aid principle might be to create a centralized, more powerful actor with responsibility for overseeing federal compliance across the administrative state.[490] Creating a powerful institutional entity would help ensure that agencies, other policymakers, and the broader public fully consider the ways in which federal authority and constitutional nondiscrimination obligations interact.

3. Social movements and broader public understandings.

Movements for racial justice—from large national organizations to grassroots activists—might also draw upon the history of struggle against federal aid for discrimination, and the Fifth Amendment itself. Doing so could force a larger public reckoning with the federal government's constitutional responsibilities.

Very strong constitutional precedent, along with clear historical evidence, indicate that the federal government violated the Fifth Amendment for many decades.[491] Equally clear precedent indicates that the government has an obligation to undo the harms it created.[492] That legacy of *Brown II*, *Green*, and *Swann* is a

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[487] For an overview, see Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 339–42 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

[488] *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980) (directing the Attorney General to coordinate Title VI, Title IX, and Section 504 enforcement).

[489] *E.g.*, USCCR, REASSESSMENT, *supra* note 482, at 97; USCCR, FEDERAL, *supra* note 482, at 1059–60.

[490] Under President Lyndon Johnson, early efforts were made to coordinate federal civil rights efforts from a presidential committee, but those quickly ended. *See* Singer et al., *supra* note 46, at 857–60; *see also id.* at 862–77 (arguing for better coordination of Title VI enforcement); Charles M. Lamb, *Administrative Coordination in Civil Rights Enforcement*, 31 VAND. L. REV. 855, 857–59 (1978) (same). More recently, Marianne Engelman Lado has forcefully argued for centralizing civil rights enforcement in the executive branch. *See* Marianne Engelman Lado, *No More Excuses: Building a New Vision of Civil Rights Enforcement in the Context of Environmental Justice*, 22 U. PA. J.L. & SOC. CHANGE 281, 327–30 (2019).

[491] *See supra* Part II; *supra* Part III. For historical examples, see Plessy *Preserved*, *supra* note 25, at 951–1003; *Subsidizing Segregation*, *supra* note 25, at 876–913.

[492] *See supra* Part II.D.

responsibility that does not fall simply upon state and local actors; it also rests on the federal government and remains unfulfilled.

That is the single most significant aspect of the Fifth Amendment history recounted here. Most people still do not think of the federal government as having engaged in systemic undermining of the Reconstruction Amendments in the way that southern (and northern) states did in the past. Nor do they think of the federal government as directly culpable for segregation in an actionable way, one giving rise to serious remedial obligations.

Remembering the struggle to end federal support for segregation and the constitutional principle it produced offers a way to show the public the true significance of past federal actions—and the legal responsibility that ensues. To frame the federal government as having violated the Constitution, systematically and for decades, changes the frame for how we understand and respond to the present. For activists to recall the prior struggle to halt the federal government's involvement in segregation and draw upon the constitutional norm it articulated might further fuel the already existing and increasingly strong movement to address deep racial subordination in this country.

Would calling upon and debating constitutional history—and the Constitution itself—produce racial progress and redress? Reason for hope exists, but, of course, no one can know the ultimate outcome. Reckoning with the Fifth Amendment carries risks. But the concerns that drove the constitutional principle into obscurity are best addressed in the open and on the merits rather than avoided. Remembering is the initial step.

CONCLUSION

Civil rights advocates long fought to limit the use of federal power and funds to propel racial segregation and exclusion. They used the Constitution as a tool in doing so, arguing that the Fifth Amendment's Due Process Clause barred the inequitable use of the nation's resources to benefit only some. Over time, they succeeded in convincing courts that equal protection principles applied equally to states and the federal government and that such principles barred knowing support for segregation. Congress legislated a statutory version of that principle in Title VI of the Civil Rights Act of 1964.

For a brief period, the no-aid principle flourished, recognized by the federal courts as "clearly established" black-letter law that

constrained the national government.[493] However, by the 1980s, the principle began to dissipate for lack of enforceability. Suits to challenge federal involvement in discrimination began to face difficult obstacles in doctrines relating to standing, implied private rights of action, and APA review. Litigants found the courtroom door closing.

The rationales for turning away such suits suggested that judges and litigants had forgotten the reasons Title VI and similar statutes were enacted—to end a constitutional dilemma over federal responsibility for funding segregation. Instead, courts characterized the statutory framework as simply another tool for federal officials to stop civil rights violations by others, forgetting the Fifth Amendment backdrop. Courts also expressed their unwillingness to police the executive branch's approach to civil rights, arguing that they need not "oversee the overseer."

Procedural obstacles should not be allowed to silence the constitutional norm. The Fifth Amendment ideal should be remembered and revived so that the nation can once again consider the profound questions of federal constitutional responsibility that it invokes. To avoid those inquiries, no matter how overwhelming they may seem, distorts historical memory and blocks necessary deliberations regarding fundamental norms. Our society remains structured by the apartheid that the federal Spending Clause power once entrenched. Recovering the Fifth Amendment norm forces us to ask whether the Constitution requires us to remedy that longstanding system of racial caste.

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493 Nat'l Black Police Ass'n v. Velde, 712 F.2d 569, 580 (1983).