ADMINISTRATIVE EQUAL PROTECTION: FEDERALISM, THE FOURTEENTH AMENDMENT, AND THE RIGHTS OF THE POOR

Karen M. Tani†

This Article intervenes in a burgeoning literature on "administrative constitutionalism," the phenomenon of federal agencies—rather than courts—assuming significant responsibility for elaborating the meaning of the U.S. Constitution. Drawing on original historical research, I document and analyze what I call "administrative equal protection": interpretations of the Fourteenth Amendment's Equal Protection Clause in a key federal agency at a time when the Clause's meaning was fiercely contested. These interpretations are particularly important because of their interplay with cooperative federalism—specifically, with states' ability to exercise their traditional police power after accepting federal money.

The Article's argument is based on a story of change over time. In the late 1930s, when federal courts appeared reluctant to vindicate equal protection claims, the Federal Social Security Board (later to become part of the Department of Health, Education and Welfare) took a more active role via its administration of federal grants for state-run public welfare programs. Through the 1940s and 1950s, agency lawyers developed and applied a nondeferential rationality model of equal protection to assess state welfare rules. When paired with the agency's control over generous federal subsidies, this interpretation had tangible consequences: administrators challenged some of the era's most restrictive state welfare laws and, in the process, spread the notion that poor Americans had constitutional rights, including under the Fourteenth Amendment. In the mid-1960s, as the agency became embroiled in battles over school desegregation, administrators deftly recharacterized their constitutional interpretation as a statutory one. They saw their constitutional arguments take on new life, however, as welfare rights advocates (including former agency personnel) wielded them in court. Both developments are visible in the landmark case King v. Smith *(1968). There*

† J.D., Ph.D. (History); Assistant Professor of Law, University of California, Berkeley. For helpful comments and conversations I thank Greg Ablavsky, Charisma Acey, Catherine Albiston, Michelle Wilde Anderson, Ken Bamberger, Eric Biber, Andrew Bradt, Dan Farber, Karen Frick, Abbe Gluck, Robert Gordon, Sarah Barringer Gordon, Sophia Lee, Bernadette Meyler, Calvin Morrill, Melissa Murray, Anne Joseph O'Connell, David Owen, Bertrall Ross, Peter Schuck, Andrea Sinn, Steve Sugarman, Amanda Tyler, and John Yoo, as well as participants in the 2014 Harvard/Stanford/Yale Junior Faculty Forum, the 2014 Policy History Conference, the Berkeley Law Faculty Workshop, the Berkeley Law Junior Working Ideas Group, the Berkeley Law Public Law Workshop, and the University of Pennsylvania Legal History Workshop. For invaluable firsthand accounts of the history recounted here, I thank Frances and David White. Andrew Talai, Luke Diamond, Elisa Redish, and Nora Krinitsky provided exceptional research assistance.

the Supreme Court affirmed the poor claimants' victory in the court below, but rejected the lower court's equal protection holding in favor of one grounded in the agency's novel statutory interpretation. Administrative equal protection thus continued to operate as a meaningful constraint on state action—and in fact helped remake the administration of American poor relief in the late twentieth century—but remained hidden from view.

In addition to giving content and direction to the study of administrative constitutionalism, this history enriches legal scholarship in three ways: (1) it provides context for the "new federalism" revolution of the last decades of the twentieth century; (2) it opens up new questions about today's "uncooperative federalism"; and (3) it helps explain the penurious protections that today's equal protection jurisprudence offers the poor.

INTRODUCTION

There is no more celebrated cohort of lawyers in modern American history than the "New Deal lawyers"—the men and women who flocked to Washington, D.C., in the 1930s and early 1940s to design, defend, and administer President Franklin D. Roosevelt's ambitious slate of recovery and reform measures.[1] Alanson Work Willcox was one of these lawyers. In 1934 he left private practice in New York City to heed the Treasury Department's call: the U.S. government had just abandoned the existing gold standard, and it desperately needed lawyers to draft regulations for transactions in gold bullion and silver. In a pattern that would be familiar to many New Deal lawyers, this short-term consulting gig led to another, and by 1936 Willcox had a permanent position with one of the New Deal's brand new agencies, the Social Security Board.[2]

As Assistant General Counsel to the Social Security Board, Willcox helped defend the Social Security Act of 1935 against constitutional challenges,[3] leading to several thrilling victories.[4] The cornerstone of the modern welfare state, the Act created national systems of old-age and unemployment insurance and authorized a generous system of federal subsidies for state welfare programs.[5] The favorable Supreme Court decisions thus preserved a vital component of the New Deal. Along with other decisions from the spring 1937 Term, they also suggested a historic reorientation of the Court: after famously striking down the National Industrial Recovery Act and the Agricultural Adjustment Act,[6] the Court seemed to signal that it would no longer second-guess social and economic legislation.[7]

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1 *See generally* Michele Landis Dauber, *New Deal Lawyers*, *in* 3 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 399, 399–403 (David S. Tanenhaus ed., 2008) (synthesizing existing literature on New Deal lawyers); PETER H. IRONS, THE NEW DEAL LAWYERS 300 (1982) (recounting the important legal work of attorneys in the National Recovery Administration, Agricultural Adjustment Administration, and National Labor Relations Board (NLRB)).

2 Bertram F. Willcox, *Alanson Willcox: From Waddington to Washington*, CORNELL ALUMNI NEWS (Cornell Alumni Ass'n, Ithaca, N.Y.), May 1979, at 29, 30.

3 *Id.*

4 *See* Helvering v. Davis, 301 U.S. 619, 640–45 (1937) (upholding the Act against a challenge to the financing of the old-age insurance program); Steward Mach. Co. v. Davis, 301 U.S. 548, 585–90 (1937) (upholding the Act's unemployment compensation provisions against a Tenth Amendment challenge); Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 527 (1937) (upholding the Act against a challenge to the financing of the unemployment insurance program).

5 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620, 620–27 (1935) (codified as amended in scattered sections of 42 U.S.C.).

6 United States v. Butler, 297 U.S. 1, 87–88 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

7 *See generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 219–28 (1995) (outlining the Supreme Court decisions that constituted the "Constitutional Revolution" of 1937). Historians disa-

With the legality of the New Deal secured, Willcox might have returned to the more lucrative world of private practice—yet he stayed on. Perhaps it was because of the sense of community that the Social Security Board fostered (the General Counsel's softball team reportedly enjoyed a "keen[ ] rival[ry]" with the team from the Bureau of Unemployment Compensation[8]); or perhaps the coming of World War II inspired him to remain in government service.[9] Ultimately, Willcox worked for the same federal agency for twenty-five years: from 1936 to 1953 and again from 1961 to 1969.[10] He watched the Board transition from an independent agency to part of Roosevelt's cleverly named Federal Security Agency (FSA), where it would join the Public Health Service, the Office of Education, and the Food and Drug Administration, among others; the FSA would in turn become the Department of Health, Education and Welfare (HEW), where Willcox would end his career.[11]

During the decades after 1936, this Article argues, Willcox and other agency lawyers engaged in legal work every bit as significant, although much less visible, than their defense of the landmark Social Security Act: they developed a theory about how the Fourteenth Amendment's Equal Protection Clause[12] ought to apply in one crucial

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gree about the extent to which Supreme Court jurisprudence changed markedly in the spring of 1937. *Compare* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 200–02 (1993) (arguing that the United States "underwent a true constitutional revolution" with the Court's minimum wage decisions from spring of 1937 and later), *with* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 89–91 (1998) (emphasizing the importance of longer-term doctrinal evolution on the Supreme Court's decision making in 1937 and claiming that the minimum wage decisions were "no different from other . . . regulations that the Court had upheld").

8 THOMAS H. ELIOT, RECOLLECTIONS OF THE NEW DEAL: WHEN THE PEOPLE MATTERED 141 (1992).

9 Bertram Willcox, Alanson's brother and the author of the article cited in note 208, *infra*, interrupted his own legal career to serve in the Ambulance Field Service during World War I and as a member of the Appeals Board of the U.S. War Labor Board during World War II. *Cornell Men Carry the American Flag to the French Front*, XIX CORNELL ALUMNI NEWS (Cornell Alumni Ass'n, Ithaca, N.Y.), May 31, 1917, at 398, 401; Kheel Center for Labor-Management Documentation and Archives, Cornell University Library, *Bertram F. Willcox Arbitration Papers, 1950–1969*, *available at* http://rmc.library.cornell.edu/EAD/htmldocs/KCL05394.html.

10 *See* Willcox, *supra* note 2, at 30–32.

11 *See* Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953*, 76 U. CHI. L. REV. 587, 593 (2009). In 1979, HEW became the Department of Health and Human Services (HHS). *Historical Highlights*, U.S. DEP'T OF HEALTH AND HUM. SERVICES, http://www.hhs.gov/about/hhshist.html (last visited Mar. 9, 2015). In 1995, the Social Security Administration came full circle, once again becoming an independent agency, but the Social Security Act's remaining "welfare" program (Aid to Families with Dependent Children (AFDC), which would soon become Temporary Aid to Needy Families) remained with HHS. *Id.*

12 U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

context—the administration of federal grants-in-aid—and they put that theory into practice. I call this phenomenon "administrative equal protection." Drawing on extensive primary source research in government archives, personal papers, and legal records, I trace the development of administrative equal protection and I link it to concrete outcomes: changes in state laws, federal policies, and even, circuitously, Supreme Court doctrine.

Administrative equal protection may sound like a contradiction in terms: Every first-year law student learns that it is the function of courts, not agencies, to decide what the Constitution means. According to a burgeoning literature on "administrative constitutionalism," however, agencies play a much greater role in interpreting the Constitution than scholars have previously imagined.[13] Indeed, administrative constitutionalism appears to be a defining feature of our "age of statutes"[14]—a practice that has been built into the U.S. legal system. For instance, the administrative equal protection described here grew directly out of an agency's statutorily delegated obligations. The Social Security Act charged the Social Security Board not only with running the brand new national social insurance programs, but also with administering grants-in-aid to the states for three need-based income support programs: Aid to Dependent Children (ADC), Old Age Assistance, and Aid to the Blind.[15] (Federal administrators referred to these programs as "public assistance"; we would now probably call them "welfare.") A state that wished to receive federal funds

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13 On "administrative constitutionalism," see generally WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33 (2010) (situating administrative constitutionalism in the broader study of American constitutionalism and explaining how it operates); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 807 (2010) (providing a pioneering "examin[ation] [of] how agencies actually go about interpreting and implementing the Constitution" and "how administrators' interpretations affect what it means to be governed by the Constitution"); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013) (surveying works in the emerging field of administrative constitutionalism and providing an initial framework for evaluating this phenomenon). It is possible to define administrative constitutionalism more broadly than I do. Whereas I focus on administrators' application and interpretation of the Constitution, some scholars—most notably Eskridge and Ferejohn—also include the elaboration of "small 'c' constitutional public norms and needs" and the interpretation of landmark legislation (what they call "superstatutes"). ESKRIDGE, JR. & FEREJOHN, *supra*, at 32–33. Eskridge and Ferejohn also do not limit their actors to administrators. They associate administrative constitutionalism with "the normative, problem-solving" work of a wide variety of "political (as opposed to judicial) officers," including "legislators and their staffs" and "chief executives and their advisers." *Id.* at 26. Metzger's definition of administrative constitutionalism is also broader than mine, in that her definition encompasses "the construction (or 'constitution') of the administrative state through structural and substantive measures." Metzger, *supra*, at 1900.

14 *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 95–97 (1979).

15 Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

submitted a state "plan"—essentially, a compilation of all the laws and policies pertaining to the state's welfare program—and if the plan satisfied federal requirements, the agency began issuing matching grants (i.e., reimbursements for a portion of what the state spent).[16] Federal review was ongoing: federal administrators issued grants on a quarterly basis, conducted various types of post-hoc audits, and evaluated all changes to state plans.[17] In short, the Social Security Act *required* federal administrators to review state laws, policies, and administrative decisions. It is little wonder that the Fourteenth Amendment (promising that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws"[18]) cast a shadow over their day-to-day work.

This Article proceeds as follows: Part I provides an overview of the literature on administrative constitutionalism, explaining how the U.S. legal system encourages this phenomenon and why it matters. Because administrative constitutionalism is of such pressing interest, Part I argues, we badly need additional empirical work, especially on constitutional interpretations that intersect with the theories and practices of American federalism. To this end, Part I introduces the Article's main example: administrative equal protection in the federal agency charged with administering federal welfare grants to states in the mid-twentieth century.

Parts II through IV go deep into the archives to recover administrative equal protection's revealing "life story."[19] Equal protection, Lawrence Sager famously argued, is a classic "underenforced constitutional norm": the constructs that the federal judiciary has developed to enforce this constitutional concept have tended to capture "only a small part of the universe of plausible claims" (i.e., the judiciary has artificially "truncated" the broader concept).[20] It is thus not surprising to see the Equal Protection Clause enjoy a robust life outside the courts. Until now, however, an important aspect of that life has been hidden from view.

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16 *Id.*

17 MARTHA DERTHICK, THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS 21–22 (1970).

18 U.S. CONST. amend. XIV, § 1.

19 I hope that other scholars will elaborate on my telling of the "life story." In the period under examination, other grant-administering and benefit-conferring agencies (e.g., the Department of Transportation, the Internal Revenue Service) likely also considered the Equal Protection Clause in the course of their work, especially after the Supreme Court began to suggest that segregation was constitutionally impermissible. The literature on administrative constitutionalism would be considerably enriched if we could compare administrative equal protection across the administrative state.

20 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1214, 1216 (1978).

In Part II, I argue that as early as 1936, federal welfare administrators applied the Equal Protection Clause to their work. In this post–*Lochner* era,[21] when federal courts appeared reluctant to accept equal protection arguments, agency lawyers developed a version of "rational basis review with bite"[22] to evaluate state welfare laws. Their interpretation of equal protection directly affected the administration of grants-in-aid to the states between the late 1930s and early 1960s, including, as Part III contends, in the era of "massive resistance" to civil rights gains.

The increasingly acerbic federal-state disputes analyzed in Part III set the stage for Part IV, in which I discuss another heretofore unrecognized phenomenon: the way in which the agency's interpretation of equal protection intersected with people and forces outside the agency and ultimately made its way into Supreme Court doctrine. In the mid-1960s, an influential network of activists, social welfare workers, and lawyers (including former agency personnel) began using the agency's ideas about equal protection to challenge the nation's welfare system—first in formal agency hearings and then in federal court. Administrators, meanwhile, changed tactics. With the federal government's responsibilities for welfare and education now housed in the same agency, administrative equal protection had become more dangerous. Administrators responded by reframing their constitutional interpretation as a statutory one, rooted specifically in the Social Security Act. The landmark welfare rights case *King v. Smith* (1968) illustrates the complexity of administrative equal protection: in a sweeping and important decision, poverty lawyers won recognition for poor people's rights against states, but the Supreme Court used the agency's statutory interpretation to dodge the equal protection question. The legacy was mixed: two years later, in a less sympathetic case, the Supreme Court "emasculat[ed] . . . the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration" (in the words of Justice Thurgood Marshall),[23] but the Court's liberal statutory interpretation endured, transforming the relationship between poor claimants and state welfare providers.

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21 *Lochner v. New York*, 198 U.S. 45 (1905), has come to stand for an entire era, one in which judges used the Reconstruction Amendments to protect individual economic liberty from majoritarian social and economic reform legislation, rather than to vindicate the rights of African Americans. By 1937, the *Lochner* era had clearly ended, but its replacement was uncertain. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 9 (2010).

22 *See generally* Gerald Gunther, *The Supreme Court, 1971 Term. Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (noting the emergence in Supreme Court doctrine of "equal protection bite without 'strict scrutiny'"); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (documenting the Supreme Court's occasional application of heightened scrutiny under the guise of rational basis review).

23 Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

Part V concludes by discussing the ways in which the history recounted here enriches legal scholarship. I identify lessons for the study of (1) federalism, including both the "new judicial federalism" of the Rehnquist Court and today's so-called "uncooperative federalism";[24] (2) administrative law, especially administrative constitutionalism; and (3) constitutional law, as applied to the poor.

I
Administrative Constitutionalism and American Federalism

This Part outlines the emerging literature on administrative constitutionalism (subpart A) and suggests the fruitfulness of connecting this literature to one of the most important developments in modern American history: the emergence of "cooperative federalism"[25] (subpart B). My historical case study (introduced in subpart C) sits at precisely this intersection.

A. Federal Agencies and the Making of Constitutional Meaning

"It is emphatically the province and duty of the judicial department to say what the law is," Chief Justice John Marshall famously proclaimed in *Marbury v. Madison*.[26] At the time, Justice Marshall was advancing a relatively modest proposition about the Court's role in the American constitutional system: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[27] A century and a half later, the Supreme Court went a significant step further, declaring itself the "supreme" expositor of "the law of the Constitution."[28]

Yet Article III courts, especially the Supreme Court, have never been able to occupy the field of constitutional meaning-making. First, as President Andrew Jackson famously observed, the courts lack the

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24 *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1258–59 (2009) (using the term "uncooperative federalism" to refer to situations in which "states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law").

25 On "cooperative federalism," see *infra* note 60 and accompanying text.

26 5 U.S. 137, 177 (1803).

27 *Id.* On the modesty of *Marbury*, see William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 Duke L.J. 1, 37–38 (1969) ("There is . . . no doctrine of national, substantive judicial *supremacy* which inexorably flows from *Marbury v. Madison* itself . . . .").

28 Cooper v. Aaron, 358 U.S. 1, 18 (1958). This claim continues to spark controversy among legal scholars. *See, e.g.*, Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 221 (2004) ("[J]udicial supremacy was not cheerfully embraced in the years after *Marbury* was decided. The Justices in *Cooper* were not reporting a fact so much as trying to manufacture one . . . ."); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 Mich. L. Rev. 1539, 1553–54 (2005) (providing examples of the range of legal scholars who have "debat[ed] whether the federal judiciary enjoys interpretive supremacy").

ability to enforce their interpretations, allowing other actors to fill the breach ("John Marshall has made his decision," Jackson supposedly declared, referencing the controversial Indian law decision *Worcester v. Georgia*,[29] "now let him enforce it!").[30] Second, the Court is not omnipresent. It cannot and does not grant certiorari in all cases involving federal constitutional meaning.[31] Third, some constitutional violations do not, in practice, have a judicial remedy. Note the slew of doctrines that constrain the exercise of judicial power. The "irreducible constitutional minimum of standing" (demanding injury-in-fact, causation, and redressability) limits the exercise of federal jurisdiction to "cases" and "controversies" between proper parties.[32] Even where standing exists, the justiciability doctrines—mootness, ripeness, and the political question doctrine—may counsel the exercise of restraint.[33] And for cases that are "confessedly within [the Court's] jurisdiction," the Court has developed doctrines to avoid the unnecessary resolution of constitutional questions.[34] Factor in the

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29 31 U.S. 515 (1832). *Worcester* was one of the Court's first attempts to grapple with the place of American Indian polities in the nation's constitutional structure; it also implicated *the* constitutional question of the day: the respective powers of the states and the federal government. President Jackson's refusal to enforce the Court's decision amounted to a rejection of the judiciary's exclusive authority to give meaning to the Constitution. In this, Jackson was not alone. For example, President Lincoln famously rejected the legal basis for the Court's ruling in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and refused to apply the decision outside "that particular case." 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5, 9 (1896).

30 Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J. S. HIST. 519, 519 (1973) (emphasis omitted) (quoting HORACE GREELEY, THE AMERICAN CONFLICT: A HISTORY OF THE GREAT REBELLION IN THE UNITED STATES OF AMERICA, 1860–'65, at 106 (1866)) (internal quotation marks omitted). On whether Jackson actually said as much, see DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 412 n.2 (2007) (noting that "the story rests on a recollection long after the fact" but "is consistent with Jackson's behavior and quite in character").

31 The Supreme Court grants certiorari in a minuscule number of cases. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 240 (2009). Note, too, that of the cases the Court accepts, most come from the federal courts of appeals rather than state courts. *See Statistics: Circuits*, SCOTUSBLOG.com, http://www.scotusblog.com/statistics/ (last visited Mar. 9, 2015) (noting that in this past Term, only six of the Court's seventy cases came from state courts). As a result, "state courts continue to hold and to exercise substantial authority on issues of federal constitutional law." Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 NW. U. L. REV. 979, 980 (2010).

32 Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).

33 On political questions, see Nixon v. United States, 506 U.S. 224, 229 (1993). On mootness, see DeFunis v. Odegaard, 416 U.S. 312, 316 (1974). On ripeness, see Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967).

34 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–48 (1936) (Brandeis, J., concurring) (listing the canons of constitutional avoidance).

Court's traditional aversion to "advisory opinions"[35] and one sees just how often the Court declines opportunities to espouse constitutional meaning. In these situations, other actors may fill the vacuum.

The recent literature on administrative constitutionalism marries insights about the federal judiciary's limitations with observations about the day-to-day interpretive work of the nation's administrative agencies—bodies "whose existence is barely hinted at in the Constitution," but which are now so numerous, established, and important as to constitute a "fourth branch" of government in many scholars' eyes.[36] The administrative constitutionalism literature starts from the realist insight that in the twenty-first-century United States, "most governing occurs at the administrative level and thus that is where constitutional issues often arise."[37] Administrators regularly interpret and enforce (or decline to enforce) the Constitution. Through such actions they may dictate the fate of constitutional claims and shape future ones, for example, by coloring popular understandings of the Constitution's guarantees or by preventing constitutional questions from reaching the judiciary. Similarly, their actions may inform future judicial interpretations of the Constitution or distort applicable doctrine.[38] In other words, administrative constitutionalism is not simply about conscious efforts on the part of

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35 *See* Flast v. Cohen, 392 U.S. 83, 96 (1968) (discussing the origin and theory behind the prohibition on advisory opinions).

36 Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575 (1984). This emphasis on the "fourth branch" is what distinguishes administrative constitutionalism scholarship from an older body of scholarship on "the Constitution outside the courts." On the latter, see, e.g., Michael J. Gerhardt, *The Constitution Outside the Courts*, 51 DRAKE L. REV. 775, 776–82 (2003) (offering numerous historical examples of constitutional interpretation by Congress and the president). The literature on constitutional interpretation within the executive branch is particularly thick. *See, e.g.*, KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 27 (2007) ("The judicial authority to interpret the Constitution is neither absolute nor stable."); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 116 (1993) (arguing that the executive branch is free to interpret the Constitution autonomously).

37 Metzger, *supra* note 13, at 1898. A vast sociological literature on "street-level bureaucrats" makes a similar point but does not engage explicitly with administrators' constitutional interpretations. *See, e.g.*, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE 3–25 (30th Anniv. Expanded ed., 2010) (documenting the often vast decision-making power of low-level administrators). The same distinction holds true for the literature on agency "nonacquiescence" with judicial rulings. *See, e.g.*, Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989) (describing and evaluating "[t]he selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals").

38 *See* Metzger, *supra* note 13, at 1935. On how agencies might prevent a court from considering a constitutional question, see Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 508 (2005).

administrators to avoid violating the Constitution—an obvious and unobjectionable concern—but about the intentional and unintentional ways in which they "elaborate[ ] and implement[ ]" "constitutional meaning"[39] as they go about carrying out their statutorily delegated obligations.

Contemporary examples abound. In her recent synthesis of the field, Gillian Metzger cites the U.S. Food and Drug Administration's recent decision, in the face of obvious First and Fifth Amendment concerns, to require that tobacco companies include graphic warnings about smoking-related health risks when marketing cigarettes; the Office of Legal Counsel's 2011 determination that the President's Article II powers permitted him to commit U.S. forces to the NATO military campaign in Libya, without prior approval from Congress (arguably contradicting Congress's Article I power to declare war); and the Department of Housing and Urban Development's 2013 rule prohibiting housing practices that "actually or predictably result[ ] in a disparate impact" on protected groups or that produce or reinforce "segregated housing patterns" (an interpretation of the Fair Housing Act but also arguably an interpretation of the constitutional guarantee of equal protection).[40]

To date, however, much of what we know about the *consequences* of administrative constitutionalism comes from a handful of discrete historical examinations. Sophia Lee, for example, has shown how administrative actors in the Federal Communications Commission (FCC) in the 1960s and early 1970s used the constitutional "state action doctrine" to persuade private employers to adopt equal employment rules—cautiously at first and then insistently, using the full force of the agency's investigatory, regulatory, and adjudicatory powers.[41] At the time, it was unclear whether the doctrine actually covered such actors—that is, whether their conduct was even subject to challenge under the Fourteenth Amendment.[42] The FCC continued in this vein even after the D.C. Circuit struck down its equal employment rules.[43] The FCC story is more interesting still when paired with another finding: at the same historical moment, Lee argues, administrators in the now-defunct Federal Power Commission interpreted the state action doctrine to mean that they should *not* implement equal employment policies (i.e., they declared private employers *beyond* the reach of the Fourteenth Amendment).[44] By contrasting the conduct of actors in

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39 Metzger, *supra* note 13, at 1901.

40 *Id.* at 1897–98; Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,479–82 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100).

41 *See* Lee, *supra* note 13, at 811–44.

42 *See id.* at 810, 834.

43 *See id.* at 872–73.

44 *See id.* at 848–52.

these two administrative bodies, Lee shows how agencies have "imaginatively extended or retracted, . . . diverged from, and even contradicted courts' constitutional doctrine" in the important arena of equal employment rulemaking, creating a variegated constitutional landscape for employers and employees to navigate.[45]

Reuel E. Schiller's historical work on administrative censorship offers another example. Prior to World War II, he finds, courts regularly deferred to administrative regulation of speech in several broad classes of cases, including, for example, state regulation of public fora speech and federal regulation of the mails and radio.[46] In the absence of judicial interference, agencies defined the practical protections of the First Amendment in these arenas.[47] The situation changed during the War, Schiller argues, when concerns arose about all potential encroachments on democratic forms of government,[48] but a basic and important insight remains: courts do not occupy every field of constitutional interpretation; in some cases, agencies have functioned as the primary expositors of constitutional norms, and their interpretations have had enduring consequences.[49]

Standing on this solid but relatively narrow foundation, legal scholars have proceeded eagerly to normative concerns. As Metzger notes, agencies occupy an "ambiguous constitutional space," "[t]hey lack direct electoral accountability," and much of their work is

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45 *See id.* at 804. Lee's work on the NLRB has produced similar findings. In the post-World War II period, Lee shows, the NAACP turned to courts *and* agencies to vindicate workers' civil rights, advancing novel theories about the constitutional obligations of employers, unions, and the NLRB itself. *See* Sophia Z. Lee, *Hot Spots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327, 328–30, 337 (2008). One notable result was a Board-rendered constitutional interpretation (in *Hughes Tool*, 147 NLRB 1573 (1964)) that was "out ahead" of the interpretations of both Congress and the Supreme Court. *Id.* at 329–30. For more on the NLRB's engagement with the constitutional doctrines governing the American workplace, see SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT 11–115 (2014).

46 Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 4 (2000).

47 *Id.*

48 *Id.* at 5.

49 For other historical examples, see ESKRIDGE, JR. & FEREJOHN, *supra* note 13, at 30–32 (arguing that in the late 1960s and early 1970s, attorneys working for the federal Equal Employment Opportunity Commission interpreted Title VII of the Civil Rights Act of 1964 in light of their own understanding of the Equal Protection Clause's applicability to pregnancy discrimination, anticipating by several years the Supreme Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974)); GOLUBOFF, *supra* note 21, at 111–73 (arguing that a particular understanding of the Reconstruction Amendments animated the work of the Department of Justice's (DOJ) Civil Rights Section (CRS) in the 1940s; documenting how the CRS helped revive and in fact expand the Thirteenth Amendment as a meaningful source of protection for black workers); Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181 (2014) (showing how at the turn of the twentieth century, administrative decisions regarding the constitutional status of Puerto Ricans percolated into lower courts, ultimately ripening into the constitutional doctrine of territorial nonincorporation).

obscure or inaccessible to outsiders.[50] Critics have also accused agencies of "tunnel vision," an impulse towards self-aggrandizement, and vulnerability to interest group capture.[51] Given these concerns, should steps be taken to limit administrative constitutionalism, or should it instead, as Metzger and others suggest, be "embrace[d] and encourage[d]"?[52]

Without denying the importance of these normative questions, I believe that the field still needs more empirical work (which I define as not simply quantitative analyses of data but any methodologically disciplined research based on observation or experience). To be sure, such research has limits: even the richest empirical work could be said to "reveal[ ] the world through a glass, darkly."[53] But without it, "the lawmaker and the scholar know fearfully little, and much of that is wrong."[54] What we make of administrative constitutionalism as advocates and policymakers—and what we do with this phenomenon as scholars (a topic to which I return in Part V)—should turn not on assumptions but on concrete evidence. To that end, this Article aims for depth over breadth: it focuses on one federal agency and analyzes that agency's interpretation and articulation over time of a single constitutional commitment.

B. Federal Agencies in the Age of Cooperative Federalism

My chosen focus also provides a means of exploring two legal developments that ought to be studied in tandem (and not merely through doctrine): the rise of a robust federal administrative state and important changes in the theories and practices of American federalism.[55]

Scholars of administrative law often classify agencies on the basis of structure or design. Most salient to them is "the formulation and specification of the controls that Congress, the Supreme Court and

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50 Metzger, *supra* note 13, at 1901.

51 *Id.* at 1919.

52 *Id.* at 1916. With caveats, Metzger favors administrative constitutionalism, on the theory that for all agencies' limitations, they are better than courts at balancing constitutional concerns with Congress's goals and choices. *Id.* For other responses to the normative questions, see ESKRIDGE, JR. & FEREJOHN, *supra* note 13, at 18 (describing administrative constitutionalism as a natural and desirable way of "develop[ing] and express[ing] our foundational institutions and norms"); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. (forthcoming 2015) (characterizing administrative constitutionalism as a useful mechanism for adapting the Constitution to changing circumstances and therefore a crucial supplement to judicial constitutionalism).

53 Carl E. Schneider & Lee E. Teitelbaum, *Life's Golden Tree: Empirical Scholarship and American Law*, 2006 UTAH L. REV. 53, 60 (2006).

54 *Id.*

55 *Cf.* Gillian E. Metzger, *Administrative Law and the New Federalism*, 57 DUKE L.J. 2022, 2026 (2008) ("[T]he relationship between federalism and federal administrative law remains strangely inchoate and unanalyzed.").

the President"—the three branches of government named in the Constitution—"may exercise over administration and regulation."[56] This focus stems from historical and ongoing concerns about agencies' place in the nation's constitutional system: Are agencies legitimate? If so, why?[57] To the extent that scholars are interested in what agencies actually do, they tend to focus on two functions, to the exclusion of others: rulemaking (the quasi-legislative function) and adjudication (the quasi-judicial function). These are the functions specified in the landmark Administrative Procedure Act (1946) (APA)[58] (which arose from that same basic concern about agencies' place within the nation's constitutional and political system).[59]

Scholars of administrative law pay less attention to a different, crucially important function: that of administering federal-state grants-in-aid. The vigorous use of grants-in-aid (essentially, subsidies) is a hallmark of what political scientists in the 1930s dubbed a "new federalism" and what scholars since then have labeled "cooperative federalism."[60] Intergovernmental cooperation was by then hardly an

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56 Strauss, *supra* note 36, at 579. Such controls include the process for selecting and removing an agency's leaders, the vulnerability of agency decisions to veto by other entities, the source of agency funds, the method by which those funds are replenished, and so on.

57 *See* Jerry L. Mashaw, *The American Model of Federal Administrative Law: Remembering the First One Hundred Years*, 78 GEO. WASH. L. REV. 975, 977 (2010) ("[A]dministrative law concerns itself with the internal structures and procedures that are required for legitimate administrative action.").

58 Administrative Procedure Act, 5 U.S.C. § 550 (2012).

59 *See generally* JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 1–14 (2012) (describing the historical circumstances that inspired and shaped the APA).

60 On the history of federalism, see, e.g., MARTHA DERTHICK, KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM (2001) (exploring the nature of America's federal system, with a focus on the changes that accompanied progressivism, the New Deal, and the modern civil rights movement); WILLIAM H. RIKER, THE DEVELOPMENT OF AMERICAN FEDERALISM 113–34 (1987) (tracing change—and continuity—over time in the main features of America's federal system); DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA 19–177 (2012) (tracking developments in American federalism from the founding to the twenty-first century); Harry N. Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 633, 675–83 (1979) (compiling and analyzing generations of scholarship on the "historical dimension" of American federalism). Federalism's constitutional life—that is, its embodiment in constitutional doctrine—has its own history. *See, e.g.*, Alison L. Lacroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 397 (2015) (examining the evolution of the spending power to conclude that constitutional federalism is not fixed); Logan Everett Sawyer III, *The Return of Constitutional Federalism*, 91 DENV. U. L. REV. 221, 221 (2014) (documenting and explaining "[t]he return of federalism to a prominent and hotly contested place in constitutional jurisprudence"); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 6–49 (2004) (comparing the two models of federalisms utilized by the Rehnquist Court). On "new federalism" and "cooperative federalism," see JANE PERRY CLARK, THE RISE OF A NEW FEDERALISM: FEDERAL-STATE COOPERATION IN THE UNITED STATES 3–11, 187–258 (1938) (coining the term "new federalism" to describe the changed nature and degree of federal-state cooperation in the first three de-

innovation, but the first decades of the twentieth century witnessed a new degree of interconnectedness, a more empowered federal government, and an increased willingness on the part of state and local lawmakers to allow the federal government (or at least its money) into areas of governance that once seemed to fall squarely within states' jurisdiction. The New Deal solidified this change.[61] Between 1900 and 1930, the combined amount of federal grants to states rose from $2.8 million annually to over $100 million; by fiscal year 1946–1947, the estimated annual total exceeded $1 billion. This money quickly became a significant part of state budgets. In the early years of the Depression, federal grants covered less than 2% of state and local expenditures; by 1950, that figure was closer to 9%.[62] And the use of grants did not stop there. President Lyndon Johnson's Great Society programs, many of which remained on the books for decades (e.g., Medicaid), caused another steep jump in federal grant sums: from a sum of $9 billion in 1958 to $23.9 billion in 1970.[63]

Today grants-in-aid are a mainstay of American governance. In fiscal year 2012, the federal government distributed $455.27 billion in grant money to states and localities,[64] accounting for 31.2% of total

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cades of the twentieth century); KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE: CONGRESS AND THE NEW FEDERALISM, 1877–1929 (2007) (cataloguing "new federalism"-type reforms and showing that they date back to the late nineteenth century); V. O. KEY, JR., THE ADMINISTRATION OF FEDERAL GRANTS TO STATES 206–64 (1937) (discussing the role of the "cooperating state agency" in the administration of federal grants to states); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (describing "the changed attitude of the [Supreme] Court toward certain postulates or axioms of constitutional interpretation" that the author associates with "dual federalism" and its embrace of positions favoring the centralization of power). Federalism scholars today recognize the endurance of federal-state collaboration, but some question whether the word "cooperative" remains apt. *See, e.g.*, Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014) (arguing that the degree of federal-state integration is now so high that federalism, as we know it, has given way to "a form of nationalism"); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 1998 (2014) (using the phrase "national federalism" to describe today's federal system); Abbe R. Gluck, *Instrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 538 (2011) (recognizing that much of today's federal-state cooperation follows directly from statutory incentives and directives).

61 Harry N. Scheiber, *From the New Deal to the New Federalism, 1933–1983*, *in* THE NEW DEAL LEGACY AND THE CONSTITUTION: A HALF-CENTURY RETROSPECT, 1933–1983, at 1–10 (1984).

62 George E. Bigge, *Federal Grants-in-Aid: A Bulwark of State Government*, 13 SOC. SEC. BULL. 3, 3 (1950); Cecile Goldberg, *Development of Federal Grant Allocations*, 10 SOC. SEC. BULL. 3, 4 (1947).

63 Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 269–70 (1996).

64 U.S. OFFICE OF MGMT. & BUDGET, TABLE 12.1 SUMMARY COMPARISON OF TOTAL OUTLAYS FOR GRANTS TO STATE AND LOCAL GOVERNMENTS: 1940–2019 (2013), *available at* http://www.whitehouse.gov/omb/budget/Historicals. This figure represented 15.4% of federal outlays and 3.5% of the GDP. *Id.*

state expenditures.[65] Agencies come into play because those billions of dollars are not simply deposited in lump sums in state treasuries, but are distributed via carefully considered allotments, each one tagged for a specific purpose and attached to specific conditions. The Department of Health and Human Services (HHS) alone, for example, administers 461 grant programs, ranging from the new Affordable Care Act grants to grants for family planning.[66] The Department of the Interior administers 270 grant programs, covering everything from disaster relief to American Indian educational assistance.[67] The list could go on. The point is that each grant requires management, monitoring, and daily acts of legal interpretation. Agencies do that work.

These acts of legal interpretation—including, at times, *constitutional* interpretation—often escape public scrutiny and judicial review. Administrative law scholars will think immediately of the Supreme Court's famous decision in *Citizens to Preserve Overton Park v. Volpe*, where the Court reviewed a controversial grant from the Department of Transportation to the Tennessee Department of Highways,[68] but for every decision of this nature there are thousands that remain in the shadows. When administrators decide, for example, how to interpret the particular conditions that Congress has attached to a federal grant or whether a grant recipient's actions conflict with those conditions, these decisions may not be "final" under the APA, especially when administrators frame decisions as suggestions rather than mandates. Administrators may thus circumvent the APA's demands for transparent decision making and may also elude oversight by the courts.[69] An agency's decision to stop the flow of federal dollars to an

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65 NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: EXAMINING FISCAL 2010–2012 STATE SPENDING 2 (2012), *available at* http://www.nasbo.org/publications-data/state-expenditure-report/state-expenditure-report-fiscal-2010-2012-data.

66 CATALOG OF FEDERAL DOMESTIC ASSISTANCE, *Agencies: Department of Health and Human Services*, https://www.cfda.gov/?s=agency&mode=form&tab=program&id=0bebbc3b3261e255dc82002b83094717.

67 *Agencies: Department of the Interior*, CATALOG OF FED. DOMESTIC ASSISTANCE, https://www.cfda.gov/?s=agency&mode=form&tab=program&id=b8765976b02cee3a384dec3de1edf2a0 (last visited Apr. 2, 2015).

68 401 U.S. 402 (1971). The decision is famous among administrative law scholars for its articulation of the standard of judicial review in cases challenging agency actions.

69 In this, the administration of grants-in-aid is not unique. Intentionally or not, agencies routinely escape the procedural requirements of the APA, for example, by issuing "guidance" documents instead of rules. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1391–92 (2004) (explaining that, in practice, agencies may often choose between promulgating a legislative rule, which will be subject to the notice-and-comment requirements of the APA, and issuing a guidance document, which will not); Connor N. Raso, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 792, 806, 820–21 (2010) (finding that between 1996 and 2006, the ratio of guidance documents to legislative rules was significant, but concluding that concerns about agencies' strategic use of guidance documents are overwrought); *cf.* Edward Rubin,

existing grantee *may* be subject to judicial review (this question has spawned confusion over the past fifty years, owing to its entanglement with evolving understandings of sovereign immunity),[70] but in practice such decisions are few and far between.[71] It is in the interest of both federal administrators and state grantees to resolve conflicts before they reach the defunding stage. All this is to say: if we seek to deepen our understanding of administrative constitutionalism and its implications, a major grant-administering agency is a good place to start.

C. Welfare Administration as a Case Study

An agency involved with grants-in-aid for public welfare is an ideal object of study—and not just because legal scholars have devoted relatively little attention to welfare administration.[72] Of the

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It's Time to Make the Administrative Procedure Act Administrative, 89 CORNELL L. REV. 95, 96–100 (2003) (noting that the APA is dramatically out of step with what agencies actually do).

70 *See* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 624 (2003) (discussing *Bowen v. Massachusetts*, 487 U.S. 879 (1988), in which "the Court held that the District Court had jurisdiction to review the government's refusal to reimburse Massachusetts for its Medicaid expenditures," and the confusion among lower courts in the wake of the decision).

71 Cases such as *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), represent a different, but related type of challenge to grants-in-aid: plaintiffs allege that in creating a particular grant, Congress overstepped its constitutionally delegated powers. *Id.* at 2580; *see also* South Dakota v. Dole, 483 U.S. 203, 209–12 (1987) (holding that Congress did not exceed its powers by enacting a law that withholds federal highway funds from states that allow individuals under twenty-one years of age to purchase alcohol).

72 Many legal scholars examined welfare administration between the late 1960s and mid-1980s, as the Supreme Court grappled with a stream of welfare rights cases and their aftermath. *See, e.g.*, Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 492–500 (1966) (examining problems with contemporary efforts to judicialize welfare administration); Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818, 821–37 (1971) (documenting how five Virginia welfare departments administered AFDC); Robert L. Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 1143, 1149–63 (1970) (analyzing a 1967 amendment to the AFDC title of the Social Security Act and the role of HEW in implementing that amendment); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1200–22 (1983) (describing the "formalization, bureaucratization, and proletarianization" of welfare administration in the 1960s and 1970s); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 2–28 (1985) (contrasting New Deal jurisprudence on welfare administration with jurisprudence from the 1960s and 1970s). Since then, however, the field has been relatively thin. Important exceptions include Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 355–79 (2012) (discussing how federal administrators used rights language as an administrative tool in the late 1930s and 1940s); Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1145–86 (2000) (examining the model of administration that has dominated welfare since the 1996 welfare reform); James A. Krauskopf, *The Administration of Public Assistance*, 22 FORDHAM URB. L.J. 883, 887–96 (1995) (describing the nature of welfare administration

major categories of grants that emerged in the first decades of the twentieth century, during the birth of modern "cooperative federalism," grants for welfare were arguably the most significant. In 1937, just after the enactment of the Social Security Act, federal aid for highways ($317 million) overshadowed that for welfare ($155 million), but within just two years, the situation was reversed.[73] By 1943, state receipts for welfare ($389 million) were more than double those for highways ($164 million).[74] (By comparison, state receipts for agriculture, an early area of federal funding, amounted to only $28 million.)[75] For the fiscal year ending June 30, 1947, grants for the categorical public assistance programs *alone*—that is, not including the full slate of federal-state health and welfare programs—constituted 57% of the total federal aid awarded to the average state.[76]

Public assistance grants were also significant because of the burdens they carried with them. One burden was fiscal: under the Social Security Act, states received these grants on a matching basis, meaning a state got nothing if it spent nothing, and it got more if it spent more (up to a statutorily prescribed maximum). State legislators responded rationally, by spending their own funds on public assistance, but they also demonstrated a keen awareness of the distorting effect of federal incentives.

A related burden was ideological. The Social Security Act allowed states great discretion over benefit levels and eligibility requirements—Southern senators would have blocked the Act had it been otherwise[77]—but some of the "strings" attached to the federal grants represented a sharp break with states' traditional approach to poverty. Historically, poor relief was a local function: local overseers of the poor decided who deserved aid, how aid would be given, and what would be demanded of the recipient in return. The Social Security Act, by contrast, demanded uniform, statewide rules and centralized state administration. As interpreted by federal administrators, the Act also severely curtailed the freedom of local authorities. States that

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circa 1994 and discussing potential implementation and administration problems of proposed welfare reforms).

73 COUNCIL OF STATE GOVERNMENTS, FEDERAL GRANTS-IN-AID: REPORT OF THE COMMITTEE ON FEDERAL GRANTS-IN-AID 38 (1949).

74 *Id.*

75 *Id.*

76 *Id.* at 81.

77 Southern senators feared that if poor African Americans received adequate assistance from the government, they would not be willing to work for low wages in fields and homes. Accordingly, they insisted that states have the power to determine benefit levels and eligibility restrictions (with a few exceptions). ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE 51–56 (1998). On the power of Southern Democrats in Congress during this period, see Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108. POL. SCI. Q. 283, 283–92 (1993).

wanted federal reimbursements could delegate administration to local authorities, but state officials had to ensure, for example, that local administrators gave poor claimants relief in cash rather than "in kind" (clothes, grocery orders, etc.), and that applicants had an opportunity to appeal unfavorable decisions. Public assistance grants thus burdened states in a way that highway grants, for instance, did not.[78]

A final burden involved oversight. Public assistance grants funded ongoing programs, not one-time projects (they were "formula grants" rather than "project grants"). In the public assistance context, this translated into continual monitoring. Federal administrators stopped short of supervising state officials, but they issued guidance documents, conducted regular audits, and imposed strict reporting requirements.[79] Much of this oversight, importantly, was not subject to the participatory requirements of the APA. Not until the late 1960s were the provisions of the federal *Handbook of Public Assistance*—the most authoritative source of federal guidance to states—formally promulgated as regulations.[80]

By the late 1960s, federal public assistance grants had transformed the way that states cared for their poor citizens, including those who had long occupied subordinate positions in local hierarchies. As Martha Derthick has demonstrated, federal grants helped produce more liberal and inclusive policies, significantly less local variation, more centralized policymaking, and greater bureaucratization and professionalization of administration.[81] Precisely how these grants produced such sweeping change is less clear. Constitutional interpretation by federal administrators, I argue, is a crucial piece of the puzzle. This same puzzle piece also helps us understand how we arrived at a very different place by the late twentieth century, in which welfare policymaking had been largely devolved to the states, agencies had grown accustomed to more rigorous congressional and judicial oversight, and legal advocates had lost nearly all hope of establishing robust constitutional protections for the poor.

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78 *See generally* Karen M. Tani, Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1935–1965 (2011) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Van Pelt Library, University of Pennsylvania) (examining the administration of public assistance between the New Deal and the War on Poverty).

79 *Id.* at 181.

80 St. John Barrett, *The New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1, 3 (1970).

81 DERTHICK, *supra* note 17, at 193–94.

II
Administrative Equal Protection in Mid-Century Welfare Administration, 1936–1953

This Part draws on original archival research to recover a concrete and powerful example of administrative constitutionalism: interpretations of the Equal Protection Clause[82] in the administration of federal-state public assistance programs in the decades after the New Deal.

A brief explanation of the agency in question: In 1935, as part of President Roosevelt's slate of reforms for a depression-ridden nation, Congress enacted the Social Security Act. This sweeping piece of social legislation not only created a national system of old-age insurance (Social Security) but also established generous grants for specific state welfare programs. To administer the Act, Congress created the Social Security Board, an independent agency. In 1939, as part of the Roosevelt Administration's efforts to organize a burgeoning mass of executive agencies (and also to protect vulnerable New Deal programs against conservative retrenchment), the Social Security Board came under a new "umbrella" agency: the FSA.[83] In 1953, the FSA became the HEW and the agency was elevated to cabinet-level status.[84]

For Social Security Board lawyers, leading actors in this Article, these organizational changes were largely cosmetic. When the FSA subsumed the Social Security Board, the Board's Office of the General Counsel did not disband; it simply became General Counsel for the entire FSA.[85] More importantly, for purposes of this Article, none of this restructuring affected the day-to-day work of the lawyers who

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82 During this same era, federal administrators also advanced their own interpretation of the Fourteenth Amendment's Due Process Clause, which, in their view, animated the Social Security Act's fair hearing requirement. *See, e.g.*, *infra* note 88 (discussing Social Security Board attorneys' arguments that the fair hearing provision implicated due process rights). As with their Equal Protection interpretation, their Due Process interpretation anticipated positions that the Supreme Court would not take until the late 1960s. *See* Karen M. Tani, Administrative Constitutionalism and the Welfare State: An Historical Case Study (June 2014) (a paper presented at the annual meeting of the Policy History Conference) (on file with author).

83 Reorganization Plan No. 1, § 202, 53 Stat. 1423, 1425 (1939); Mariano-Florentino Cuéllar, *"Securing" the Nation: Law, Politics, and Organization at the Federal Security Agency, 1939–1953*, 76 U. Chi. L. Rev. 587 (2009). There was one other significant change along the way: in 1946, another executive reorganization renamed the Social Security Board the Social Security Administration and altered the leadership structure, from a three-member board to a single commissioner. Reorganization Plan No. 2, 53 Stat. 1423, 1424–26 (1946).

84 *See* Derthick, *supra* note 17, at 22.

85 Tani, *supra* note 72, at 316 n.1. Between 1939 and 1953, and again between 1961 and 1969, the FSA/HEW General Counsel came from the Social Security Board. Fowler Harper (1939–40), Jack Tate (1940–47), and Alanson Willcox (1961–69) all hailed from the Social Security Board. Eisenhower appointee Parke Banta was the sole outsider. OGC Key Personnel Archive of Former General Counsels, Dep't Health & Human Services, http://www.hhs.gov/ogc/personnel/ogcarchive.html (last visited Apr. 3, 2015).

reviewed and monitored state public assistance programs. For the actors most involved and invested in interpreting the Equal Protection Clause, there was continuity.

This Part proceeds in three stages. In subpart A, I argue that from the outset, federal agency lawyers brought the Equal Protection Clause to bear on their work with state welfare programs. Between 1936 and 1946 these lawyers developed a coherent understanding of what that clause required (they embraced a nondeferential rationality model for reviewing state laws and policies) and circulated it within the agency. The following subparts trace administrative equal protection and its development into the late 1940s and early 1950s. In this era the agency sought—and failed—to strengthen its authority to enforce the Constitution's equal protection guarantees (subpart B), but nonetheless boldly invoked the Fourteenth Amendment in a dispute with Arizona and New Mexico (subpart C). The dispute led to federal court, where a district court judge accepted the agency's constitutional interpretation, but an appellate court ordered the case dismissed on sovereign immunity grounds, effectively insulating administrative equal protection from judicial review.

A. Interpreting the Social Security Act in the Shadow of the Constitution

The practice of interpreting the Social Security Act in the shadow of the Constitution[86] dates back at least to 1936, when the Social Security Board was a brand new agency. In February of that year, agency lawyer Sue S. White invoked the Constitution in a memo discussing whether states applying for grants-in-aid under the Act were allowed to exclude American Indians living on reservations from their federally subsidized welfare programs.[87] Certainly not, she answered: the text of the Social Security Act was less than clear on this issue, but in

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86 I borrow the shadow metaphor from Robert Mnookin and Lewis Kornhauser's landmark article, *Bargaining in the Shadow of the Law*. "Divorcing parents do not bargain . . . in a vacuum[,]" the authors famously argued; "they bargain in the shadow of the law[,]" as each side understands it. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979). Similarly, federal administrators interpreted the Social Security Act in the shadow of the Constitution, as they understood it. For all the Constitution's ambiguity, this higher law helped define the range of interpretive possibilities that federal administrators considered.

87 Memorandum from Sue S. White, Att'y, Soc. Sec. Bd., to Thomas H. Eliot, Gen. Counsel, Soc. Sec. Bd. (Feb. 5, 1936) (on file with NARA II, HEW Records, 235/40/10). Throughout this Article, "NARA II" refers to the National Archives and Records Administration in College Park, Maryland. "HEW Records" refers to the General Records of the Department of Health, Education and Welfare and the Federal Security Agency. Citations to documents on file with NARA II are given in the form [Records group number]/[Entry number]/[Box number], in conformity with the National Archives' record-keeping system.

her view, such a plan would run afoul of the Fourteenth Amendment.[88]

White cited no legal authority for her position, and her confidence is curious. In 1936, the Supreme Court had yet to adopt strict scrutiny for classifications based on immutable traits; existing precedents treated racial segregation as consistent with the Fourteenth Amendment.[89] Nor did the Equal Protection Clause come up in congressional hearings on the Social Security Act.[90] In fact, as many scholars have noted, aspects of the Act (e.g., the decentralized structure of the public assistance titles, the absence of a federally defined standard of need, the exclusions of domestic and agricultural workers from social insurance) appeared to make concessions to the racial hierarchies that existed out in the states.[91]

Ultimately, White urged a more cautious approach to the potential equal protection violation, lest the agency expose itself to accusa-

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88 *Id.* On Sue White's background, see Karen M. Tani, *Portia's Deal*, 87 CHI.-KENT L. REV. 549, 557 (2012). Another early example comes from an April 1936 memorandum by Assistant General Counsel Jack B. Tate: Tate insisted to the Board's leadership that although public assistance benefits were the creations of statute and thus could be eliminated "by the mere exercise of the legislative will," individual applicants were "entitled to due process and equal protection of the laws." Memorandum from Jack B. Tate, Assistant Gen. Counsel, Soc. Sec. Bd., to Soc. Sec. Bd. 1 (Apr. 27, 1936) (on file with NARA II, SSB Records, 47/13/95). Throughout this Article "SSB Records" refers to the General Records of the Social Security Board.

89 Justice Stone's famous "footnote four," in which he suggested heightened scrutiny of legislation aimed at discrete and insular minorities, was still two years away. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

90 *Social Security Act: Hearings on H.R. 7260 Before the Subcomm. on Fin.*, 74th Cong. (1935) (no mention of "equal protection" or "Fourteenth Amendment"). Interestingly, there is one reference to "equal treatment," but not in the part of the hearings dealing with the Act's public assistance titles: Senator (and future Supreme Court Justice) Hugo Black (D., Alabama) asked lawyer Thomas Eliot, one of the Act's drafters, to clarify the meaning of a provision in Title V, dealing with grants to states for Services for Crippled Children. *Id.* at 88. To receive federal funding, the provision read, a State plan must "provide such methods of administration . . . as found by the Chief of the Children's Bureau to be necessary for the efficient operation of the plan." *Id.* at 87. (The public assistance titles contained similar language, as Black may or may not have noticed.) *See id.* at 60, 79, 166. "Would [that provision] not give to the Federal Government the right to say what kind of hospitals the children should be taken to . . . and how they should be taken care of . . . ?" Senator Black asked. *Id.* at 87. "In other words, would it not go further than simply giving the Federal Government the right to require that all types and classes of people should receive *equal treatment* . . . ?" *Id.* at 88 (emphasis added). Eliot clarified that the provision related to "administration only." *Id.*

91 *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 44–45 (2005) (explaining how Southern representatives in Congress, who then occupied key committee positions, tailored the Social Security Act to funnel money towards their states with a minimum of disruption to racial hierarchies); LIEBERMAN, *supra* note 77, at 29–30 (explaining that without the noted concessions, the Act threatened to undermine white supremacy).

tions of "assuming judicial functions"[92]—a veiled reference to conservative critiques of agency decision making.[93] But starting around 1940, another agency lawyer made equal protection something of a personal crusade. As I have written elsewhere, Assistant General Counsel A. Delafield (A. D.) Smith and his agency colleagues had a strong interest in characterizing public assistance payments as rights rather than gratuities.[94] They viewed gratuities as the stuff of an archaic "old poor law" system, incompatible with the New Deal's modern, rational approach to public assistance.[95] As time went on and federal officials confronted the resilience of traditional relief-giving practices, the principle of equal treatment became an important point of contrast. Federal administrators described payments under the old system as variable, unpredictable, and often discriminatory. The Social Security Act, Smith wrote in 1940, could not be more different: it "stipulate[d] that each individual shall be entitled as a matter of right to the uniform application of the State's criteria of eligibility and standard of need."[96]

As this quotation and other writings suggest, Smith believed that the Social Security Act incorporated an "equal treatment" principle,[97] even if it did not say so explicitly. (The language quoted above comes not from the statute but from the agency's *interpretation* of the statute.) Like White, however, Smith also believed that a *constitutional* guarantee of equal protection governed the agency's work. He hinted at this in a 1939 memo about the permissible bases for classification in

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92 Memorandum from Sue S. White, Att'y, Soc. Sec. Bd., to Thomas H. Eliot, Gen. Counsel, Soc. Sec. Bd. 9 (Feb. 11, 1936) (on file with NARA II, HEW Records, 235/40/10). Strong action on this issue would come only after the war, in response to pressure from American Indians themselves. *See infra* Part II.C.

93 The most famous example is Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331 (1938). Lurking in the background, too, was the Roosevelt Administration's desire to shield New Deal social and economic legislation from searching judicial review.

94 Tani, *supra* note 72, at 321–22.

95 *Id.* at 319.

96 Memorandum from A. D. Smith, Principal Att'y, Office of the Gen. Counsel, Fed. Sec. Agency, to Gertrude Gates, Chief, Div. of Plans and Grants, Bureau of Pub. Assistance 1 (Feb. 14, 1940) (on file with NARA II, HEW Records, 235/40/25). Smith referred here to the Social Security Act's requirement that a state plan "provide that it shall be in effect in all political subdivisions of the State"—not exactly the "stipulation" he suggested. 42 U.S.C. § 1352 (2012). The only other statutory language that plausibly related to equal treatment was language precluding a state from imposing "[a]ny citizenship requirement which excludes any citizen of the United States." *Id.* Legislators seem to have understood this clause as a prohibition on state laws that discriminated against new citizens in favor of older citizens. *See* S. REP. NO. 74-628, at 29 (1935) ("A person shall not be denied assistance on the ground that he has not been a United States citizen for a number of years, if in fact, when he receives assistance, he is a United States citizen."); H.R. REP. NO. 17-615, at 18 (1935).

97 A. Delafield Smith, *Elements of the Judicial in Security Programs*, 17 SOC. SERV. REV. 424, 425 (1943).

federally subsidized state welfare plans: the Social Security Act said nothing about classification, and yet clearly, Smith wrote, states should not be permitted to differentiate one needy citizen from another on the basis of hair color, skin color, "religious predilections," or "any basis of grouping that is not germane in some degree to the problem at hand."[98]

Smith's invocation of constitutional equal protection (an invocation that would be repeated many times over in the coming years) is notable not only because of the absence of statutory support but also because his interpretation gave the Equal Protection Clause considerably more "bite" than did contemporary judicial decisions. As Victoria Nourse and Sarah Mcguire have argued, "equal protection arguments were alive and well at the turn of the twentieth century"[99]—a favorite (or in Justice Oliver Wendell Holmes, Jr.'s memorable words, "the usual last resort") of those who sought to resist state regulation.[100] But those arguments rarely succeeded: unless the challenged legislation was "without any reasonable basis, and therefore purely arbitrary," it would survive judicial review.[101] Equal protection arguments tended to prevail only "when a strong liberty interest was at stake," such as a man's right to work. [102] Starting in 1938, the Supreme Court hinted at an equal protection revival, but as of the early 1940s, that revival had yet to materialize.[103] A. D. Smith clearly had different ideas, at least when it came to *agency* review of state statutes.

Smith circulated his thoughts about equal protection more widely in 1941. Welfare administration regularly raised "equal-protection-of-the-law" questions, Smith wrote in an article in the *Social Service Review*.[104] Could a state agency exclude a person on account of time already spent on the relief rolls or because the person's parents were

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98 Memorandum from A. D. Smith, Principal Att'y, Office of the Gen. Counsel, Fed. Sec. Agency, to Geoffrey May, Assoc. Dir., Bureau of Pub. Assistance 4 (Dec. 20, 1939) (on file with NARA II, HEW Records, 235/40/18). This was a clear invocation of constitutional equal protection. *See* Cockrill v. California, 268 U.S. 258, 262 (1925) ("The equal protection clause does not require absolute uniformity . . . . The state . . . may classify persons on bases that are reasonable and germane having regard to the purpose of the legislation.").

99 V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 975 (2009).

100 Buck v. Bell, 274 U.S. 200, 208 (1927).

101 Nourse & Maguire, *supra* note 99, at 983 (quoting Johnston v. Kennecott Copper Corp., 248 F. 407, 413 (9th Cir. 1918)) (internal quotation marks omitted).

102 *Id.*

103 *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (suggesting that in the future the Court might give "more exacting judicial scrutiny" to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" and to legislation directed at "discrete and insular minorities"). Only later would legal scholars trace the Court's modern equal protection jurisprudence back to "footnote four." GOLUBOFF, *supra* note 21, at 45.

104 A. Delafield Smith, *Judicial Trends in Relation to Public Welfare Administration*, 15 SOC. SERV. REV. 242, 256–57 (1941) (citations omitted).

aliens? Revisiting an old issue, could a state agency exclude Indians?[105] Since these were all instances in which state officials treated one category of persons differently from another, they all called for equal protection analysis. Smith also noted that for many of those affected, administrators—not judges—were their best hope: "When all is said and done," Smith predicted, "justice for the majority of individuals affected by these laws will be sought finally and authoritatively before [an] administrative tribunal."[106]

The lawyers' references to equal protection grew more frequent and forceful during the war years, as voices from across the political spectrum touted equality, fair treatment, and the "rule of law" as quintessential American values.[107] The beauty of the Social Security Act, Smith explained in a 1943 article, was that it assured every American that "his case will not rest in the discretion of the administrator but upon the basic guaranties of (1) the right to equality of treatment and (2) apt and legally approvable procedures for compelling the satisfaction of that right"—in other words, "'equal protection' and 'due process.'"[108] This change—this shifting poor relief into a constitutionally protected zone—would support Americans' "sense of security" and "attitude of self-reliance" in these troubling times, Smith argued, and thereby build "the morale of our succeeding generations."[109]

For the same reasons, agency lawyers in the mid-1940s became more vocal about the violations of equal protection that, in their view, continued to pervade state-level welfare administration. Smith's 1946 article in the *Social Security Bulletin* (a reprint of a speech delivered at that year's National Conference of Social Work) went beyond identifying equal protection "questions" to signaling outright disapproval of laws that "classified our [needy] children in terms of the sins of their parents"—that is, the parents' immigration status, spending choices, sexual behaviors, and so on.[110] Smith considered such classifications

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105 *Id.* at 258 (citations omitted). Smith was inclined to agree with White on this issue. Memorandum from A. D. Smith, Principal Att'y, Office of the Gen. Counsel, Fed. Sec. Agency, to Geoffrey May, Assoc. Dir., Bureau of Pub. Assistance (May 31, 1940) (on file with NARA II, SSB Records, 47/13/92).

106 Smith, *supra* note 104, at 259.

107 *See generally* DAVID CIEPLEY, LIBERALISM IN THE SHADOW OF TOTALITARIANISM 24 (2006) ("If fascism meant arbitrary government, the United States stood for due process and the rule of law."); EDWARD PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 235–72 (1973) (noting a shift in democratic theory in the decades following World War II, as intellectuals eagerly differentiated the United States from its totalitarian counterparts around the globe).

108 Smith, *supra* note 97, at 425.

109 *Id.* at 425–26; *see also id.* at 426 ("Economically and socially, the sense of security requires the knowledge that what we obtain we obtain as of right and as an equal before the law.").

110 A. Delafield Smith, *Community Prerogative and the Legal Rights and Freedom of the Individual*, 9 SOC. SEC. BULL. 6, 7 (1946).

constitutionally impermissible, for, in terms of need (the legally relevant characteristic), the child of the "sin[ful]" parent was no different from the child of the innocent one.[111]

Anticipating a point that the constitutional law scholar Jacobus tenBroek would famously raise in the mid-1960s,[112] Smith also objected to the way that state laws created a special set of requirements for poor Americans. Under the generally applicable public laws, Smith explained, "[y]ou may buy . . . what you wish or enjoy"; you may be "immoral" or "idle[ ]"; if you are a laborer, you may go on strike; if you are a child, you may live in peace, so long as your home does not violate certain "objective standards" of health and safety. Through welfare laws, however, state and local officials enforced different standards on the poor: Through economic sanctions, they deterred adults from engaging in legal but undesirable behaviors. Through "suitable home" restrictions, they targeted living environments that, under the generally applicable law, were no cause for concern. "[T]his," Smith scolded, "is not equality in any legal sense."[113] Smith's boss, General Counsel Jack B. Tate, articulated similar concerns in a 1946 speech to the agency's field staff. State laws that excluded children from public assistance because they lived with a relative of a different religious faith, for example, or because they were not the products of "legitimate" unions, were "of course *plainly unconstitutional*."[114]

Judicial support for this interpretation remained thin. As late as 1949, leading constitutional law scholars described the Supreme Court's application of the Equal Protection Clause as "halting, indecisive, and unpredictable."[115] Tate himself conceded that "no close legal precedents" supported his views.[116] Courts did not give searching

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111 *Id.* Only in the late 1960s would the Supreme Court embrace this reasoning. *See infra* note 318.

112 Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964) (Parts I & II); *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614 (1965) (Part III).

113 Smith, *Community Prerogative and the Legal Rights and Freedom of the Individual*, *supra* note 110, at 7.

114 Jack B. Tate, Remarks at the Field Staff Conference 23, 25 (1946) (on file with NARA II, HEW Records 235/40/75) (emphasis added).

115 Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 380 (1949).

116 Tate, *supra* note 114, at 24. The most favorable language probably came from the 1941 Supreme Court case *Edwards v. California*, in which the Court struck down a California law criminalizing the transport of indigent nonresidents into the state, but the majority based its decision on the Commerce Clause, not the Fourteenth Amendment. *See* 314 U.S. 160, 177 (1941). Not until the mid-1950s, in the criminal defense context, did the Court begin to use the Equal Protection Clause to strike down state laws that unfairly burdened the poor. *See* Douglas v. California, 372 U.S. 353, 357 (1963) (holding that "when an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with" the Fourteenth Amendment); Griffin v. Illinois, 351 U.S. 12, 13–26 (1956) (finding a Fourteenth Amendment violation where a state denied a

consideration, Tate explained, to matters "described as charitable or eleemosynary" (if public benefits were a gift, the beneficiary could hardly complain about the amount received or the manner of treatment). Meanwhile, assistance recipients had not pressed the issue for "fear [of] being thought 'uncooperative'" by those with control over their livelihoods. Perhaps Congress would someday clarify the legal status of public assistance payments. Until then, Tate urged, it was up to *administrators* to "distinguish between individuals only on a rationally apt and constitutional basis," to remove conditions that subjected the individual to excessive public control, and (without irony) to "guarantee the individual his proverbial day in court."[117]

B. A Brush with Congress

By late 1946, top people in the federal grant-administering agency[118]—not just the lawyers and other mid-level administrators—agreed that states with approved welfare programs ought to be assuring "equal treatment of individuals in similar circumstances."[119] The precise way forward was less clear. The softest approach, which the agency pursued starting that October, was persuasion: "[W]herever appropriate," the agency's Bureau of Public Assistance directed its regional directors, they should recommend to state officials ways to "strengthen[ ] statutory provisions affecting the right to assistance and

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defendant's criminal appeal solely on the basis of his inability to pay for a trial transcript). A decade later the Court would apply a similar analysis in the voting rights context. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666–70 (1966) (holding that a poll tax violated the Equal Protection Clause); *see also* Bullock v. Carter, 405 U.S. 134, 140–49 (1972) (striking down system of election filing fees on equal protection grounds). And in the early 1970s, a number of Justices would characterize the poor as a "suspect class," sufficient to trigger strict scrutiny of laws that treated them differently. *See* James v. Valtierra, 402 U.S. 137, 144–45 (1971) (Marshall, J., dissenting) (asserting, in a case involving public approval of low-income housing projects, that classifications based on wealth merited strict scrutiny); Boddie v. Connecticut, 401 U.S. 371, 385–86 (1971) (Douglas, J., concurring) (opining that as applied to low-income persons, filing fees in divorce cases violated the Fourteenth Amendment). As a body, however, the Supreme Court has consistently refused to embrace that interpretation. *See* Harris v. McRae, 448 U.S. 297, 323 (1980) (reiterating that the "Court has held repeatedly that poverty, standing alone, is not a suspect classification" (citing James v. Valtierra, 402 U.S. 137 (1971))); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 25 (1973) (holding that the poor as a "disadvantaged class is not susceptible of identification in traditional terms"). In any case, Smith and Tate were writing at a time when lawyers could only speculate about how the Court would apply the Constitution to the poor. For an up-to-date overview of Supreme Court jurisprudence in this area, see Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 410–19 (2010).

117 Tate, *supra* note 114, at 24–25, 38.

118 The Social Security Board was by this point the Social Security Administration, which was nested within the FSA. *See supra* note 83 and accompanying text.

119 Memorandum from Jack B. Tate, Gen. Counsel, Fed. Sec. Agency, to Watson B. Miller, Adm'r, Fed. Sec. Agency, 9 (Oct. 8, 1946) (on file with NARA II, HEW Records 235/40/11).

equitable treatment of individuals."[120] Such a piecemeal strategy, however, would take time to bear fruit. Thus administrators considered two other strategies: (1) an amendment to the Social Security Act, which would explicitly require states to adhere to the constitutional requirement of equal protection; and (2) a favorable court opinion. In the late 1940s and early 1950s, amidst a burgeoning civil rights movement, they pursued both.

In the spring of 1948, A. D. Smith decided to "spark" a conversation about equal protection.[121] "The thinking has heretofore been in the negative, i.e. forbidding discrimination on the basis of race, creed or color," Smith explained to a colleague in advance of the annual meeting of the agency's regional attorneys. He proposed to "approach the matter positively—*as the Constitution does*—and think . . . of assuring that the benefits of the grant-in-aid programs are made equally available to all."[122] The statements that Smith circulated to the entire regional attorney cohort elaborated: Many of the problems with contemporary social legislation, Smith explained, stemmed from "failure to legislate and operate under the equal protection of the laws principle," which he understood in rationality terms.[123] "[Y]ou have to define the scope of your objective" and then "carry thru," by allowing the statutory objective alone to guide differences in treatment.[124] Laws that made public assistance turn on subjective moral judgments, laws that maintained the "tradition of discretion" that had long haunted the administration of poor relief—all these might give way in the face of a more robust application of the equal protection principle.[125]

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120 Memorandum from Jane Hoey, Dir., Bureau of Pub. Assistance, to Reg'l Dir., Fed. Sec. Agency (Oct. 11, 1946) (on file with NARA II, HEW Records 235/40/30).

121 Letter from A. D. Smith, Assistant Gen. Counsel, Fed. Sec. Agency, to Louis Shneider, Reg'l Att'y, Fed. Sec. Agency (Apr. 20, 1948) (on file with NARA II, HEW Records 235/40/75).

122 *Id.* (emphasis added). The use of the word "positive" may seem curious, given that the Equal Protection Clause is phrased negatively (as a prohibition on particular exercises of state power), but by 1948, federal government officials often spoke of equality in affirmative terms. *See, e.g.*, PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 3–10 (1947) (discussing the government's obligation to secure Americans' rights, including the right to "equality of opportunity" in employment, housing, education, health care, and public services and accommodations).

123 On the rationality model of equal protection and its alternatives, see Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 52–62 (1990).

124 A. D. Smith, *Equal Protection of the Laws Principle*, Apr. 27, 1948 (on file with NARA II, HEW Records 235/40/75).

125 *Id.*; *see also* Memorandum from A. D. Smith, Assistant Gen. Counsel, Fed. Sec. Agency, to All Reg'l Att'ys, Fed. Sec. Agency, 3–4 (Apr. 29, 1948) (on file with NARA II, HEW Records 235/40/75) (noting various "problems and oddities in classification" that he had observed, such as denials of ADC on the ground that a parent refused to undertake a surgical operation, or participate in a training course, or institute a criminal support action against a family member).

There was one glaring problem: How could federal administrators enforce this equal protection principle, especially at a time when judicial support was lacking?[126] One option was to secure commitments from state legislatures to, first, observe the principle, and second, "characteriz[e] . . . the . . . [welfare] program as one dealing with rights *such as are concededly subject to review under the equal protection clause*."[127] With such clear statements, courts would be free to scrutinize the practices of state and local welfare administrators (i.e., such scrutiny would not read as dangerous *Lochner*-type judicial activism).[128] Many states, of course, did not want to guarantee equal protection to their needy citizens, which is why Smith pushed a second option: that Congress amend the Social Security Act to *condition* each state's federal funds on the state's commitment to equal protection.[129]

Smith's proposal may have sounded radical to some, but it was not a pie-in-the-sky idea. Only months before, in October 1947, President Truman's Committee on Civil Rights recommended that Congress condition "all federal grants-in-aid and other forms of federal assistance" on the absence of discrimination and segregation.[130] "Apropos the current civil rights discussion," the General Counsel's office recommended Smith's proposed reform to administrators at the very top of the federal social welfare bureaucracy.[131]

The proposal had several advantages, Alanson Willcox explained in March 1948. (Willcox, the New Deal lawyer spotlighted in the Introduction, succeeded Tate as General Counsel in 1947.) The first was that "it would frame the [discrimination] issue in the sweeping terms of the Fourteenth Amendment rather than in terms of race and color."[132] (The Supreme Court had not yet interpreted the Equal Protection Clause as a presumptive prohibition on racial classifications.)[133] Another was that the proposal could be implemented without a dramatic expansion of agency power: the federal agency would simply withhold grants until states guaranteed their

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126 Smith cited a number of cases in an attempt to bolster his argument, but none pertained to welfare payments. Smith to All Reg'l Att'ys, *supra* note 125, at 1–2.

127 Smith, *supra* note 124, at 2 (emphasis added).

128 Memorandum from Alanson W. Willcox, Gen. Counsel, Fed. Sec. Agency, to All Reg'l Att'ys, Fed. Sec. Agency (May 3, 1948) (on file with NARA II, HEW Records 235/40/75).

129 Smith, *supra* note 124, at 2.

130 PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *supra* note 122, at 166.

131 Memorandum from Alanson Willcox, Gen. Counsel, Fed. Sec. Agency, to Oscar Ewing, Adm'r, Fed. Sec. Agency (Mar. 15, 1948) (on file with NARA II, HEW Records 235/40/48); Memorandum from Alanson Willcox, Gen. Counsel, Fed. Sec. Agency, to Donald Kinglsey, Assistant Adm'r, Fed. Sec. Agency (Apr. 9, 1948) (on file with NARA II, HEW Records 235/40/48).

132 Willcox to Ewing (Mar. 15, 1948), *supra* note 131, at 1.

133 Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 216–17 (1991).

commitment to equal protection. Should a state subsequently violate its pledge, a court could resolve the issue.[134] Perhaps most important, Willcox argued, the proposal would vindicate the nation's "democratic pledge of equality"[135]—so vital in the Cold War context—by refuting "[t]he too common thought . . . that the State may give to one and withhold from another in its unfettered discretion."[136]

Within a year, a version of Smith's proposal appeared before the House Ways and Means Committee, as part of the agency's suggested revision of the Social Security Act. ("[D]eterminations of eligibility for and amounts of assistance . . . *shall be made on bases which, within the area served, will assure to every individual the equal protection of the laws* . . . .")[137] But if legislators were aware of administrative equal protection, members of this Committee expressed no interest in placing it on firmer ground, not even if the Act promised judicial rather than administrative vindications of the "equal treatment" guarantee. When offered a substitute provision, providing that state-level fair hearings would be "subject to judicial review to assure due process *and equal protection of the law*," the Committee rejected it, reportedly out of concerns about a "multitude of [court] suits."[138] In the wake of the Vinson Court's recent racial discrimination decisions and amidst ongoing NAACP litigation campaigns,[139] the Southern-dominated Committee may well have had something to fear.[140]

C. A Brush with the Courts

The failure of legislative reform did not, however, weaken the agency's commitment to equal protection. In their dealings with states, federal officials continued to raise the issue on their own. The most notable example is the agency's response to two states' contin-

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134 Willcox to Ewing (Mar. 15, 1948), *supra* note 131, at 1–2.

135 Memorandum from Alanson W. Willcox, Gen. Counsel, Fed. Sec. Agency, to John L. Thurston, Assistant Adm'r for Programs, Fed. Sec. Agency (Nov. 5, 1948) (on file with NARA II, HEW Records 235/40/48).

136 Willcox to Ewing (Mar. 15, 1948), *supra* note 131, at 1.

137 H.R. 2892, 81st Cong. § 1407(a)(8) (1st Sess. 1949) (emphasis added).

138 J. Meyers, Notes from Regional Attorneys' Conference, Oct. 19, 1949 (on file with NARA II, HEW Records 235/40/75) (emphasis added).

139 *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (holding that state court enforcement of restrictive covenants that exclude persons of color from ownership or occupancy of real property is a violation of the Fourteenth Amendment); Sipuel v. Board of Regents, 332 U.S. 631, 632–33 (1948) (per curiam) (holding that the state must conform with the Fourteenth Amendment's Equal Protection Clause and allow qualified persons of color access to legal education at state institution as readily as applicants of any other group). *See generally* Whittington B. Johnson, *The Vinson Court and Racial Segregation, 1946–1953*, 63 J. NEGRO HIST. 220, 221–27 (1978) (examining the Vinson Court's record on civil rights).

140 LEE J. ALSTON & JOSEPH P. FERRIE, SOUTHERN PATERNALISM AND THE AMERICAN WELFARE STATE: ECONOMICS, POLITICS, AND INSTITUTIONS IN THE SOUTH, 1865–1965, at 45–46 (1999).

ued exclusion of reservation Indians from the states' federally subsidized public assistance programs. This dispute, which lasted for nearly two decades, would ultimately allow the agency's equal protection interpretation to surface in federal court.[141]

The example requires a brief digression: In the early days of the Social Security Act, the federal agency persuaded most states that public assistance should be available to Indians on the same terms as everyone else. The lawyers believed that the Fourteenth Amendment dictated this result,[142] but in communications with the states, administrators chose not to disclose the legal basis for their position. During the depths of the Great Depression, they did not need to: the mere suggestion that the agency would withhold federal money was enough—at least for most states. Arizona and New Mexico, the two states with the largest populations of reservation Indians, refused to give in so easily.[143] After learning the agency's policy, the two states' legislatures enacted public assistance programs that purported to satisfy federal requirements and therefore received federal funds; later, at the implementation stage, state and local administrators excluded Indians from coverage.[144]

For the next five years, obfuscation at the state level and political negotiations in Washington left most Indians in the two states (both on reservation and off) locked out of public assistance programs.[145] Federal administrators were aware of the states' discriminatory practices and disapproved of them, on both statutory and constitutional grounds.[146] But agency leaders agreed "to let sleeping dogs lie," according to Arizona Senator Carl Hayden—a member, not coincidentally, of that body's powerful Appropriations Committee.[147]

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141 For earlier examples, see Memorandum from Edward J. Rourke, Office of Gen. Counsel, Fed. Sec. Agency, to Reg'l Dir., Region 3, Fed. Sec. Agency (June 14, 1944) (on file with NARA II, HEW Records 235/40/70) (noting two previous occasions in which the Social Security Board refused to approve state plan material "on the ground that the contemplated action would violate the Constitution of the United States").

142 *See supra* note 87.

143 Karen M. Tani, *States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty, 1935–1954*, 33 LAW. & HIST. REV. (forthcoming 2015) (on file with author).

144 *Id.* at 14–15.

145 By 1938, the Social Security Board had disturbing data on the dearth of Indian public assistance recipients in the two states, but out of consideration for the two states and for the Bureau of Indian Affairs, agency leaders awaited a legislative solution before pressing the issue. None was forthcoming. Arizona Senator Carl Hayden regularly proposed amending the Social Security Act to provide complete federal financing for all Indian public assistance claims, but without support from Interior Department officials, he repeatedly failed. *Id.* at 14.

146 *Id.* at 12.

147 Letter from Carl T. Hayden, U.S. Senator, to Harry W. Hill, Comm'r, Ariz. State Dept. of Welfare (Oct. 23, 1939) (on file with the Arizona State University Libraries Arizona Collection, Carl T. Hayden Papers, 1851–1979, Box 699).

Starting in the 1940s, however, Indians in the two states began to press for inclusion, using compelling wartime rhetoric. By 1947, a coordinated campaign was afoot. The National Congress of American Indians (NCAI), a recently formed pan-Indian organization, encouraged reservation Indians in Arizona and New Mexico to apply for public assistance. Via two well connected former Interior Department lawyers, Felix Cohen and James Curry, the NCAI then forwarded evidence of discrimination and inaction to allies in the Social Security Board. This activism gave the federal agency the ammunition and motivation it needed to initiate the process of formally sanctioning the two states. (The sanction—complete defunding—was so severe that although administrators frequently alluded to it, they rarely used it. By the early 1960s, it was known as the "nuclear option" in agency parlance.)[148] Ultimately the two states avoided losing their grants only by formally committing, in April of 1949, to treating Indian public assistance applicants the same as all others.[149]

This series of events matters for two reasons. First, when we look beneath the surface, we see that the agency's "equal treatment principle" was more than just talk: it informed negotiations with the states and helped inspire the risky step of confronting them.[150] Consider, for example, A. D. Smith's November 1947 response to an internal request for legal analysis: he explained that the actions of the two Southwestern states not only violated the Social Security Act, but also implicated "the basic constitutional issue of equal protection of the laws under the Fourteenth Amendment."[151] This was not simply because of racial discrimination, Smith emphasized. The two states would likely claim that they had merely distinguished "wards" of the federal government from nonwards. But given the states' ostensible purpose—providing for needy citizens—their distinction had "no logic" unless the federal government was actually fulfilling the needs of all Indians in the states, a claim for which there was no evidence.[152] In August 1948, in the midst of a series of conferences with state offi-

148 On the "nuclear option," see Notes from Conversation with Frances White (May 25, 2014) (on file with author).

149 Tani, *supra* note 143, at 23.

150 Risky because such action could provoke political backlash, which might manifest itself in reduced appropriations.

151 Memorandum from A. D. Smith, Assistant Gen. Counsel, Fed. Sec. Agency, to Jane M. Hoey, Dir., Bureau of Pub. Assistance, 2 (Nov. 21, 1947) (on file with NARA II, HEW Records 235/40/7).

152 *Id.*; *see also* Memorandum from Alanson W. Willcox, Gen. Counsel, Fed. Sec. Agency, to Oscar Ewing, Adm'r, Fed. Sec. Agency (Dec. 10, 1947) (on file with NARA II, HEW Records 235/40/11) (reporting to the head of the agency that the GC's office prepared "a statement of the current situation and included a discussion to the effect that arbitrary denial of assistance is violative of rights guaranteed by the Fourteenth Amendment").

cials, Smith prepared a similar statement for Social Security Administrator Arthur Altmeyer. Again, constitutional equal protection informed Smith's sense of the agency's obligations. "Suppose . . . that some State should suddenly stop paying all negroes, jews and catholics [sic]. How could a federal official sworn to observe the Constitution of the United States certify funds under such conditions . . . ?" Smith asked.[153]

Whether constitutional arguments swayed state officials to adjust their policies is unclear. (The more likely explanation is their appreciation for their limited political power, combined with Congress's eventual bestowal of a higher-than-normal federal matching rate for payments to reservation Indians.)[154] What *is* clear is that federal administrators' understanding of the Constitution, combined with civil rights activism outside the agency, affected administrators' perception of their role and their willingness to wield politically risky financial sanctions. It also shaped their response to the legal challenge that Arizona filed against the agency shortly thereafter.

That lawsuit is the second reason that this administrative skirmish matters: unsatisfied with the administrative resolution of the Indian inclusion issue, Arizona officials looked for an opportunity to sue the federal agency; the suit, in turn, allowed the agency to advance its Fourteenth Amendment interpretation in federal court.

The opportunity arrived in 1950, when Congress amended the Social Security Act to include a new category of public assistance: Aid to the Permanently and Totally Disabled (APTD).[155] The structure was the same as for the programs authorized by the 1935 Act: states that wished to take advantage of federal financial support created state-specific plans; federal administrators checked these plans against statutory requirements, and if appropriate, disbursed funds.[156] The APTD law that the Arizona legislature enacted in the spring of 1952 explicitly denied assistance "to any person of Indian blood while living on a federal Indian reservation."[157] When federal administrators re-

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153 Memorandum from A. D. Smith, Assistant Gen. Counsel, Fed. Sec. Agency, to Arthur Altmeyer, Comm'r, Soc. Sec. Admin. 2 (Aug. 12, 1948) (on file with NARA II, HEW Records 235/40/79). It was not a hypothetical question: just a month later, in September 1948, Felix Cohen and two colleagues responded to the agency's inaction by filing suit on behalf of eight Indians involved with the NCAI campaign, alleging deprivation of the plaintiffs' civil rights; they withdrew the lawsuit the following June, only after the agency initiated hearings and state officials formally agreed to revise their position. Tani, *supra* note 143, at 4–5.

154 Tani, *supra* note 143, at 26; Social Security Act Amendments of 1950, ch. 809, sec. 351, § 1401 64 Stat. 477, 555 (1950).

155 *See* Social Security Act Amendments of 1950, ch. 809, sec. 351, §§ 1401–05, 64 Stat. 477, 555–58 (1950).

156 *Id.*

157 Tani, *supra* note 143, at 26.

fused to authorize federal funds, Arizona sued to compel agency approval (*Arizona v. Hobby*).[158] If the gamble paid off, the judiciary would both curb the federal agency's authority and reject its legal interpretations.[159] For their part, agency lawyers had long hoped for the chance to win judicial support for the equal protection principle. "[W]e should miss no opportunity," A. D. Smith wrote to one of his regional attorneys in late 1947, "of urging the conception of social programs as the constitution of legal rights in which the usual legal guarantees of due process and equal protection of law are applicable and of the reasons behind this view."[160] Arizona's lawsuit gave them that chance.

The agency's interpretation of equal protection received its first-ever public airing on February 20, 1953, when District Court Judge Henry A. Schweinhaut considered the Government's motion to dismiss the case.[161] In accordance with federal law, the Department of Justice (DOJ) represented the agency in court, but two agency attorneys (including General Counsel Alanson Willcox) appeared alongside Assistant United States Attorney Ross O'Donoghue. The arguments that O'Donoghue presented were consistent with opinions that had long circulated inside the agency. For example, although the government could have defended its actions without reference to the Constitution, O'Donoghue characterized Arizona's APTD plan as in conflict with both the Social Security Act *and* the Equal Protection Clause. The framing of the equal protection argument was also consistent with the agency's. Arizona had created a classification based on race, O'Donoghue explained to Judge Schweinhaut, and tried to salvage it by adding a classification based on residence (on a federal reservation). In light of the purpose of the statute (providing aid to needy and disabled individuals), neither classification was proper, and nothing proper could be "created by adding together [the] two negatives."[162]

After hearing from Arizona's lawyer, as well as from Felix Cohen (representing amici curiae the Association on American Indian Affairs and the Hualapai and San Carlos Apache tribes), Judge Schweinhaut found in favor of the government and dismissed the case.[163] His brief oral opinion was a victory for administrative equal protection.

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158 Arizona v. Hobby, No. 2008–52 (D.D.C. dismissed Feb. 20, 1953).

159 Tani, *supra* note 143, at 26–27.

160 Memorandum from A. D. Smith, Assistant Gen. Counsel, Fed. Sec. Agency, to Reg'l Att'ys, Fed. Sec. Agency (Oct. 30, 1947) (on file with NARA II, HEW Records 235/40/75).

161 Transcript of Oral Argument, Arizona v. Hobby, No. 2008–52 (D.D.C. Feb. 20, 1953) (on file with the Mudd Manuscript Library, Princeton University, Princeton, N.J., Association on American Indian Affairs Records 1851–2008, Box 328, folder 21).

162 *Id.* at 6.

163 *Id.* at 28.

Schweinhaut, a Franklin D. Roosevelt appointee, had come to the federal bench after serving as the first chief of the DOJ's new Civil Liberties Section (commonly known by its subsequent appellation, the Civil Rights Section) and had presumably thought much about the meaning of the Fourteenth Amendment.[164] Schweinhaut was not persuaded, as Cohen had argued, that Arizona intended to discriminate against Indians on racial grounds; the intended classification was between wards of the government and nonwards. Yet this seemingly more benign classification was constitutionally impermissible, he implied, *and the agency was correct to find it so*: "I think the Administrator could not, constitutionally, or under the terms of the statute, itself, probably . . . approve [Arizona's] plan . . . ."[165] In other words, the agency acted legally and properly when it scrutinized the Arizona legislature's chosen classifications and when it rejected Arizona's plan on constitutional grounds.

As it turned out, this important finding would remain hidden from public view. In granting the government's motion, Schweinhaut "put aside jurisdictional questions,"[166] but the appellate court to which Arizona turned next was not so inclined. On May 13, 1954, a three-judge panel of the D.C. Circuit Court of Appeals remanded the case with instructions to dismiss it. "[T]he purpose of [Arizona's] suit [was] 'to reach money which the government owns,'" Judge David L. Bazelon explained, meaning that it implicated the doctrine of sovereign immunity; the Complaint offered no statutory or constitutional basis for avoiding that doctrinal bar.[167] The decision had troubling implications for states: if other federal courts agreed, state officials were not entitled to judicial review of administrative interpretations of the Constitution—interpretations with very high stakes.

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164 On the work of the Civil Rights Section in the 1930s and 1940s, see GOLUBOFF, *supra* note 21, at 111–40.

165 Transcript of Oral Argument, Arizona v. Hobby, *supra* note 161, at 28.

166 *Id.*

167 Arizona v. Hobby, 221 F.2d 498, 500 (D.C. Cir. 1953) (quoting Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 375 (1945)). Sovereign immunity doctrine appears considerably more complicated today. *See supra* note 70; *see also* Katherine J. Florey, *Sovereign Immunity's Penumbras: Common Law, 'Accident,' and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 767 (2008) ("[C]ourts have gone from strictly construing the doctrine to creating a sort of common law, 'penumbral' sovereign immunity that extends well beyond what are normally considered to be the doctrine's boundaries."); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 527 (2003) ("'[S]overeign immunity' . . . has never barred all remedies for governmental wrongs, even some remedies that could affect the treasury or government property.").

III
Administrative Equal Protection in the Age of Massive Resistance, 1954–1963

Fifteen years after the *Arizona v. Hobby* decision, in 1968, the federal agency would present a different face to state grantees. The Social Security Board (now technically the Social Security Administration) was by then nested within HEW, a cabinet-level successor to Roosevelt's FSA. Old New Dealers occupied leadership positions, but as compared to the late 1940s, the agency had taken on a more conservative cast. The following anecdote exemplifies the change:

In September of 1968, in the wake of months of racially charged political turmoil and violence, as well as a dramatic occupation of the Washington Mall by the Poor People's Campaign, HEW Secretary Wilbur Cohen sought legal advice on a pressing matter: HEW's policy regarding racially discriminatory actions by the hundreds of state agencies and institutions to which HEW distributed federal funds.[168] The Civil Rights Act of 1964, which contemporaries understood as an effort to vindicate the Fourteenth Amendment, likely spurred Cohen's inquiry. Title VI of that Act mandated that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[169] The Act authorized HEW, the gatekeeper to billions of dollars of federal funds, to "effectuate" that Title.[170] It remained unclear, however, whether HEW could or should use its power to enforce the *Constitution*'s commands.[171]

HEW's General Counsel, Alanson Willcox, sent back a long reply, noting that if anything, the "question ha[d] become more urgent" because of the upcoming reargument before the Supreme Court in *Shapiro v. Thompson*, one of a flurry of welfare rights cases before the

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168 Memorandum from Alanson Willcox, Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Sec'y [Wilbur Cohen], Dep't of Health, Educ., and Welfare (Sept. 13, 1968) (personal collection of Frances White, on file with author).

169 42 U.S.C. § 2000d (1964).

170 42 U.S.C. §§ 2000d, 2000d–1 (1964).

171 *See* Stephen C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 26–27 (1995) (discussing congressional debates over Title VI, in which differences of opinion emerged about executive branch authority to enforce constitutional equal protection guarantees in the absence of congressional authorization). Further complicating the picture was *Bolling v. Sharpe*, 347 U.S. 497 (1954), in which the Supreme Court read an equal protection guarantee into the Fifth Amendment's due process clause. The case could be read to imply that HEW itself acted unconstitutionally every time it released federal funds to a program that violated an individual's constitutional rights.

federal courts.[172] *Shapiro* involved the constitutionality of several states' one-year residence restrictions for receipt of federally subsidized welfare benefits,[173] restrictions which an emerging cohort of poverty lawyers and civil libertarians assailed as outmoded and discriminatory.[174] But Willcox's sense of "urgen[cy]" stemmed from a different concern: his knowledge of an argument that Professor Archibald Cox—the former Solicitor General, no less—planned to raise on behalf of the poor appellees. Although HEW officials had long expressed sympathy with the appellees' position,[175] Cox's brief to the Court implied that HEW should have done even more: "The requirements of the Due Process and Equal Protection Clauses are to be read into [the Social Security Act] as certainly as if they were incorporated expressly," Cox insisted; if a state rule complied with the letter of the statute but violated the Constitution, HEW officials "acted properly" when they disapproved.[176]

Willcox—the same Willcox who had actively supported administrative equal protection in the 1940s—staked out a more cautious position: in the absence of "authoritative court precedents," HEW "should be required to make as few constitutional decisions as possible." His reasons were pragmatic: "[U]nless supported by fairly explicit court decisions," he wrote Secretary Cohen, such administrative decisions could not "go effectively much beyond bland generalizations." If they did, they would be "unsatisfactory and probably unacceptable," especially "where there is room for real and rational difference of opinion, and where the financial and political stakes may be high."[177]

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172 Shapiro v. Thompson, 394 U.S. 618 (1969); Willcox to Cohen, *supra* note 168, at 1. The original argument, in May of 1968, resulted in deadlock. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 78–79 (1993).

173 *Shapiro* consolidated challenges to Connecticut, Pennsylvania, and District of Columbia statutory provisions that aimed to "deter[ ] the in-migration of indigents" by denying welfare assistance to residents who had "not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance." *Shapiro*, 394 U.S. at 621–22, 631. The Court's decision turned on its articulation of the "right to travel," a rare "fundamental right" under the U.S. Constitution. *Id.* at 630, 638. Because the state residency restrictions burdened this right, the Court applied a less deferential standard of review, ultimately concluding that the restrictions violated the Fourteenth Amendment. *Id.* at 638.

174 *See generally* Elisa Martina Alvarez Minoff, Free to Move? The Law and Politics of Internal Migration in Twentieth-Century America, (Apr. 24, 2013) (unpublished Ph.D. dissertation, Harvard University) (on file with author) (detailing the legal and political reform of internal migration in the mid-twentieth century).

175 *See, e.g.*, Smith, *supra* note 124 ("It is 'a real question' whether the Constitution allows the legislatures to impose any residence requirements on applicants for social benefits.").

176 Supplemental Brief for Appellees on Reargument at 42–43, Shapiro v. Thompson, 394 U.S. 618 (1969) (Nos. 9, 33, and 34), 1968 WL 112575.

177 Willcox to Cohen, *supra* note 168, at 1. In a separate memo, Willcox pled with Cox to reconsider: Cox's statements about agency responsibility for constitutional

In fact, Willcox's 1968 advice about what HEW *should* do directly conflicted with HEW's own past practices. He ultimately conceded as much: when it came to public welfare, Willcox admitted, HEW had repeatedly invoked an "'equitable treatment' doctrine," in ways that "verge[d] on deciding constitutional questions."[178] What happened between 1953 and 1968 to cause him to bury that history?

Answering this question requires an investigation of the fraught period between 1954 and 1963, when civil rights occupied the center of the national stage and major political realignments were underway. In the face of Republican Dwight Eisenhower's victory in the 1953 Presidential election and in the wake of the "Dixiecrat Revolution" of 1948, the Democratic Party held together. Feeling white supremacy under threat, however, Southern Democrats increasingly broke party ranks to align with conservative Republicans.[179] In short, the New Deal was under stress, especially where it implicated the nation's internationally recognized "race problem." Outside Washington, meanwhile, anxiety about federal power abounded. American federalism, as interpreted by the Supreme Court, had long shielded racially discriminatory state and local practices from federal interference.[180] No longer, the Court signaled in *Brown v. Board of Education*.[181] In 1957, in Little Rock, Arkansas, federal troops made that message clear and concrete, but resistance continued in both the South and the North.[182]

Federal administrators were not insulated from these broader political pressures. At HEW, New Deal liberals continued to populate

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interpretation and enforcement would not only impose a "large order" on HEW, but they would also "work a substantial change" in intergovernmental relationships. Letter from Alanson Willcox, Gen. Counsel, Dept. of Health, Educ., and Welfare, to Archibald Cox, Harvard Law Sch. (Sept. 10, 1968) (personal collection of Frances White, on file with author).

178 Willcox to Cohen, *supra* note 168, at 1.

179 IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 389–94 (2014).

180 *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896) (upholding the constitutionality of state segregation laws); The Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (holding that Congress lacked the constitutional authority to outlaw racial discrimination by private entities).

181 347 U.S. 483 (1954); *see also* Brown v. Bd. of Educ. (II), 349 U.S. 294, 301 (1955) (requiring states "to admit public schools on a racially nondiscriminatory basis").

182 On state and local resistance to federal antidiscrimination pressures, see generally TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–1963 (1989) (providing a narrative history of the modern civil rights movement); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2009) (updating the history of the modern civil rights movement to include the efforts of ordinary citizens and activists in the North).

the "mezzo level,"[183] but with the transition to more conservative executive leadership, top positions promptly changed hands.[184]

There were important changes, as well, in public perceptions of welfare—perceptions that endured into the 1960s. In the wake of World War II, federally subsidized welfare programs became entangled in broad changes shaking the nation: the solidification of a robust national regulatory state, the disruption of gender norms, the mass migration of black Americans out of the South, and the disturbing reality of a wealthy nation with pockets of joblessness. The ADC program[185] was particularly controversial:[186] as ADC costs ballooned and the proportion of nonwhite, unmarried mothers on the rolls grew, many states proposed restrictive amendments to their state plans, including behavioral requirements, spending restrictions, and outright prohibitions on aid to "unsuitable homes" (defined in this era as homes involving illegitimate children or live-in boyfriends).[187]

In the face of these changes, subpart A shows, federal administrators continued to invoke administrative equal protection in their reviews of state laws, and they continued to affect state policy choices, but they faced increased resistance. Subparts B and C document two conflicts, both from the early 1960s, between HEW and state officials. Subpart B describes the federal agency's highly publicized dispute with Louisiana over its racially discriminatory suitable home laws. Subpart C recovers a lesser known but equally important skirmish with Michigan over a change to the state's ADC program. Both incidents spread the agency's understanding of equal protection further afield, including into the hands of an emerging cohort of poverty law activists. Both incidents also affirmed for administrators the need for a tool like administrative equal protection. But the political fallout,

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183 This is Daniel Carpenter's term for the influential layer of agency personnel below the top, politically appointed leadership. DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, at 19–21 (2001).

184 Top New Deal administrators were also vulnerable because of the rise of anticommunism and the extensive machinery that developed to root out loyalty-security risks in government. Enemies of the New Deal used this machinery to depopulate the federal government of prominent left-liberals. On the political climate in Washington at this time and how it impacted HEW administrators, see LANDON STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 177–258 (2012); Tani, *supra* note 88, at 566–68.

185 ADC would later become AFDC, *see infra* note 247 and accompanying text. In 1996, it would be restructured and renamed Temporary Aid to Needy Families.

186 The programs for aid to the elderly, the blind, and the disabled raised general concerns about welfare fraud and the rise of a massive, bureaucratized "welfare state" but were less prone to criticism. Tani, *supra* note 78, at 5–6.

187 *See generally* WINIFRED BELL, AID TO DEPENDENT CHILDREN (1965) (documenting how states used "suitable home" policies in the late 1950s and early 1960s to disqualify potential ADC recipients); ELLEN REESE, BACKLASH AGAINST WELFARE MOTHERS (2005) (describing resistance against welfare programs from the late 1940s through the 1950s). On the logic behind many of these laws, see *infra* note 214 and accompanying text.

along with civil rights pressures and the era's broader antiwelfare climate (even amidst the "rediscovery" of poverty in America),[188] encouraged administrators to reframe their "equal protection principle" in precisely the manner suggested by this Part's opening anecdote. That reframing is the subject of subpart D. It is also a thread linking this Part to the next, on the legal campaign for welfare rights.

A. Administrative Equal Protection Meets "Welfare Backlash"

Agency efforts to vindicate equal protection continued in the Eisenhower era in part because states were doing so many things that blatantly contradicted the agency's earlier pronouncements.[189] Between 1954 and 1960 at least nineteen states attempted to deny ADC to illegitimate children.[190] In a similar vein, many states proposed laws conditioning children's ADC payments on the mother's behavior:

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188 It may seem contradictory to characterize the climate as "anti-welfare" when there was a surge of interest in fighting poverty, but these two phenomena went hand in hand: New Deal welfare programs, critics alleged, had produced dependency on government, which in turn created and sustained intergenerational cycles of poverty. The policy initiatives that comprised the "War on Poverty" represented a deliberate turn away from traditional income support programs in favor of facilitating "opportunity" and supporting individual and community initiative. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 262–66 (10th ed., 1996); MOLLY C. MICHELMORE, TAX AND SPEND: THE WELFARE STATE, TAX POLITICS, AND THE LIMITS OF AMERICAN LIBERALISM 61–65 (2012).

189 *See* Frances L. White, Equitable Treatment Under the Public Assistance Titles, 9 (1963) (personal collection of Frances L. White) (on file with author) (describing A. D. Smith's interpretation of equal protection as "dominant" within the agency during this time).

190 *See* Memorandum from the Office of the Reg'l Att'y, Region IV, Dep't of Health, Educ., and Welfare, to Office of the Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare (July 8, 1954) (on file with NARA II, HEW Records, 235/40/73) (Mississippi); Memorandum from Office of the Reg'l Att'y, Region IV, Dep't of Health, Educ. and Welfare, to Office of the Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare (May 7, 1959) (on file with NARA II, HEW Records, 235/40/73) (Alabama); Memorandum from Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Gen. Counsel, Dep't of Health, Educ., and Welfare (Jan. 15, 1959) (on file with NARA II, HEW Records, 235/40/20) (North Carolina); Memorandum from Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Gen. Counsel, Dep't of Health, Educ., and Welfare 7 (Mar. 13, 1959) (on file with NARA II, HEW Records, 235/40/20) (South Dakota); Memorandum from Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Gen. Counsel, Dep't of Health, Educ., and Welfare 8 (Oct. 14, 1959) (on file with NARA II, HEW Records, 235/40/20) (Florida, Louisiana); Memorandum from Office of the Reg'l Att'y, Region IV, Dep't of Health, Educ., and Welfare, to the Office of the Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare 2 (Mar. 6, 1957) (on file with NARA II, HEW Records, 235/40/73) (Tennessee); Memorandum from Office of the Reg'l Att'y, Dep't of Health, Educ., and Welfare, Region V, to the Gen. Counsel, Dep't of Health, Educ., and Welfare 4 (Apr. 4, 1957) (on file with NARA II, HEW Records, 235/40/73) (Illinois); *Legislative Developments in the States*, 17 PUB. WELFARE 124, 167–68 (July 1959) (Texas, Louisiana). Bell also found evidence of similar proposals from Arkansas, Delaware, Kentucky, Michigan, New Jersey, Oregon, Pennsylvania, South Carolina, Utah, and Virginia. BELL, *supra* note 187, at 72.

her agreement to file nonsupport paperwork,[191] establish the paternity of the child,[192] cease "illicit" relationships,[193] undergo sterilization,[194] accept available employment,[195] participate in rehabilitative treatment,[196] and submit to fingerprinting.[197]

Against this onslaught of new and innovative state-level activity, which historians have described as a wave of welfare "backlash,"[198] federal agency lawyers raised statutory objections—and constitutional ones. When North Carolina considered prohibiting payments to families with more than two illegitimate children, the federal agency informed the state welfare department that the bill would likely violate the Social Security Act *and* the Constitution, a message that the state welfare director conveyed directly to Governor Luther Hodges.[199] When Delaware officials considered a bill that would limit a mother to receiving assistance for not more than two illegitimate children unless she agreed to be sterilized, agency lawyers made sure that state officials were aware of the "serious legal questions . . . under the equal

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191 *See* Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Secretary, Dep't of Health, Educ., and Welfare (July 15, 1958) (on file with NARA II, HEW Records, 235/40/20) (Illinois); Memorandum from Office of the Reg'l Att'y, Region III, Dep't of Health, Educ., and Welfare, to the Gen. Counsel, Dep't of Health, Educ., and Welfare (Feb. 5, 1958) (on file with NARA II, HEW Records, 235/40/73) (Virginia); Memorandum from Office of the Reg'l Att'y, Region IX, Dep't of Health, Educ., and Welfare, to the Gen. Counsel, Dep't of Health, Educ., and Welfare (Mar. 3, 1959) on file with NARA II, HEW Records, 235/40/74) (Washington).

192 *See* Gen. Counsel to Sec'y (July 15, 1958), *supra* note 191 (Illinois); Memorandum from the Gen. Counsel, Dep't of Health, Educ., and Welfare to the Secretary, Dep't of Health, Educ., and Welfare (Mar. 14, 1958) (on file with NARA II, HEW Records, 235/40/20) (Virginia); Loren C. Belknap, *An Analysis and Criticism of the Program of Aid to Dependent Children*, 6 J. PUB. L. 25, 42 (1957).

193 *See* Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Sec'y, Dep't of Health, Educ., and Welfare (July 15, 1957) (on file with NARA II, HEW Records, 235/40/20) (Alabama).

194 *See* Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Sec'y, Dep't of Health, Educ., and Welfare (May 13, 1955) (on file with NARA II, HEW Records, 235/40/20) (Delaware).

195 *See Legislative Documents in the States*, 17 PUB. WELFARE 128 (July 1959) (Washington); *Legislative Documents in the States*, 13 PUB. WELFARE 185, 192 (Oct. 1955) (Missouri); Belknap, *supra* note 192, at 39 (reporting such policies in 13 states; citing specifically Florida, Georgia, New Mexico, South Carolina, Tennessee, Mississippi, and the District of Columbia).

196 *See* Belknap, *supra* note 192, at 39 (reporting such policies in eleven states; citing specifically California, Alabama, Georgia, South Carolina, Tennessee, Washington, and West Virginia).

197 *See* Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to Sec'y, Dep't of Health, Educ., and Welfare (Nov. 15, 1957) (on file with NARA II, HEW Records, 235/40/20).

198 *See generally* REESE, *supra* note 187; Sarah A. Soule & Yvonne Zylan, *Runaway Train? The Diffusion of State-Level Reform in ADC/AFDC Eligibility Requirements, 1940–1967*, 103 AM. J. SOC. 733, 740 (1997).

199 ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS 77 & n.163 (2009); Assoc. Gen. Counsel, to Gen. Counsel (Jan. 15, 1959), *supra* note 190.

protection clause" that the proposal raised.[200] In response to bills in South Dakota,[201] Alabama,[202] and Illinois,[203] federal administrators sent similar messages, and although many factors may have prevented these bills from becoming law, it is notable that none of them did.

We might expect federal administrators to have been even more bold in this period, in light of the Supreme Court's decisions in *Brown*[204] and, later, *Griffin v. Illinois*.[205] *Brown*, after all, continued the Court's post-*Lochner* reinvigoration of the Equal Protection Clause and established that the Clause's meaning must adapt to changing circumstances.[206] *Griffin*, the first of a series of cases recognizing the equal protection rights of poor litigants,[207] equated "discriminat[ion] on account of poverty" with discrimination "on account of religion, race, or color."[208]

In their day-to-day work, however, administrators were discovering the limits of the constitutional concept of equal protection. The starkest example was Mississippi: alluding to the Constitution simply was not enough when, within days of the *Brown* decision, the Mississippi legislature attached a rider to its 1955 appropriation act prohibiting assistance payments to any child whose mother had an illegitimate child after being placed on the assistance rolls. Federal

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200 Memorandum from Gen. Counsel, to the Sec'y, Dep't of Health, Educ., and Welfare (May 13, 1955). This report also noted that the Delaware bill resembled previously considered legislation from Georgia and Missouri. *Id.*

201 *See* Assoc. Gen. Counsel, to the Gen. Counsel (Mar. 13, 1959), *supra* note 190 (advising the South Dakota agency that the bill "represent[ed] unequal treatment of children . . . and would raise a question under title IV of unreasonable classification"). I found no subsequent mentions of the bill in federal agency correspondence or newspaper searches.

202 *See* Memorandum from Office of the Reg'l Att'y, Region IV, Dep't of Health, Educ., and Welfare, to Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare (May 9, 1956) (on file with NARA II, HEW Records, 235/40/73) (informing Alabama officials about the questions that the Social Security Commissioner raised about Georgia's similar proposal in 1951; "we assume . . . that the questions were sufficient to discourage the enactment of the Alabama bill"); Cody Hall, *Bills Flood Legislature On 2nd Day*, ANNISTON [Al.] STAR, May 10, 1957, at 10 (noting that under state law, unwed mothers could continue to "draw monthly welfare checks for every illegitimate child, no matter how many").

203 *See Legislative Developments in the States*, 15 PUB. WELFARE 130, 151–52 (Oct. 1957); Editorial, *Reforming Aid to Dependent Children*, FREEPORT [Ill.] J. STANDARD, Apr. 12, 1957, at 10 (noting that the bill was defeated).

204 347 U.S. 483 (1954).

205 351 U.S. 12 (1956).

206 347 U.S. at 489–95.

207 *See supra* note 116.

208 *Griffin*, 351 U.S. at 17. The potential significance of *Griffin* for the poor was apparent immediately to observers. *See, e.g.*, Bertram F. Willcox and Edward J. Boustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 2 (noting that "for the first time the Supreme Court has addressed itself squarely to the impact of poverty on constitutional rights under the due process and equal protection clauses of the fourteenth amendment"). The Burger Court would later reconceptualize the *Griffin* line of cases as due process cases. Klarman, *supra* note 133, at 287.

agency lawyers warned that the state had thereby established an "unreasonable classification," jeopardizing its federal grant.[209] But legislators showed no sign of changing their minds, and agency leaders (the new Eisenhower appointees) chose not to take formal action. Instead, the agency's regional representatives negotiated with the Mississippi Department of Public Welfare over how it would interpret the new state legislation. This pragmatic approach produced concessions—for example, the state agency agreed to treat an illegitimate birth as just one factor in its evaluation of a home's "suitability"—but these changes had little meaning for the families that the law targeted.[210]

B. Louisiana and Unsuitable Homes

The agency's conciliatory approach in Mississippi also created a damaging precedent. In the summer of 1960, using Mississippi's federally approved plan as a template, Louisiana amended its ADC law to prohibit payments to any woman who had a child out of wedlock after receiving a check from the welfare department, unless and until she presented proof that she had "ceased illicit relationships" and was "maintaining a suitable home for the child."[211] A law enacted in the same legislative session denied welfare benefits to an illegitimate child "if the mother of the illegitimate child . . . is the mother of two or more older illegitimate children."[212] When the law went into effect, 23,000 children—the vast majority of whom were black—lost their ADC benefits.[213] This disparate impact was no accident: the laws were

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209 Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to Sec'y, Dep't of Health, Educ., and Welfare (Feb. 14, 1955) (on file with NARA II, HEW Records, 235/40/20); *see also* Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to Sec'y, Dep't of Health, Educ., and Welfare (June 14, 1954) (on file with NARA II, HEW Records, 235/40/20) (criticizing the Mississippi ADC provision for being both over- and under-inclusive); Office of the Reg'l Att'y, Region IV, to Office of the Assoc. Gen. Counsel (July 8, 1954), *supra* note 190 (noting the existence of an illegitimacy provision in a Mississippi appropriations bill); Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to Sec'y, Dep't of Health, Educ., and Welfare 10 (Aug. 14, 1956) (on file with NARA II, HEW Records, 235/40/20) (noting that a Mississippi statute with a "suitable home" provision, as applied, would potentially be unconstitutional).

210 Memorandum from Office of the Reg'l Att'y, Region IV, Dep't of Health, Educ., and Welfare, to Assoc. Gen. Counsel, Dep't of Health, Educ., and Welfare (June 9, 1954) (on file with NARA II, HEW Records, 235/40/73); Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to Sec'y, Dep't of Health, Educ., and Welfare 6 (Jan. 15, 1958) (on file with NARA II, HEW Records, 235/40/20); Memorandum from Gen. Counsel, Dep't of Health, Educ., and Welfare, to Sec'y, Dep't of Health, Educ., and Welfare (May 14, 1958) (on file with NARA II, HEW Records, 235/40/20).

211 Act of July 7, 1960, No. 251, § 233(D), 1960 La. Acts 527.

212 Act of July 7, 1960, No. 306, § 233(C), 1960 La. Acts 634.

213 *Louisiana Drops 23,000 Children on Relief Rolls as Illegitimates*, N.Y. TIMES, Aug. 28, 1960, at 62L. For an excellent summary of the Louisiana "suitable home" controversy and its relationship to broader concerns about federal-state welfare policy, see Lisa Levenstein,

part of a "segregation package," designed to countermand federal integration orders, retaliate against African Americans for their civil rights demands, and undermine state politicians who had blunted segregationist demands.[214]

The incident produced strong reactions. Editorials in major newspapers condemned Louisiana's approach as "mean" and "uncivilized";[215] "not only unjust, but criminal."[216] Louisiana Governor Jimmie Davis defended the laws in equally strong terms, dismissing the affected mothers as "a bunch of prostitutes"[217] who ran "baby factories for money."[218] On the ground, local churches, community groups, and civil rights organizations rushed to the children's aid. But the most important response, for the purposes of this Article, was from the Greater New Orleans branch of the National Urban League: it called on HEW, as the primary source of Louisiana's public assistance funds, to intervene.[219]

In outward appearance, HEW proceeded cautiously, warning Louisiana officials that the state's new ADC law was the subject of "serious concern."[220] Internally, much stronger language circulated. "[T]he public assistance titles of the Social Security Act must be read and administered in the light of Constitutional limitations," insisted one HEW lawyer; HEW was obligated to "determine the reasonableness of a[ny] State plan classification" and to cut off funds where a classification was "Constitutionally obnoxious."[221] Some

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From Innocent Children to Unwanted Migrants and Unwed Moms: Two Chapters in the Public Discourse on Welfare in the United States, 1960–1961, 11 J. WOMEN'S HIST. 10 (2000).

214 KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR 70–71 (2001); *see also* Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following* Brown v. Board of Education, 47 DUKE L.J. 399, 423–24 (1997) ("Louisiana's bill denying welfare benefits coincided . . . with an increased tendency to disguise discrimination as moral reform.").

215 Editorial, *Sins of the Fathers*, N.Y. TIMES, Oct. 6, 1960, at 40.

216 Editorial, *Louisiana Relief Rolls*, CHI. DEFENDER, Sept. 5, 1960, at 10.

217 *Governor Calls ADC Mothers Prostitutes*, CHI. DEFENDER, Sept. 26, 1960, at 2 (internal quotation marks omitted).

218 John Corporon, *Louisianans Dispute Effect of Cut in Relief for Unwed Mothers*, WASH. POST, Sept. 29, 1960, at A23 (internal quotation marks omitted).

219 JENNIFER MITTELSTADT, FROM WELFARE TO WORKFARE: THE UNINTENDED CONSEQUENCES OF LIBERAL REFORM, 1945–1965, at 88–89 (2005).

220 *See* Letter from Kathryn D. Goodwin, Dir., Bureau of Pub. Assistance, to Mary Evelyn Parker, Comm'r, [La.] Dep't of Pub. Welfare (Sept. 1, 1960) (on file with SWHA, NSWAR2, Box 53). Throughout this Article, "SWHA" refers to the Social Welfare History Archives at the University of Minnesota, Minneapolis, Minn. "NSWA2 Records" refers to the Records of the National Social Welfare Assembly, Supplement 2.

221 Memorandum from Myron J. Berman, Office of the Gen. Counsel, Dep't of Health, Educ. and Welfare, to Kathryn Goodwin, Dir., Bureau of Pub. Assistance (Aug. 14, 1959), cited in White, *supra* note 189, at 10–11. Berman may have had in mind the Supreme Court's 1953 equal protection case *Morey v. Doud*, in which the Court "caution[ed] that '[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" 354 U.S. 457, 464

administrators believed they had the power and the duty, in other words, to censure the state. The real question was whether the agency's more conservative leadership had the will.

In this instance (as in the case of Indian exclusion), civil rights and social welfare organizations spurred agency action. The September 30, 1960, petition from the National Social Welfare Assembly (NSWA), a council of leading social work and social welfare organizations, was perhaps the most important. Addressed to HEW Secretary Arthur Flemming, the petition not only bore the names of the nation's most reputable charitable organizations, but it also carried the imprimatur of agency insiders.[222] "[P]ersons familiar with the provisions of the Social Security Act and their implementation under law over the years," the petition read, believed that HEW had "ample authority" to find Louisiana in violation of the statute and perhaps also the Constitution.[223]

A few of those "familiar persons"—such as former Bureau of Public Assistance director Jane Hoey—signed their names, but Secretary Flemming likely recognized the fingerprints of others. The moving force behind all the NSWA's policy positions was Elizabeth Wickenden, an old New Dealer who enjoyed close friendships with leading liberals (Abe Fortas and Lyndon Johnson, to name a few) and high-ranking HEW administrators.[224] In fact, it was former Social Security Commissioner Arthur Altmeyer who brought the Louisiana situation to her attention. He urged Wickenden and his old friend Wilbur Cohen to get involved.[225] (Cohen was then a professor at the University of Michigan, but had worked in the agency for decades and, as mentioned, would briefly serve as HEW Secretary.)[226]

Amidst these pressures, Secretary Flemming took the unusual step (unusual for the Eisenhower years) of publicly threatening to

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(1953) (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)). Other, more recent decisions, however, would have suggested a less stringent form of review. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 491 (1955) (upholding the challenged regulation because it bore a "rational relation" to a legitimate objective; observing that "[t]he prohibition of the Equal Protection Clause goes no further than . . . invidious discrimination").

222 Letter from Clark W. Blackburn, Nat'l Soc. Welfare Assembly, to Arthur Flemming, Sec'y, Dep't of Health, Educ. and Welfare (Sept. 30, 1960) (on file with SWHA, NSWA2 Records, Box 53).

223 *Id.* ("The Constitutional guarantee of equal treatment under the law would also appear to be ignored in a policy which arbitrarily excludes from a public benefit a whole class of children who are otherwise eligible.").

224 On Wickenden's background and influence, see STORRS, *supra* note 184, at 244–50.

225 *See* Elizabeth Wickenden, Notes on Conversation with Harry Rosenfeld (Nov. 1, 1960) (on file with SWHA, NSWA2 Records, Box 53).

226 Cohen became secretary by default, more or less, in 1968, when John Gardner resigned.

withdraw Louisiana's entire $22 million public assistance grant.[227] By mid-October, HEW had scheduled a formal "conformity" hearing for the state, at which the agency would adjudicate Louisiana's right to continue receiving federal funding.[228]

What happened next suggests how administrative interpretations of the Constitution may escape the bounds of an agency, and also how they may work their way back in. With the aid and encouragement of agency insiders, outside advocates treated the upcoming hearing like a judicial appeal and began preparing amicus-style legal briefs.[229] Jane Hoey circulated a memo to Wickenden and her allies in which she set forth pertinent sources of legal authority—including the Constitution.[230] Arthur Altmeyer chimed in, insisting that Louisiana had violated both the Social Security Act and the Fourteenth Amendment.[231] Several former attorneys from HEW's General Counsel's office, including Willcox (then working for the American Hospital Association), offered help.[232] With federal administrators' encouragement and assistance, four influential advocacy groups—the ACLU, Child Welfare League of America, National Urban League, and Family Services Association of America—ultimately submitted briefs.[233] Each claimed that Louisiana's laws failed to conform to the requirements of the Social Security Act—and also violated the Fourteenth Amendment.[234] For their part, HEW lawyers avoided any explicit

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227 Bess Furman, *Flemming Calls Aged Plan Sound*, N.Y. TIMES, Sept. 23, 1960, at 30; *see also* Bess Furman, *U.S. Seeks to Bar Aid for Louisiana*, N.Y. TIMES, Nov. 15, 1960, at 42 ("The department held that Louisiana's action in cutting 23,000 children off its rolls 'required withholding further Federal grants.'").

228 *See Federal Agents Probe Louisiana Child Aid Cut*, WASH. POST, Oct. 14, 1960, at B5.

229 Wickenden, *supra* note 225.

230 Jane Hoey, Notes, Aid to Dependent Children – Title IV, Social Security Act – Louisiana 1–3 (Nov. 7, 1960) (on file with SWHA, NSWA2 Records, Box 53).

231 Letter from Elizabeth Wickenden, Nat'l Social Welfare Assembly, to Shad Polier (Nov. 4, 1960) (on file with SWHA, NSWA2 Records, Box 53).

232 The other two were Harry Rosenfeld and Leonard Lesser. Wickenden, *supra* note 225.

233 The agency's stamp was strongest on the ACLU brief, which Willcox prepared. Wickenden, *supra* note 231.

234 *See* Memorandum of the Am. Civil Liberties Union (on file with SWHA, NSWA2 Records, Box 53); Memorandum of the Child Welfare League of Am., Inc. (on file with SWHA, NSWA2 Records, Box 53); Memorandum of the Family Servs. Ass'n of Am. (on file with SWHA, NSWAR2, Box 53); Memorandum of the Nat'l Urban League, Inc. (on file with SWHA, NSWA2 Records, Box 53). That activists should raise equal protection arguments in the fall of 1960 is perhaps unsurprising: Louisiana's new welfare laws were as transparently discriminatory as the Alabama redistricting law that the Supreme Court had recently struck down in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and the "separate but equal" public school systems invalidated in *Brown v. Board of Education*, 347 U.S. 483 (1954). More novel and surprising is the fact that activists mobilized those arguments in an *administrative setting*. They seemed to believe that constitutional arguments would have purchase with agency decision makers. They also may have had their eyes on the courts. *See* Wickenden, *supra* note 225 ("[Rosenfeld] said an adverse decision could certainly be

mention of the Constitution during the November 1960 hearings. But they did insist that Louisiana had enacted a "wholly unreasonable and capricious" eligibility requirement.[235] In other words, Louisiana's laws would fail even the most minimal rationality review had they been challenged in court on equal protection grounds.

The agency's January 16, 1961, decision disappointed the amici—Louisiana would keep its grant, in light of state officials' recent steps to correct "overzealous interpretation and implementation" of their suitable home laws—but the announcement that Secretary Flemming issued to accompany the decision vindicated many of the amici's arguments.[236] The Social Security Act authorized the states to impose "*reasonable* conditions of eligibility," the Flemming Ruling began.[237] Some conditions were not reasonable—because they were inconsistent with the "well-ordered system for dispensing assistance" that the Act also required. (None of this language, to be clear, came from the text of the Act itself.) Conditions that denied aid to a child solely because of the conduct of his or her caretaker—such as Louisiana's "suitable home" condition—fell into the unreasonable category because they aimed primarily at correcting the adult's behavior, not meeting the child's need. States were free, of course, to regulate their citizens' conduct, but they were not free to use the ADC program to impose a higher standard on the poor. Flemming gave states until July 1, 1961, to rid their plans of "suitable home"-type requirements. He urged seven states in particular to take a hard look at their books, and he promised, even as he turned over the agency's reins to President John F. Kennedy appointee Abraham Ribicoff, that specific federal guidance would follow.[238]

Historians and poverty law scholars know the Flemming Ruling as a belated but important statement on moralistic state welfare laws. It bears remembering for another reason, as well: it offers a first glimpse of how federal administrators began to repackage administrative equal protection as a statutory interpretation. A "lame duck" after the

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appealed to the courts under either the [APA] or the Constitution itself, in which case any amicus curiae briefs would become a part of the legal record under review.").

235 Bess Furman, *U.S. Seeks to Bar Aid for Louisiana*, N.Y. TIMES, Nov. 15, 1960, at 42.

236 BELL, *supra* note 187, at 146.

237 Memorandum from the U.S. Dep't of Health, Educ. and Welfare, Office of the Sec'y, to the Comm'r of Soc. Sec. (Jan. 16, 1961) (on file with SWHA, NSWA2 Records, Box 53) [hereinafter "Flemming ruling"] (emphasis added).

238 *Id.* The states were Georgia, Arkansas, Mississippi, Texas, Florida, Virginia, and Michigan. BELL, *supra* note 187, at 146–47. Federal guidance did follow, as did an amendment to the Social Security Act that lent narrow support to the Flemming Ruling (Congress affirmed the "no suitable home laws" part, but ignored Flemming's more general insistence on "reasonable conditions of eligibility"). Aid to Dependent Children of Unemployed Parents Act, Pub. L. No. 87-31, 75 Stat. 77. Wilbur Cohen apparently used back channels to secure this language from Congress. The formal hearings on the bill make no mention of the suitable home controversy.

1960 Presidential election, Secretary Flemming was not afraid to make a statement on the way out, and he had doubts about Louisiana's actions. When HEW's top lawyer, Eisenhower appointee Parke Banta, proved unsupportive,[239] Flemming consulted a few lawyers who had been with the agency longer, such as regional attorney Bernice Bernstein. Bernstein was intimately familiar with the agency's position on suitable home policies, its broader commitment to equal protection, and the legal groundings for all of the agency's work; she had been around when these principles were first articulated and she used them often in her dealings with states. (Bernstein also happened to be close friends with Elizabeth Wickenden.)[240] By early January, Flemming was convinced that Louisiana's suitable home law violated the Equal Protection Clause and had decided to say as much.[241]

The narrower statutory ruling that Flemming ultimately issued appears to have been the result of a last-minute intervention by Assistant Secretary Rufus Miles, a lifetime bureaucrat and the self-proclaimed "male midwife" of HEW.[242] "You propose to take the position that you are obliged, under the terms of the Fourteenth Amendment," to issue this ruling, Miles wrote Flemming on January 9, 1961, but did that obligation actually exist?[243] Although not a lawyer, Miles had strong views, especially about the consequences of such a ruling. For one, he wrote, it could cause citizens "grave apprehension" about the limits of executive power and its tendency to encroach on the courts. Would it have been right, before the Supreme Court's decision in *Brown*, for HEW to deny federal grants to states that did not align with the Secretary's personal understanding of the Constitution? Clearly not. And what about all the other constitutional questions that HEW confronted? If the secretary declared suitable home laws unconstitutional, must he also confront the public hospitals and universities that maintained racial segregation while receiving federal grants? If the agency failed to act "with restraint," Miles predicted,

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239 Banta apparently told Flemming that he "wouldn't know how to go about" defending a defunding decision. Interview by Harlan Phillips with Dr. Arthur S. Flemming in Eugene, Oreg. 13 (Apr. 25, 1964) (transcript on file with the Columbia Oral History Archives, Rare Book & Manuscript Library, Columbia University, New York, N.Y.). Banta's private notes suggest that he believed the matter to be one of "fed-state relations," best "handled quietly." Note card on Louisiana public assistance matter (Sept. 1, 1960) (on file with the State Historical Society of Missouri, Columbia, Missouri, Parke M. Banta Papers, 1918–1970, Box 2).

240 On Bernstein's life and work, see Tani, *supra* note 88, at 564–69.

241 Memorandum from Rufus Miles, Admin. Assistant Sec'y, Dep't of Health, Educ. and Welfare, to the Secretary, Dep't of Health, Educ. and Welfare (Jan. 9, 1960) (on file with NARA II, HEW Records, 235/34/219).

242 M.E. Grenander Dep't of Special Collections and Archives, Finding Aid for the Rufus Edward Miles, Jr. Papers (1934–1985) *available at* https://library.albany.edu/speccoll/findaids/apap048.htm#history (last visited Mar. 9, 2015).

243 Miles to the Sec'y, *supra* note 241.

Congress would quickly "'clip the wings' of the Executive Branch."[244] Flemming apparently listened. His January 16 ruling cited the Social Security Act alone,[245] even though the Equal Protection Clause underlay his decision.

C. Michigan and Undeserving Fathers

Three days later, Flemming retired from HEW, narrowly avoiding the next federal-state welfare controversy. This controversy would cause administrative equal protection to surface once more, and once again, the official agency pronouncement would clothe administrators' constitutional interpretation in statutory garb.

The controversy began with President Kennedy's welfare reforms—a response to the growing suspicion that New Deal public assistance programs, especially ADC, were not working. As head of President Kennedy's transition team on social policy, agency veteran Wilbur Cohen suggested that the reforms include a temporary extension of ADC to children of unemployed fathers, a program named ADC-UP. (Up to that point, grants had not been available to children of two-parent households, unless the father was demonstrably incapable of working.) Bundled with other antirecession measures, ADC-UP sailed through Congress.[246] A year later, Congress reauthorized the program for five years as part of a larger slate of welfare reforms. The same legislative package changed ADC to "Aid to *Families* with Dependent Children" (a blatant and unsuccessful attempt at rebranding); ADC-UP thus became AFDC-UP.[247]

Public welfare experts immediately grasped what seemed to elude legislators: AFDC-UP was an unprecedented (albeit temporary) expansion of federal government responsibility. "Employability" had long been a main dividing line in America's system of public welfare provision. Adults who were categorically "unemployable," by reason of old age, disability, or sole responsibility for a child, were proper subjects of federal beneficence; state and local governments retained responsibility for everyone else, on the theory that local authorities were better qualified to judge need, deservingness, and the amount of pressure necessary to make a capable adult choose work over relief. AFDC-UP blurred this distinction by extending AFDC payments (which by 1950 supported not only the child but also the caretaker relative) to a subset of the "employable" poor.[248] It also moved the

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244 *Id.*

245 Flemming ruling, *supra* note 237.

246 MITTELSTADT, *supra* note 219, 109–12.

247 Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 104(a), 76 Stat. 172, 185–86 (1962) (emphasis added).

248 MITTELSTADT, *supra* note 219, 112–13.

federal government one step closer to a complete takeover of poor relief.[249] The launch of AFDC-UP, in other words, was ripe for conflict.

The site of one such conflict was Michigan, where voters had just elected moderate Republican George Romney, a "self-made" businessman with "magazine ad charm" who professed disdain for partisan squabbling and promised to restore power to individual citizens.[250] Once in office, Romney made a point of tackling issues that had deadlocked others.[251] AFDC-UP was one. Democratic state legislators had twice tried to pass legislation allowing Michigan to participate in the program, but were blocked by conservative Republicans from rural districts.[252] Romney came into the first session of the legislature with a compromise bill in hand, drafted by a veteran state welfare administrator.[253]

What opponents feared, Romney understood, was an open-ended program that would run away with state funds and, more important, would capture counties' general relief clients. The significance of general relief was twofold. First, it kept local welfare agencies in business. After the enactment of the Social Security Act in 1935, when most states rushed to claim federal grants, Michigan counties jealously guarded their autonomy. The state legislature ultimately created a separate bureaucratic structure to administer the new federally subsidized programs rather than force local operations to conform to federal standards,[254] and that separate structure had endured.[255] Second, general relief preserved local authorities' power over poor, able-bodied residents. AFDC-UP, with all its federal rules and requirements, was a threat. It did, however, offer cash-strapped localities a

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249 *Id.*

250 *See* Marquis Childs, *Romney's Backers Look to the Future*, WASH. POST, Mar. 25, 1963, at A14 (noting Romney's "ambitious plans for making over the state government and Michigan's Republican party"); Robert D. Novak, *Rambling Romneyism*, WALL ST. J., Oct. 15, 1962, at 12 (identifying "distrust of the great power groupings in modern America" and the necessity of "broad-based citizen participation" as basic tenets of "Romneyism").

251 *See Three for '64: G.O.P. Hopefuls Make Plans*, N.Y. TIMES, Feb. 18, 1963, at 14.

252 *Push Federal Aid Program*, HOLLAND [MICH.] EVENING SENTINEL, Jan. 29, 1963; *Old Arguments Flare in Senate on ADC Proposal*, IRONWOOD [MICH.] DAILY GLOBE, Jan. 18, 1962.

253 GILBERT Y. STEINER, SOCIAL INSECURITY: THE POLITICS OF WELFARE 102 (1966).

254 Memorandum from Herbert Rubinstein to Walter Devries, Exec. Assistant to Governor George Romney, Governor, Mich. 4 (Sept. 12, 1962) (on file with BHL, GR Papers, Box 23). Throughout this Article, "BHL" refers to the Bentley Historical Library at the University of Michigan, Ann Arbor, Mich. "GR Papers" refers to the George Romney Papers, 1939–1973.

255 *See id.* at 1–8 (identifying issues in Michigan's administration of public welfare); Memorandum from Lynn Kellogg, Acting Dir., Dep't of Soc. Welfare, Mich., to George Romney, Governor 4 (Apr. 17, 1963) (on file with SWHA, NSWA2 Records, Box 57) (explaining that locally administered "[d]irect relief" was "the backbone of the county social welfare departmental structure," and that if a new ADC-UP program "reduced direct relief too greatly," county-level welfare departments would become "economically unsound").

way to shift their relief costs to another level of government. By carefully choosing who was eligible, Romney believed, he could make all localities see that the fiscal benefits outweighed traditional concerns.[256]

Romney's bill threaded the needle by defining "unemployed" parent as a person who had been eligible to receive unemployment benefits after January 1, 1958.[257] This definition would qualify an estimated 10,000 families for AFDC-UP. More important, it excluded some 20,000 other families, such as those in which the parent did not work in an industry covered by the current unemployment program (farm labor and domestic service, for example, were not covered) and those who moved in and out of the workforce too frequently to qualify.[258] These were the families, not coincidentally, that county welfare authorities were most loath to give up. As Romney's top welfare administrator explained, they were "the less educated, the less employable, [and] the less intelligent unemployed."[259] Such families were "best . . . served" by a county-level direct relief program because the county department could "establish certain controls" that would be unavailable under a federally funded program like AFDC-UP.[260]

The bill moved easily through the state house of representatives and appeared certain to pass the senate,[261] but before Romney could claim victory, the state welfare department received a disturbing call from HEW: the plan's eligibility restrictions were unreasonably narrow and thus did not satisfy federal requirements.[262] When Michigan officials ignored federal agency warnings,[263] HEW Secretary Anthony Celebrezze announced that the state legislature could enact the bill,

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256 Memorandum from Lynn Kellogg to George Romney, *supra* note 255, at 4–5.

257 STEINER, *supra* note 253, at 105.

258 *Id.* at 101.

259 Memorandum from Lynn Kellogg to George Romney, *supra* note 255, at 4. Willard Maxey died just before HEW took issue with the bill. STEINER, *supra* note 253, at 102.

260 Letter from Lynn Kellogg, Acting Dir., Dep't of Soc. Welfare, Mich., to Frank Kelley, Att'y Gen., Mich. (Apr. 5, 1963) (on file with SWHA, NSWA2 Records, Box 57). Such "controls" included, for example, the practice of giving relief in kind rather than in cash.

261 STEINER, *supra* note 253, at 102–03.

262 Transcript of conversation between Phyllis Osborne, Reg'l Representative, Region III, Dep't of Health, Educ., and Welfare, and Lynn Kellogg, Acting Dir., Dep't of Soc. Welfare, Mich., (Mar. 8, 1963) (on file with BHL, GR Papers, Box 23). Osborne, HEW's regional representative, characterized the decision as a politically motivated effort by Wilbur Cohen, a native Michigander, to frustrate Romney. *Id.* HEW had raised no objection to similar plans in two other jurisdictions. STEINER, *supra* note 253, at 105–06.

263 *See* Letter from John J. Hurley, Acting Dir., Bureau of Pub. Assistance, Dep't of Health, Educ., and Welfare, to Lynn Kellogg, Acting Dir., Dep't of Social Welfare, Mich. (Apr. 17, 1963) (on file with NARA II, SRS Records, 363/1/4) (specifying ignored telegrams). Throughout this Article, "SRS Records" refers to the Records of the Social and Rehabilitation Service (a division of HEW that was created in 1967 to house the various HEW bureaus and offices in charge of welfare, aging, and vocational rehabilitation).

but no federal funds would follow.[264] Celebrezze left the explaining to his veteran General Counsel, Alanson Willcox.

Willcox's formal legal memorandum illustrates how administrators continued to transform what had been an interpretation of the Fourteenth Amendment into an interpretation of their governing statute, the Social Security Act. If a state's eligibility criteria were narrower than what the Act permitted, Willcox explained, the agency could approve federal funds only if the limiting classification was "a rational one in the light of the purposes of public assistance programs." The purpose of AFDC-UP was to aid a group of needy children that was ineligible for traditional AFDC, namely needy children of "intact" families with an employable-but-unemployed breadwinner. Yes, the new federal law allowed states to define "unemployed," but the general rule still applied: states had no authority to be "whimsical" (or in this case, unfairly discriminatory) in their choices. "A man losing his employment with a nonprofit university or hospital is just as much (or just as little) 'unemployed' as a person in like circumstance losing his employment with a commercial establishment," Willcox argued. Such "highly artificial" line-drawing was irrational and perhaps, Willcox hinted, unconstitutional. Should the Michigan AFDC-UP bill become law, he noted, an excluded applicant "could make a forceful challenge under the Fourteenth Amendment."[265]

Romney asked his own lawyer, Richard Van Dusen, to review the Willcox memo and, not surprisingly, received a different interpretation. Willcox's so-called rule was a "bald assertion" with no statutory support, Van Dusen proclaimed. In fact, federal law *obligated* HEW to approve the plan: Michigan's bill fulfilled all the statutory requirements.[266] With this opinion in his pocket, Romney signed the state's AFDC-UP bill into law. He would not "[a]cced[e] to unauthorized federal dictation" in federal-state sharing programs, he announced.[267]

Over the following weeks, Romney received encouragement from fellow governors,[268] but much less support from his own state's Attor-

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264 Public Statement, Anthony Celebrezze, Sec'y, Dep't of Health, Educ., and Welfare (Mar. 26, 1963) (on file with WHS, EW Papers, Mss 800, Box 7; notes on file with author). Throughout this Article, "WHS" refers to the Wisconsin Historical Society in Madison, Wisc. "EW Papers" refers to the Elizabeth Wickenden Papers, 1885–2001.

265 Memorandum Concerning Authority of the Secretary under Title IV of the Social Security Act, to Disapprove Michigan House Bill 145 on the Ground of its Limitations on Eligibility, Alanson Willcox, Gen. Counsel, Dep't of Health, Educ., and Welfare (Mar. 25, 1963) (original on file with WHS, EW Papers, Mss 800, Box 7; notes on file with author) [hereinafter "Willcox memo"].

266 Memorandum from Richard C. Van Dusen to George W. Romney, Governor, Mich. 4 (Mar. 27, 1963) (on file with NARA II, SRS Records, 363/1/4).

267 Public Statement, George Romney, Governor, Mich. 1 (Mar. 27, 1963) (on file with NARA II, SRS Records, 363/1/4).

268 Tani, *supra* note 78, at 286.

ney General, Frank J. Kelley. Kelley, a political rival,[269] proffered an opinion that adopted and extended HEW's legal reasoning: Michigan's AFDC-UP law denied the people the equal protection of the law, in violation of both the U.S. *and* state constitutions.[270] Administrative equal protection simply would not go away.

Ultimately, Michigan bowed to federal authority. Romney believed that his administration's interpretation of federal law was correct, he explained at a July 21, 1963, meeting of the Governors' Conference, but he was loath to spend resources on a court challenge only to have the court refuse to hear the case. (Given the D.C. Circuit ruling in *Arizona v. Hobby*,[271] the possibility was real.) It was also probably not a good time for a "modern Republican" with presidential aspirations to affiliate himself so strongly with states' rights, or to appear dismissive of equality concerns: At that very moment, Americans were watching a civil rights debacle unfold in Birmingham, Alabama, where segregationist police chief Eugene "Bull" Connor was leading merciless attacks on peaceful protesters. All Romney could do was urge his fellow governors to seek explicit congressional recognition of states' right to judicial review of administrative decisions.[272] In the meantime, administrative equal protection continued to constrain state action—even as the agency itself steadily backed away from the business of constitutional interpretation.

D. Equal Protection as a Statutory Requirement: The Birth of Condition X

By 1963, administrative equal protection had become woven into agency culture. Consider, for example, this statement, from a HEW administrator (not a lawyer) to a regional conference of the American Public Welfare Association:

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269 Romney and Kelley had sparred mere months before, during Michigan's 1962 constitutional convention. Anticipating the Supreme Court's holding in *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (holding that state senators must be elected on the basis of "one person, one vote"), Kelley had urged delegates to tread cautiously as they considered legislative reapportionment; Convention Vice President Romney ignored his warnings. The apportionment feud continued into 1963. *Decision May Affect State*, IRONWOOD [MICH.] DAILY GLOBE, Apr. 5, 1962, at 8; *Governor, Attorney General Stand Ground on Their Fight*, HOLLAND [MICH.] EVENING SENTINEL, Apr. 11, 1963, at 17.

270 Mich. Att'y Gen. Op. No. 4156 (Apr. 11, 1963) (on file with SWHA, NSWA2 Records, Box 57).

271 No. 2008-52 (D.D.C. dismissed Feb. 20, 1953).

272 George Romney, Governor, Mich., Presentation to Committee on Federal-State Relations at the Governors' Conference 4–5 (July 21, 1963) (on file with BHL, GR Papers, Box 228). States gained that right two years later, via an amendment to the Social Security Act. *See* Old-Age, Survivors, and Disability Insurance Amendments of 1965, Pub. L. No. 89-97, § 1116(a)(1), 79 Stat. 286, 400, 419 (1965) (prescribing a ninety-day limit for such review).

> As the [AFDC] program goes through its periods of stress and strain and as communities have sought to solve . . . problems . . . by quick and easy solutions, such as new eligibility requirements, it has been necessary for the Federal Government to examine these new proposals in relation to the constitutional guarantees against unreasonable classifications of persons in similar circumstances. *The principle of reasonable classification derives from basic constitutional protections and thus, in a sense, represents a higher law than the specific provisions of law.*[273]

It is hard to imagine a clearer statement of administrative equal protection.

And yet, as previous subparts show, top administrators had begun to question how involved they ought to be in vindicating constitutional rights. Disaffected politicians were one problem—and not just state executives. West Virginia Senator Robert Byrd went on an antiwelfare rampage in 1962 and 1963, via his chairmanship of the Senate Subcommittee on Appropriations for the District of Columbia. Based on a sampling of the District's welfare cases, Byrd concluded that 75% of ADC recipients were technically ineligible for aid. In the wake of this disclosure, the Senate Appropriations Committee ordered HEW to conduct a nation-wide review of the program.[274]

Public schools were another problem, as Arthur Flemming had realized when considering how to discipline Louisiana. In the early 1960s, HEW administered not only the Social Security Act's public assistance grants, but also grants to support education in areas affected by federal governmental activities, such as defense installations.[275] If public school districts in these areas maintained racial segregation, but technically complied with the conditions of grant-authorizing statutes, did HEW have the right—and if so, the responsibility—to withhold federal funds?

HEW Secretary Abraham Ribicoff asked General Counsel Alanson Willcox that very question in the spring of 1962, as the Kennedy administration contemplated what to do about the South's slow response to *Brown*.[276] (This was before the enactment of Title VI of

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273 Jules H. Berman, Chief, Div. of Welfare Servs., Welfare Admin., Dep't of Health, Educ., and Welfare, The Federal Responsibility for Public Welfare, paper presented to the Central States Regional Conference, American Public Welfare Association, Milwaukee, Wisconsin 4 (May 2, 1963) (personal collection of Frances White, on file with author) (emphasis added).

274 *The Sleepy Welfare Watchdogs*, WALL ST. J., Dec. 14, 1962, at 16.

275 *See* Impact Aid Program, Pub. L. No. 81-815, 64 Stat. 967 (1950); Pub. L. No. 81-874, 64 Stat. 1100 (1950) (repealed and eventually reauthorized and codified as part of Title VIII of the Elementary and Secondary Education Act, 20 U.S.C. § 7701).

276 Memorandum from Alanson W. Willcox, Gen. Counsel, Dep't of Health, Educ., and Welfare, to the Sec'y, Dep't of Health, Educ., and Welfare (Apr. 25, 1962) (personal collection of Frances White, on file with author). Congress had also expressed interest in the issue. Only two months prior, the House Committee on Labor and Education had

the 1964 Civil Rights Act, which would provide firmer guidance.[277]) Willcox—who had championed administrative equal protection throughout his career—returned a cautious response. He was "quite prepared to assume," he wrote to Ribicoff, that such school districts were violating the Fourteenth Amendment, irrespective of whether they were under court orders to desegregate, but HEW's role in policing such violations was questionable. In his view, administrative officers were not free "to project" the Supreme Court's school segregation decisions "into areas where [their] applicability is open to serious legal doubt," especially when it meant contravening a statutory mandate. "Federal financial aid of course does strengthen schools that discriminate," Willcox noted, but this "powerful argument" was not HEW's to consider; it ought to be addressed to Congress or the courts.[278]

If this were true, however, what legal principle authorized the agency to take the stances that it had so visibly taken with Arizona and Louisiana? What principle allowed Willcox himself, less than a year after giving this advice to Ribicoff, to oppose Michigan's AFDC-UP plan? In the fall of 1963, HEW's Office of General Counsel tasked

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summoned Ribicoff before it to testify about integration in public education programs. There, Ribicoff had been grilled about his agency's basis for continuing to issue federal funds to segregated school districts. HALPERN, *supra* note 171, at 27.

277 *See* Civil Rights Act of 1964, Title VI, Pub. L. No. 88-352 78 Stat. 241 (prohibiting discrimination on the ground of race, color, or national origin from all programs and activities receiving federal financial assistance; authorizing federal agencies that extend such assistance to effectuate the Title's commands, subject to oversight by Congress, the president, and the federal judiciary).

278 Willcox to Ribicoff, *supra* note 276, at 2–3, 5. Around this time, the DOJ did try to bring this argument before the courts, by seeking to enjoin certain public schools from racially segregating the children of U.S. military personnel and other federal government employees. *See, e.g.*, United States v. Bossier Parish Sch. Bd., 220 F. Supp. 243, 244 (W.D. La. 1963) (invoking contractual and statutory authority to sue a local school district). DOJ lawyers advanced a "contractual obligation" theory, arguing that when local schools used federal grant monies for construction of their facilities, they had to comply with *Brown*'s desegregation mandate. *Id.* at 244–45. The strategy produced underwhelming results. *Compare Bossier Parish Sch. Bd.*, 220 F. Supp. at 248 (finding no standing and no claim upon which relief can be granted), *and* United States v. Biloxi Mun. Sch. Dist., 219 F. Supp. 691, 694 (S.D. Miss. 1963) (finding no claim or standing), *and* United States v. Cnty. Sch. Bd. of Prince George Cnty., Va., 221 F. Supp. 93, 105 (E.D. Va. 1963) (finding no claim or standing), *with* United States v. Madison Cnty. Bd. of Educ., 219 F. Supp. 60, 61 (N.D. Ala. 1963) (finding for the government on the merits). For its part, HEW took a more modest course: beginning in September 1963, Secretary Ribicoff ruled, segregated schools would not be considered "suitable" for children residing on federal property (i.e., military bases); if a district with segregated schools chose not to desegregate, the Commissioner of Education was authorized to create alternative, integrated schools on base; the district would then lose the federal funds that would have gone towards educating the on-base children (while retaining funds for other federally connected children who continued to attend). U.S. COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS '63, 200 (1963). HEW took an even more conservative approach with regards to medical facilities that received federal aid, since the statute that authorized funds—the Hill–Burton Act—specifically permitted 'separate but equal' facilities. *Javits Assails Segregated Hospital Aid*, WASH. POST, Aug. 9, 1963, at A2.

new recruit Frances White, fresh out of Yale Law School, with answering this question.

After spending weeks sifting through agency records, White concluded that "Federal administrators ha[d] always required State plans to satisfy a condition which is not explicitly contained in the statute." Sometimes they called that condition "reasonable classification"; sometimes "equal protection," "equity," or "uniformity." Sometimes they referred to it as "condition 2(a)(x)," an unwritten but implicit addendum to the requirements in "sections 2(a)(1), 2(a)(2), 2(a)(3), etc." of the various public assistance titles of the Social Security Act. But administrators had never defined "the exact scope of such a condition," nor had they explained their enforcement choices.[279]

Surveying agency actions from the 1940s and 1950s, White found clear evidence that administrators believed they were giving life to the Constitution's equal protection mandate. Were the agency to take that stance in late 1963, however, it would lead to an "inevitable"—and unpalatable—conclusion: "[T]hat all State programs which were receiving Federal aid could be forced to satisfy the requirements of the equal protection clause." If this were true, and if paired with the Supreme Court's recent interpretations of the Fourteenth Amendment, federal administrators would have to ensure "that the Constitution followed every Federal dollar to its ultimate destination" and that the civil rights of every beneficiary were protected. The agency could not afford "such epidemic theories."[280] If defunding a state welfare program was the "nuclear option" in agency parlance, White later recalled, then defunding a state *on equal protection grounds* was "a hydrogen bomb," capable of leveling the whole landscape of federally subsidized social welfare programs. "[O]ur weapon," she explained, had become "too big."[281]

White urged her colleagues to consider how the Social Security Act, rather than the Constitution, could support the agency's goals. The touchstone, they could argue, was the Act's fundamental purpose—which, in the case of the AFDC Title, was to support a specific class of needy children. White extracted this purpose from the Title's definition of "dependent child," namely, "a [needy] child under the age of eighteen who has been deprived of parental support or care . . . and who is living with [a list of specified relatives]." In reviewing state plans that adopted a narrower classification, White continued, the agency could properly insist on "reasonableness in the light of the general purpose of the statute"—and the results would be

279 White, *supra* note 189, at 1, 15.

280 *Id.* at 9–12.

281 Karen M. Tani, Notes from Conversation with Frances White (May 25, 2014) (on file with author).

"quite similar to those obtained from the equal protection rationale."[282]

Meanwhile, the statutory approach would allow the agency to avoid the segregation landmine. If eligible individuals received the material assistance to which they were entitled under the law, "can one object to the 'separate but equal' room which a person must sit in when he comes to fill out an application blank?" Such a system would surely violate equal protection, White answered, but under the preceding logic, the federal administrator had a principled basis for remaining silent.[283] (This, again, was before the enactment of Title VI, which would explicitly authorize HEW to object in such a case.)[284]

As for the effect on the other programs HEW administered, the statutory-based approach to equal protection also had an advantage: unlike the Constitution-based approach, it was not "readily transferable" to other programs, even other programs authorized under the Social Security Act.[285] In short, it was a more precise and limited tool. Going forward, agency lawyers would follow White's suggestion. (Actors outside the agency, we will see, did not feel so constrained.)

There was only one notable dissenter: A. D. Smith (retired by then and living in Western Massachusetts). "[O]ne does not forbid the exclusion of negroes and Indians because of its non-conformity with program objectives," Smith scolded Willcox, after Willcox sent him a copy of White's 1963 memo. "One does so . . . because it shocks the conscience and so violates the Constitutional mandate" of equal protection. Were it otherwise, Smith explained, Judge Schweinhaut and perhaps even the Social Security Board "would have failed to act affirmatively on the Indian issue." In general, Smith saw nothing wrong with a federal administrator drawing upon constitutional principles when "occasion demands"—that was the administrator's prerogative (just as it was Congress's). The contemporary political context was irrelevant. Why should "the awakened conscience of the people on the matter of Civil Rights . . . deter administrative reliance on due process and equal protection"? he demanded.[286]

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282 White, *supra* note 189, at 14–16 (quoting Social Security Act, Pub. L. No. 74-721, § 406(a), 49 Stat. 620, 629 (1935)).

283 *Id.* Regarding whether such a system would violate equal protection, White likely had in mind both *Brown v. Board of Education* and an important 1963 decision from the Fourth Circuit, *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 961 (1963) (holding that a private hospital that accepted federal funds under the Hill-Burton Act was a state actor for purposes of a Fifth Amendment equal protection challenge to its segregated facilities).

284 *See supra* note 170.

285 White, *supra* note 189, at 15–16.

286 Letter from A. D. Smith to Alanson Willcox, Gen. Counsel, Dep't of Health, Educ., and Welfare (Nov. 1, 1963) (personal collection of Frances White, on file with author).

Whether Willcox wrote back, we do not know, but the agency's subsequent actions suggest that Smith represented the way of the past, and Frances White, the way of the future. Going forward, explicit references to equal protection would all but disappear from agency correspondence with the states.

IV
Administrative Equal Protection and the Legal Campaign for Welfare Rights, 1964–1970

For people outside the agency, such as the supremely well-connected public welfare advocate Elizabeth Wickenden, administrative equal protection was neither tired nor dangerous—precisely the opposite. It felt like a fresh, new approach to a broken welfare system. In 1959, she had complained to her old friend Wilbur Cohen of feeling "exasperat[ed]"— frustrated by her inability to influence actual policy.[287] In 1962, by contrast, she was fully energized. Because of her role in the Louisiana controversy, she had started receiving correspondence from around the nation about rights violations in welfare administration. She even received letters from HEW administrators, such as Chief of Welfare Services Jules Berman. He told her about state administrators' "sudden midnight and Sunday visits" to ADC recipients' homes (in search of male companions), about "tailing recipients, and even making women take pregnancy tests." Berman feared that such methods infringed on individual rights, but as his letter to Wickenden implies, he felt unable to address the issue from his own institutional location.[288]

By 1963, drawing on the legal knowledge she had gained from agency contacts, Wickenden began pondering the use of "test cases" to help well-meaning federal administrators. As she explained to close friend Abe Fortas (two days after his oral argument before the Supreme Court in the landmark case *Gideon v. Wainright*[289]), state and local officials still tried to hold the poor to a "different standard of behavior, law enforcement, civil right etc."[290] Without "judicial backing," she believed, federal administrators were going to find it harder and harder to keep this illegal behavior in check.[291]

Wickenden expanded on this idea and developed possible constitutional arguments in a longer memo, titled "Poverty and the Law:

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287 Letter from Elizabeth Wickenden to Wilbur Cohen (July 15, 1959) (original on file with WHS, EW Papers, Mss 800, Box 12; notes on file with author).

288 Letter from Jules Berman to Elizabeth Wickenden (Oct. 9, 1962) (original on file with WHS, EW Papers, Mss 800, Box 1; notes on file with author).

289 372 U.S. 335 (1963).

290 Letter from Elizabeth Wickenden to Abe Fortas (Jan. 17, 1963) (original on file with WHS, EW Papers, Mss 800, Box 16; notes on file with author).

291 *Id.*

The Constitutional Rights of Assistance Recipients," which she circulated to her vast network of civil rights and public welfare allies in late March (right before the Michigan controversy exploded).[292] Drawing on the reams of correspondence she had received in the last year, as well as on research by public welfare colleagues, Wickenden described how state and local governments over-policed and punished the poor: officials subjected them to deportation, charged them with rarely enforced fornication and adultery laws, searched their homes in the middle of the night, and threatened to take away their children—solely because they sought public aid. Reformers had of course long railed against the abuse of the poor; what Wickenden added was "the possibilities for legal remedies"—*constitutional* remedies. They "do exist," she insisted, and lawyers must begin asserting them.[293]

Looking back from a post-"rights revolution" perspective, the importance of Wickenden's intervention may be difficult to appreciate. But imagine the world as it looked in the early 1960s: the public assistance titles of the Social Security Act had by then received close study from the federal agency and its state-level counterparts, but few others had expressed interest. Individual litigants occasionally called on state courts (and very occasionally, federal ones) to interpret the law, but their lack of access to legal representation meant that these actions were few and far between. As for lawyers and legal academics, most did not study the law of public assistance. Established doctrine suggested that public assistance was in the nature of a gift or gratuity, which implied that there was little to discuss: the government gave and took at its pleasure. Wickenden's "Poverty and the Law" helped a broader community of legal liberals catch up to where people like A. D. Smith had been since the New Deal.[294]

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292 Elizabeth Wickenden, Poverty and the Law: The Constitutional Rights of Assistance Recipients (Mar. 25, 1963) (on file with SWHA, NSWA2 Records, Box 52). Wickenden closely followed the Michigan controversy and actively rallied support for HEW. In a widely circulated memo, to which she attached the Willcox opinion, Wickenden compared Michigan's actions to Louisiana's and reminded readers that the federal government paid the vast majority of state public assistance costs. In light of this, and of the equitable treatment guarantees in the SSA and the Constitution, did the federal agency really lack the power to say no to "arbitrary and discriminatory" treatment? Elizabeth Wickenden, The Issues in the Michigan Welfare Controversy Relating to Extension of AFDC to Children of the Unemployed (Mar. 28, 1963) (original on file with WHS, EW Papers, Mss 800, Box 7; notes on file with author). Wickenden sent this memo to the Senate Finance Committee, the House Ways and Means Committee, Senator McNamara, Senator Hart, the National Urban League, all state welfare commissioners, all regional HEW officers, and many of her public welfare friends and acquaintances.

293 Wickenden, *supra* note 292, at 7.

294 Smith tried to do this himself in his retirement, but his scholarship never caught on beyond the social work and public welfare communities. *See* A. DELAFIELD SMITH, THE RIGHT TO LIFE 77–121(1955).

Over the course of the next decade, Wickenden saw her vision become a reality. Her friend Charles Reich and other law professors elaborated on existing constitutional arguments and created new ones[295] (e.g., Reich's celebrated idea of a constitutionally protected property interest in welfare payments[296]); a grassroots welfare rights movement sprouted in cities around the nation, lending a sense of urgency to law reform projects;[297] and the Johnson Administration added legal services to its ambitious War on Poverty, allowing an emergent cohort of poverty lawyers to bring welfare rights claims before the courts.[298]

Many notable Supreme Court cases resulted, including, *Shapiro v. Thomson*, in which the Court struck down state laws that unduly restricted new residents from receiving AFDC,[299] and *Goldberg v. Kelly*, in which a majority of the Court appeared to recognize welfare as a form of "property" and required agencies to provide a full evidentiary hearing before terminating a recipient's benefits.[300] All of these cases owe something to administrative equal protection. By bringing the Constitution into their work over a period of three decades, federal administrators helped Americans begin to think about welfare recipients as constitutional subjects—people who fell under the document's protection. In a country where the poor have often been treated as noncitizens, or subjects of exclusive local concern,[301] that reconceptualization mattered.

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295 Evidence suggests that Wickenden's memo circulated widely among legal scholars, including Caleb Foote (University of Pennsylvania), Ralph Fuchs (Indiana University), and Jacobus tenBroek (University of California, Berkeley). *See* Tani, *supra* note 78, at 290–91.

296 *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 778–83 (1964); *see also* Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347, 1347–55 (1963) (discussing whether searches of welfare recipients' homes without warrants violates the Fourth and Fourteenth Amendments).

297 *See generally* FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007) (chronicling the rise of the modern welfare rights movement, with a focus on New York City); ANNELISE ORLECK, STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY (2005) (describing welfare rights activism in Las Vegas, Nevada, from the 1960s through the 1980s).

298 *See generally* DAVIS, *supra* note 172 (providing an historical account of the legal arm of the modern welfare rights movement); SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING (1990) (providing an empirical study of the relationship between the Legal Services Program and Supreme Court decisionmaking between the late 1960s and early 1970s).

299 394 U.S. 618, 627–32 (1969). *Shapiro* also invalidated a residence restriction from the District of Columbia. *Id.* at 642–43.

300 *See supra* note 173 and accompanying text.

301 *See generally* CHAD ALAN GOLDBERG, CITIZENS AND PAUPERS: RELIEF, RIGHTS, AND RACE, FROM THE FREEDMEN'S BUREAU TO WORKFARE (2008) (using case studies to support T. H. Marshall's insight that traditional poor relief "treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them – as claims which could be met 'only if the claimants ceased to be citizens in any true sense of the word'") (quoting T. H. Marshall, *Citizenship and Social Class, in* THE WELFARE STATE READER 30, 33

The Supreme Court case with the most direct connection to administrative equal protection, however, is *King v. Smith*[302]—a case that reached the Court at a moment when it seemed entirely possible that a majority of the Justices would find in the Fourteenth Amendment robust protections for the poor.[303] The case began in the fall of 1966, when the Alabama Department of Pensions and Security notified Mrs. Sylvester Smith that she would no longer be receiving AFDC. The problem, Smith's caseworker told her, was that she appeared to have a boyfriend, who occasionally visited on the weekends. Under Alabama's "substitute father" regulation (known colloquially as a "man-in-the-house" rule), the agency could presume that the man supported Smith's children and terminate the household's benefits. Smith objected, both because the money mattered (although a mere $29 a month, the payment constituted over a quarter of her household income) and because she felt she was being punished for private, irrelevant behavior. Smith told her story to civil rights workers in the Selma area, who in turn relayed it to the new Center on Social Welfare Policy at Columbia University.[304]

The Center, led by lawyer Edward V. Sparer, was just beginning an impact litigation campaign, with the goal of turning welfare into a constitutional right. (Sparer had corresponded with Wickenden about this, but he also had read and admired the work of A. D. Smith.)[305] Sylvester Smith was an ideal plaintiff. First, her story suggested racial discrimination, and racial discrimination claims had traction in federal court, especially in the South.[306] Between 1964 and 1966, Alabama's substitute father regulation had resulted in the removal of 15,000 children from the rolls and the rejection of another 6,400 applications; black Americans like Smith comprised an estimated 97% of these cases.[307] A case from Alabama was also ideal because HEW had long objected to the state's substitute father

(Christopher Pierson & Francis G. Castles eds., 1949)); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 166 (Vintage Books 2d ed., 1993) (noting that as late as 1934, fourteen U.S. states deprived recipients of the right to vote or hold office).

302 392 U.S. 309 (1968).

303 *See, e.g.*, Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 434–36 (1967) (discussing pre-*King* Supreme Court decisions that were concerned "that the poor not be denied access to certain privileges available to those who can pay").

304 Walter Goodman, *The Case of Mrs. Sylvester Smith: A Victory for 400,000 Children*, N.Y. TIMES, Aug. 25, 1968, at SM28.

305 DAVIS, *supra* note 172, at 35–37.

306 *See id.* (describing the Center's "Southern strategy" for selecting its earliest cases).

307 Goodman, *supra* note 304, at 62.

regulation and had yet to formally approve it.[308] The case eventually became a class action, brought under 42 U.S.C. § 1983. Through the Center's legal team, Smith alleged that Alabama's substitute father regulation was inconsistent with both the Social Security Act and the Fourteenth Amendment (because it arbitrarily and irrationally classified certain needy dependent children as ineligible for aid).[309]

A three-judge panel of the district court [310] agreed, issuing a decision that embraced the plaintiff's equal protection argument. "[N]either the United States nor the Alabama Constitution requires Alabama to grant financial assistance to needy dependent children," the Court explained, but once Alabama undertook to do so, it had to conform its actions to "the constitutional mandate of equal protection."[311] That mandate demanded classifications that were "rationally related to the purpose of the federal and [state] Aid to Dependent Children statutes," the Court continued, and Alabama's classification was not. Indeed, it was "precisely the type of classification" that the Constitution prohibited: it aimed at discouraging the immoral conduct of mothers rather than meeting the needs of children.[312]

At this point, Alabama might have cut its losses. With just a slight change to its regulation, it could achieve the same purpose and poor claimants would be forced to litigate from scratch.[313] But Alabama officials had faith in the Supreme Court: given northern states' reliance on moralistic welfare restrictions, they reasoned, the Court would not dare affirm the decision.[314] Alabama officials also might have taken heart from HEW's refusal to weigh in: in the face of a district court directive to speak up, HEW had remained "coy."[315] HEW officials had also failed to respond to a petition from the Poor People's March on Washington, urging the agency to prohibit man-in-the-house rules immediately (i.e., without waiting for a pro-

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308 King v. Smith, 392 U.S. 309, 326 n.23 (1968) (chronicling the battle between Alabama and federal authorities over the state's suitable home and substitute father policies from 1959 to 1962); Goodman, *supra* note 304, at 67.

309 Brief for Appellees at 9, 34, King v. Smith, 392 U.S. 309 (1968) (No. 0949), 1968 WL 112516, at *9.

310 *See* 28 U.S.C. § 2282 (1948) (requiring a three-judge court to hear any case seeking an injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality), *Repealed* Act of Aug. 12, 1976, Pub. L. No. 94-381, sec. 2, 90 Stat. 1119.

311 Smith v. King, 277 F. Supp. 31, 40 (M.D. Ala. 1967).

312 *Id.* at 39–40.

313 *See* MARTIN GARBUS, READY FOR THE DEFENSE 170 (1971) (noting that poor claimants would have to start from square one if state legislators enacted a superseding statute). Georgia officials followed this course in *Anderson v. Burson*, 300 F. Supp. 401, 404 (N.D. Ga. 1968) (invalidating the state's "employable mother" rule on equal protection grounds).

314 GARBUS, *supra* note 313, at 171.

315 *Id.*

nouncement from the Court).[316] "[T]hese are not the best of times for domestic welfare," one journalist explained, "or for upsetting Southern legislators."[317]

Alabama officials miscalculated. After hearing the case, Justice William O. Douglas was prepared to embrace the lower court's equal protection analysis. Under Alabama's regulation, he explained, "[t]he economic need of the children . . . their other means of support, are all irrelevant. The standard is the so-called immorality of the mother." In Justice Douglas's view, this conflicted with the Court's recent decision in *Levy v. Louisiana*, in which the Court held that the Equal Protection Clause barred discrimination against illegitimate children.[318] He believed that "precisely the same result" should follow here.[319]

The rest of the Court agreed to invalidate the regulation, but relied on a seemingly creative interpretation of the Social Security Act rather than the Fourteenth Amendment. Political scientist R. Shep Melnick has placed great emphasis on this statutory interpretation, citing it as the epitome of a new, more aggressive mode of judicial oversight.[320] Melnick offers less insight into the origins of that interpretation: "the extraordinary story presented in *King v. Smith*" must have simply "shocked the conscience of the Justices and induced them to search for a novel interpretation of the statute," he surmises.[321]

In fact, the Court did not have to look far: the interpretation the majority used was the very one that HEW lawyer Frances White had suggested in 1963.[322] White's memo itself does not appear in the available Justices' papers, but White's interpretation was no secret by the mid-1960s. Federal administrators continued to share information with outside activists, such as Elizabeth Wickenden and her vast network. White's memo also made its way to Yale Law School, where former HEW General Counsel Jack Tate was then Dean. The White memo formed the basis of a published student note, titled *Welfare's "Condition X,"*[323] which specifically discussed the doctrine's application

316 Barrett, *supra* note 80, at 21.

317 Goodman, *supra* note 304, at 67.

318 391 U.S. 68, 71–72 (1967).

319 King v. Smith, 392 U.S. 309, 336 (1968) (Douglas, J., concurring).

320 R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 84–86 (1994).

321 *Id.* at 108.

322 *See* WHITE, *supra* note 189, at 9–13.

323 Note, *Welfare's "Condition X,"* 76 YALE L.J. 1222, 1230–31 (1967). Other student notes that suggest a HEW-Yale pipeline in the Tate era include, Note, *"Suitable Home" Tests Under Social Security: A Functional Approach to Equal Protection*, 70 YALE L.J. 1192 (1961); Comment, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967); and Comment, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234 (1967).

to substitute father policies. Smith's lawyer cited this note in his brief to the Supreme Court.[324]

HEW's interpretation of the Social Security Act—which I have argued was essentially a reframing of administrative equal protection—seems to have made an impression on a majority of the Court. The touchstones of the Social Security Act's public assistance titles, Chief Justice Earl Warren explained, were (1) need, and in the case of AFDC, (2) a child's lack of parental support. These characteristics defined the population that Congress intended to support.[325] Undeniably, states were free to add eligibility requirements and set their own standards of need—control over these choices was built into the original Act—but Alabama was not entitled to impose restrictions that had nothing to do with need and everything to do with discouraging immorality. (Perhaps it might have done so in 1936, Justice Warren conceded, but the Act has since been amended in ways that evinced a "rehabilitative," rather than punitive, approach.)[326] For similar reasons, Justice Warren rejected Alabama's argument that when a man cohabitated with a woman, the state could presume that her children were not in need. Adopting Alabama's position, Justice Warren explained, "would require us to assume that Congress, at the same time that it intended to provide programs for the economic security and protection of *all* children, also intended arbitrarily to leave one class of destitute children entirely without meaningful protection." The Court could not adopt such an "unreasonable" interpretation of congressional intent.[327]

King was a remarkable precedent. HEW had long battled punitive, moralistic state welfare rules, often using its own interpretation of the Equal Protection Clause, and had faced ever-greater resistance. When the Court at last turned its gaze to federal welfare grants to states, it steered away from the Fourteenth Amendment but otherwise

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324 Brief for Appellees at 29, King v. Smith, 392 U.S. 309 (1968) (No. 949), 1968 WL 112516, at *9.

325 King v. Smith, 392 U.S. 309, 317–18 (1968).

326 *Id.* at 325–26.

327 *Id.* at 329–30. This second part of the decision—on Alabama's absence-of-need argument—is arguably a departure from the agency's "Condition X" interpretation of the Social Security Act. Ira C. Lupu, *Welfare and Federalism: AFDC Eligibility Policies and the Scope of State Discretion*, 57 B.U. L. REV. 1, 9–11 (1977); *see also* Roger E. Kohn, *AFDC Eligibility Requirements Unrelated to Need: The Impact of* King v. Smith, 118 U. PA. L. REV. 1219, 1234 (1970) ("*King* indeed circumscribed the states' power more than did Condition X as loosely applied by the administrative agencies."). *But see id.* ("But to the extent *King* indicates that the protection of dependent children is the statutory goal overshadowing all others, the [agency's] formulation . . . of Condition X is effectively the same as the *King* rationale.").

lent judicial support to the agency's actions.[328] Plaintiffs responded by streaming into federal court.[329]

It has been easy for scholars to lose sight of *King*'s impact, however, because the decision was quickly overshadowed by another Supreme Court case, one that was a decisive defeat for the poor. The plaintiffs in *Dandridge v. Williams* challenged the ceilings that some states imposed on the amount of aid that a family could collect per month, irrespective of the number of children in the family who met the state standard of need.[330] To poverty lawyers, these "family caps" were a clear violation of the Equal Protection Clause (younger children were treated less favorably than older children, children in large families less favorably than children in smaller families). Federal administrators, however, in an intriguing blind spot, had never considered caps a violation of their "equal treatment principle."[331] Confronted squarely with an equal protection question, the Court rejected the notion that state-level welfare classifications merited anything more than rational basis review under the Fourteenth Amendment.[332] Just like that, the idea of equal protection for the poor appeared to die.

But we should not be so quick to forget *King*, for through it, the administrative formulation of equal protection lived on. Thanks to this decision, state welfare operations, not HEW, were on the defensive—an incredible reversal. Although *Dandridge* vindicated states' traditional control over benefit levels, *King* implied "that states' restrictions on eligibility"—a much more important prerogative—"were invalid unless explicitly authorized by Congress," thereby shifting a presumption that had been crucial to the enactment of the original Social Security Act.[333]

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328 Perhaps most significantly, the Court in *King* did not question the plaintiff welfare recipients' right to bring their disputes with state welfare agencies into federal court. Silence is significant because until 1961, section 1983 had "lain dormant"; *King* was the first case in which the Court accepted a section 1983 case seeking to enforce the Social Security Act. Mark Neal Aronson, *Representing the Poor: Legal Advocacy and Welfare Reform During Reagan's Gubernatorial Years*, 64 HASTINGS L.J. 933, 994 (2013).

329 Between 1968 and 1975, the Supreme Court alone decided eighteen AFDC cases. MELNICK, *supra* note 320, at 83.

330 397 U.S. 471, 473 (1970).

331 Federal administrators would have preferred to see all states provide more adequate payments to beneficiaries, but they recognized that under the Social Security Act, states had control over benefit levels and standards of need. Federal administrators seem to have understood family caps as a legitimate way of allocating scarce resources. *See* MELNICK, *supra* note 320, at 67–82.

332 *Dandridge*, 397 U.S. at 485 (applying "reasonable basis" scrutiny); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17–18 (1973) (rejecting the notion that classifications based on wealth merited stricter scrutiny).

333 MELNICK, *supra* note 320, at 84–92; *see also* Van Lare v. Hurley, 421 U.S. 338, 346–48 (1975) (striking down New York "lodger" regulations as a violation of the Social Security Act); Carleson v. Remillard, 406 U.S. 598, 600–04 (1972) (striking down a California re-

V
The Lessons of Administrative Equal Protection

This Article ends where it began, with Alanson Willcox, now at the end of his career. The spring of 1968 was not a pleasant time to be part of the federal government. Civil rights activism continued to spur violent resistance (Martin Luther King, Jr., was assassinated that April, sparking riots around the country); the war effort in Vietnam had taken a dramatic and demoralizing turn for the worse, energizing the already strong antiwar and youth movements; and President Johnson's ambitious War on Poverty appeared to be foundering.[334] The poor, some critics complained, were not responding with gratitude to the opportunities the government offered, but instead with righteous anger and a disturbing sense of entitlement.[335] They were also responding with law, as Willcox knew only too well. Poverty lawyers—many funded by the War on Poverty's Federal Legal Services Program—were suing not only state officials, for violating their statutory and constitutional rights, but also federal officials, for not doing more to crack down on the states. [336]

In response to one such suit, Willcox wrote a memo in which the very idea of administrative constitutionalism was abhorrent. "It is reasonably plain," Willcox argued, "that the Secretary has no authority to disapprove a State plan which complies with the stated Federal requirements, or to withhold funds from the State, merely because of his judgment that some aspect of the State plan may be unconstitutional." "Similarly," the Secretary had no obligation "to resolve all of the constitutional issues that may arise in the course of administering a State plan." The Secretary could not, of course, *require* a state to

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striction on aid to children whose parents are away on military duty); Townsend v. Swank, 404 U.S. 282, 285–92 (1971) (striking down the state's restrictions on children attending college or university because of a lack of congressional intent).

334 On American politics in the late 1960s, see generally Maurice Isserman & Michael Kazin, America Divided: The Civil War of the 1960s 127–92 (4th ed.) (2011) (providing an overview of the political, cultural, and social changes that rocked the nation during the second half of the 1960s); James T. Patterson, The Eve of Destruction: How 1965 Changed America (2014) (documenting the events of 1965 as a way of foreshadowing the broad and dramatic changes that unfolded over the next half-dozen years). On the particular events of 1968, see generally Jeremi Suri, Power and Protest: Global Revolution and the Rise of Detente (2005) (describing 1968 as a year of global social protest and analyzing the factors that made it so). On the War on Poverty, see generally Annelise Orleck & Lisa Gayle Hazirjian, The War on Poverty: A New Grassroots History (2010) (providing an overview of the historical writing on the War on Poverty and collecting new research).

335 *See, e.g.*, Eve Edstrom, *Shriver is Booed Out of Meeting*, Wash. Post, Apr. 15, 1966, at A1 (describing the critical reception that the Citizen's Crusade Against Poverty gave to War on Poverty spokesperson Sargent Shriver); John P. MacKenzie, *Poor's Militancy Poses Challenge to Liberals*, Wash. Post, Apr. 23, 1966, at A2 (describing "[u]gly responses from the poor and some of their spokesmen" to the Johnson Administration's poverty programs).

336 Davis, *supra* note 172, at 34–49.

violate the Constitution, but "he is under no duty to test all of the particulars of State administration against his own concepts of constitutional law."[337]

This Article has recovered a history that Willcox, in 1968, evaded. From the earliest days of the Social Security Act, I have argued, the administrators charged with overseeing federal grants labored in the shadow of the Fourteenth Amendment. In subsequent decades, when the Supreme Court's equal protection jurisprudence offered little to poor Americans, federal administrators developed and applied a nondeferential rationality model of equal protection to assess state welfare rules. And although they certainly could have done more to vindicate the rights of the poor, their interpretation had tangible consequences. Administrators challenged some of the era's most discriminatory and moralistic state welfare laws and, in the process, spread the notion that poor Americans fell within the Constitution's protections—that they were constitutional "persons" rather than "nonpersons," to borrow Justice Abe Fortas's 1967 turn of phrase.[338]

Administrators subsequently changed tactics, recharacterizing their constitutional interpretation as a statutory one, lest their actions vis-à-vis state welfare programs come back to haunt them in the realms of education and health. (What might have happened, we might wonder, had President Roosevelt not bundled these functions together in 1939?)[339] But by the early 1960s, federal administrators' ideas had spread to a growing network of liberal activists and advocates. These outsiders used the agency's carefully cultivated constitutional arguments to demand that federal courts review the worst practices within the federal-state welfare system. The 1968 Supreme Court case *King v. Smith* is a legacy of administrative equal protection: although not decided on equal protection grounds,[340] the Court's decision vindicated the agency's understanding of the equal protection *principle*. The case became much less useful, of course, when Congress reframed the purposes of the AFDC program, shifting the focus from need to work and explicitly allowing states to impose behavioral conditions on recipients, but that took nearly thirty years.[341]

Having summarized administrative equal protection's remarkable thirty-some year trajectory, this Article turns now to the question of

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337 Alanson Willcox, AWW Draft March 11, 1968, at 3–4 (Mar. 11, 1968), (personal collection of Frances White, on file with author).

338 Abe Fortas, *Equal Protection for Whom?*, N.Y. L.J., Apr. 5, 1967, at 4.

339 *Cf.* Lee, *supra* note 13, at 801–02, 810–56 (showing how, at the same historical moment, different agencies may interpret the same constitutional provisions differently).

340 Supporters of welfare rights ultimately seem to have approved this choice. *See* GARBUS, *supra* note 313, at 194.

341 *See* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

significance. Why should we care? The payoff for historians is perhaps easiest to see, especially for those who also study the "age of statutes": this Article responds to Reuel Schiller's call for "a legal history of the postwar period that includes the interaction of courts and agencies"[342] and to Jeffrey Jenkins and Eric Patashnik's demand for research on "how public laws are born, how they live, how they remake or fail to remake politics, and how they mutate and die."[343] In keeping with trends in the "new civil rights history," this Article helps us understand the path of the law—and the paths foregone—by analyzing the complex interaction of ideas, institutions, legal doctrines, and people (lay and professional) across "space, class, race, and time."[344] And joining a crop of recent historical scholarship on the "modern American state," this Article helps us make that abstract notion concrete, by describing and analyzing its *practices*—that is, "what officials do" as they go about the messy business of governance.[345]

The relevance of this history to legal scholars may be less obvious, which is why I devote the remainder of this Part to possible "lessons" for three major areas of law: federalism, administrative law, and constitutional law.[346]

Federalism. This Article's implications for our understanding of American federalism are at least two-fold. First, the history recounted here is the clear backdrop for the emergence, starting in the mid-1970s, of a "new judicial federalism"[347]—one that upheld broad

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342 Reuel E. Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 LAW & HIST. REV. 415, 418 (2008).

343 Jeffrey A. Jenkins & Eric M. Patashnik, *Living Legislation and American Politics*, *in* LIVING LEGISLATION: DURABILITY, CHANGE, AND THE POLITICS OF AMERICAN LAWMAKING 6 (2012).

344 Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2319, 2326–27 (2013).

345 MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA 5 & n.11 (2009); *see also* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929 (2013) (exploring the crucial role of the federal income tax in the development of the modern American state); STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY (2010) (locating the origins of some aspects of the modern American state in the management of Indian Affairs in the nineteenth century); JAMES T. SPARROW, WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT (2011) (connecting the expansion of government power during World War II, and the selling of that expansion to the public, to the literature on the modern American state).

346 Others could be added, most notably social welfare or "poverty" law. I am wary, however, of singling out the "law of the poor" as a discrete legal field, capable of being cabined in its own casebooks, courses, and articles. This Article's "lesson" for poverty law is that the legal regulation (and resistance) of the poor ought to be at the center, not the margins, of legal scholarship.

347 *See generally* Louise Weinberg, *New Judicial Federalism*, 29 STAN. L. REV 1191, 1192–94 (1977) (charting the emergence in the Supreme Court of a new approach to federalism,

uses of Congress's spending power (as in *South Dakota v. Dole*)[348] but placed careful limits on courts' and agencies' ability to augment the "strings" attached to grants-in-aid. As Justice Warren hinted in *King*, the Congress that enacted the Social Security Act in 1935 probably would not have agreed with the Court's 1968 interpretation of its handiwork. With progressive era mothers' pensions as their point of reference, the drafters of the original Act were familiar with moralistic state-level eligibility restrictions and did not object to them.[349] Historians also agree that the Act's drafters meant to give states vast discretion over who benefited from their programs. This Article shows how the ground shifted over the following decades. After states applied for federal grants—after they and their citizens became dependent on federal funds—the rules changed. They changed not via democratically elected legislative representatives, but, arguably, via administrative fiat (ratified belatedly by the judiciary).[350]

Perhaps the "graying" of the original Act called for such treatment. But either way, it provided fodder for critics of the New Deal order, and lent urgency to conservative calls for a new "new federalism." Take, for example, Arizona senator and presidential hopeful Barry Goldwater, the father of the New Right: in his 1960 manifesto *The Conscience of a Conservative*, Goldwater characterized federal grants-in-aid as "a mixture of blackmail and bribery." "The States are told to go along with the program 'or else,'" he alleged.[351]

Richard Nixon echoed Goldwater's concerns, and as president, immediately began constructing what would become the Rehnquist Court—famous for its attentiveness to the role of states in the federal system. In 1981, with three of Nixon's appointees in the majority (Justices Lewis Powell, Warren Burger, and William Rehnquist) and a fourth concurring (Justice Harry Blackmun), the Supreme Court signaled the end of decisions like *King v. Smith*, even as it purported to affirm *King*'s holding: "[L]egislation enacted pursuant to the spending power is much in the nature of a contract," the majority explained in *Pennhurst State School and Hospital v. Halderman*: "in return for federal funds, the States agree to comply with federally imposed conditions."[352] But by extension, the decision continued, the federal

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"requiring deferences to state administration and state adjudication that only yesterday were thought unnecessary or unwise").

348 483 U.S. 203 (1987).

349 *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935, at 280–82 (1998).

350 I say "arguably" because, although precise conversations are difficult to reconstruct, federal administrators were always aware of Congress; they could not afford to ignore the messages they received in committee hearings and behind closed doors. *See* Barrett, *supra* note 80, at 5.

351 BARRY GOLDWATER, THE CONSCIENCE OF A CONSERVATIVE 19 (1960).

352 451 U.S. 1, 17 (1981).

government may not hold a state to conditions of which it was "unaware" at the time the bargain was struck.[353] The upshot was a judicially imposed "clear statement rule": "if Congress intends to impose a condition on the grant of federal moneys," the Court held, "it must do so unambiguously."[354]

Nixon also began repackaging New Deal and Great Society matching grants as block grants, a task that successive conservative (and neoliberal) politicians would continue.[355] Proponents associated this policy change with efficiency, rationality, and democratic accountability; critics saw an attempt to undermine a half-century of liberal reform and restore to state and local governments the ability to control marginal populations. This Article reminds scholars of the context: policymakers were reacting to the ways in which cooperative federalism played out in the decades after the New Deal. In the welfare context, as in the contexts of education and health, federal aid proved to be both a precious resource and a Trojan horse. Grants brought a level of federal administrative intrusion that some state officials had not bargained for and that they had difficulty addressing via conventional channels. (Judicial review of agency decisions eluded them—the lesson of *Arizona v. Hobby*—and their representatives in Congress had a limited ability to see what federal administrators were doing on a day-to-day basis.) Block grants, much like the judicial federalism described above, did not stop the flow of federal funds to states, but they limited the power of federal administrators to change the rules unilaterally.[356]

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353 *Id.*; *see also* Bennett v. Kentucky, 470 U.S. 656, 670 (1985) (explaining that a state grantee's legal liability turns on the "statutory provisions, regulations, and other guidelines" that were "in place when the grants were made").

354 451 U.S. at 17. On *Pennhurst* as a decision signaling "intense devotion to protecting state sovereignty interests," see William N. Eskridge Jr., & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45. VAND. L. REV 593, 642 (1992). *Pennhurst*'s clear statement rule is now even more solicitous to states, thanks to the Court's explication of it in *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006). *See* Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441, 443 (2008) (explaining that in *Arlington*, the Supreme Court chose "to articulate a new, narrower standard with which to review federal conditions placed on state acceptance of federal funds").

355 *See* Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 YALE L. & POL'Y REV. 297, 297–99 (1996) (documenting and explaining the enthusiasm for block grants from the 1970s through the mid-1990s).

356 There remains one doctrinal wrinkle: the deference that the Supreme Court has said is owed to agencies' statutory interpretations under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). On the tension between *Pennhurst* and *Chevron*, see David Freeman Engstrom, *Drawing Lines between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1203–08 (2004); Peter J. Smith, Pennhurst, Chevron*, and the Spending Power*, 110 YALE L.J. 1187, 1188–92 (2001).

The Article's second contribution to the federalism field is the fresh insight it gives into today's "uncooperative federalism." At first glance, Barry Goldwater's critique of grants-in-aid appears to have a modern analogue in some states' objections to the Affordable Care Act's expanded Medicaid grants, at issue in the recent Supreme Court decision *National Federation of Independent Business v. Sebelius*.[357] Ideologically, there is doubtless some continuity. But it is not 1960 anymore: today's cooperative federalism *empowers* states, albeit from within federal statutory law[358] (including, Abbe Gluck argues, the Affordable Care Act.[359]) States today not only coadminister major regulatory programs, offering ample opportunity for negotiation and dissent, but they also claim ownership over statutory drafting and interpretation. Acting as groups, state officials leverage their power and expertise to influence the shape of new statutory schemes.[360] After the enactment of legislation, Congress's increasing use of the waiver process allows them to "rewrit[e] substantial portions of statutory schemes."[361] And when they disagree with federal administrators about statutory implementation, they may force the federal agency to explain itself before the public.[362] Influence continues through consultations between state and federal administrators, and more subtly, through the "close bonds and loyalty" that develop between these actors.[363] In short, state autonomy is a fiction, but through grant-in-aid programs and other cooperative arrangements, state *influence* is real.

Pairing this Article's historical findings with current realities, a pressing future research question is the degree to which *states*, through their coadministrative capacity, influence the meaning of the Constitution. If agency decision making is, in fact, "a main mechanism by which constitutional meaning is elaborated and implemented today,"[364] then we must consider the possibility that state officials, operating in what they understand to be their states' interests, are

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357 132 S. Ct. 2566 (2012).

358 *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 478–86 (2012); Bulman-Pozen & Gerken, *supra* note 24, at 1284; Gluck, *Intrastatutory Federalism and Statutory Interpretation*, *supra* note 60, at 585–87; Gluck, *Our [National] Federalism*, *supra* note 60, at 2005–10; Metzger, *supra* note 55, at 2100–09; Ernest A Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1380–96 (2001).

359 *See* Gluck, *Intrastatutory Federalism and Statutory Interpretation*, *supra* note 60, at 584–93.

360 *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 115–67 (2009).

361 Bulman-Pozen, *supra* note 60, at 1934, 1939.

362 *See id.* at 1939.

363 Miriam Seifter, *States, Agencies, and Legitimacy*, VAND. L. REV. 443, 469 (2014).

364 Metzger, *supra* note 13, at 1901.

imbuing the Constitution with their priorities and commitments.[365] For the Fourteenth Amendment, that would be an ironic outcome indeed.

Administrative Law. In recent years, a growing subset of administrative law scholars have devoted deep and sustained study to what agencies actually do, rather than focusing exclusively on what agencies *should* do (or what courts think they should do); only with this foundation do they turn to the question of whether our current system of administrative law doctrines and statutes is sound and desirable.[366] This Article reminds scholars how much we have left to learn when it comes to understanding agencies' engagement with the Constitution, and how much we stand to gain if we do this work. To suggest just a handful of possible research questions: Which agencies are, or have been, most likely to engage in administrative constitutionalism? Which have been inclined to renounce it? Have agency interpretations tended to be more or less conservative than judicial

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365 *Cf.* Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 610–15 (2011) (arguing for the "central importance of administrative federalism" and calling for more research on the extent to which administrative federalism protects state interests).

366 *See, e.g.*, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 1, 16 (2012) (broadening the definition of administrative law to go beyond "'judicial review of administrative action'"; using a series of historical case studies to explore "the development and implementation of law and policy by officials specifically charged with that responsibility"); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 64–98 (2006) (using interviews with top administrators at the EPA in two presidential administrations to evaluate the "presidential control model" of administrative decisionmaking); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (comparing "the actual workings of the administrative state" with "the assumptions animating the APA and classic judicial decisions that followed"); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 929–36 (2008) (using twenty years' of agency notice-and-comment rulemaking data to identify patterns over time in how agencies have promulgated rules); Connor N. Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. (forthcoming 2015) (detailing how and when agencies avoid rulemaking procedures); Raso, *supra* note 69, at 792, 806, 820–21 (providing an empirical analysis of agencies' issuance of guidance documents); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1739–75 (2012) (using a set of EPA regulations to test empirically whether judicial review of agency rulemaking protects the public interest in the ways that scholars have assumed); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 104–20 (2011) (tracking imbalances in the "rulemaking life cycle" and explaining their impact on the substance of rulemaking projects); Christopher J. Walker, *Inside Agency Interpretation*, 67 STAN. L. REV. (forthcoming 2015) (using original survey data to document and explain how federal administrators interpret statutes); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1445–63 (2012) (compiling empirical data to rebut the conclusion that ossification is a widespread problem in rulemaking); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 999–1007 (2011) (using empirical data and interviews to analyze whether and how agencies seek to avoid review by the Office of Information and Regulatory Affairs).

interpretations? What sources, experiences, and commitments have administrators drawn upon as they crafted their interpretations? Have agencies' interpretive choices and strategies changed over time, as the Supreme Court has issued clearer statements about the deference owed to agency decisions? To the extent that we can discern meaningful patterns across agencies' interpretations of the Constitution, what accounts for them?[367] The answers to these questions will necessarily affect how we model agency behavior, and, if we do not like what we see, how we change it.

Such a research agenda may sound daunting, but this Article provides a template for how to begin. The most important takeaway is to look outside of courts (as Jerry Mashaw has encouraged administrative law scholars to do)[368] and consider a broader range of sources: the archives of agencies themselves, most obviously, but also the recollections and personal papers of key administrators, the correspondence of groups and individuals who tried to influence them, and the records of professional associations and schools whose members tend to enter public administration. The world of administrative law is bigger and more complex than what can be seen from the bench, and its impact on American life is larger still. We can and should map it.

Constitutional Law. Last but not least, this history has implications for the study of constitutional law, and specifically for our understanding of the constitutional rights of the poor. Not so long ago, administrators in one of the nation's most important federal agencies believed that the Constitution required careful, skeptical review of state welfare laws. In the course of their day-to-day work, they insisted that the Equal Protection Clause was about much more than racial discrimination; it also constrained states from using their power over need-based public aid to impose different standards on the poor than on everyone else.

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367 Legal scholars have begun to answer similar questions regarding agencies' *statutory* interpretive choices, responding to Jerry Mashaw's plea for more attention to this issue, Jerry Mashaw, *Between Facts and Norms: Agency Statutory Interpretation as an Autonomous Enterprise*, 55 U. TORONTO L.J. 497, 498 (2005); *see, e.g.*, Matthew C. Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285–332 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (providing "an overview of P[ositive] P[olitical] T[heory] research on agency statutory interpretation, and suggest[ing] some directions for future research); Walker, *supra* note 366 (manuscript at 4–8) (exploring the roles of courts, legislative history, and canons in the way federal administrators interpret statutes). But work on constitutional interpretation remains scant. For a tentative effort to account for how administrative constitutionalism has changed over time, see Sophia Z. Lee, Federal Policy, Constitutional Rights, and Poverty in the Twentieth Century: "Administrative Constitutionalism" in New Contexts, Comment Delivered at the 2014 Policy History Conference (June 4, 2014) (on file with author) (dividing administrative constitutionalism between the 1930s and into the 1980s into three periods).

368 *See* MASHAW, *supra* note 366, at 7.

And yet that is not the Equal Protection Clause that most people today imagine we have. Why? The history recounted above highlights a fatal combination of factors: states' heavy reliance on federal funds, across multiple policy areas; some states' determined resistance to civil rights demands; the existence of a welfare population that had become popularly associated with blackness, immorality, and exploitation of public funds; and, in the face of all these concerns, a strategic choice on the part of key administrators to withhold a well-developed position on the meaning of the Fourteenth Amendment for the poor.

What followed was a series of Supreme Court decisions that continue to sit uneasily aside one another: *King v. Smith*, the sweeping statutory decision that, along with *Goldberg v. Kelly* and *Shapiro v. Thompson*, seemed to invite the poor under the Constitution's protective umbrella; *Dandridge v. Williams*, which just as quickly appeared to dash those hopes;[369] and, just three years later, *United States Department of Agriculture v. Moreno*, a puzzling decision in which the Court gave a less-than-deferential review to an eligibility restriction in the federal food stamps program (distinguishing between "related" and "non-related" members of a recipient household).[370] *Moreno*, perhaps more than anything, hints at what constitutional equal protection might have meant for the poor.[371] When examining a welfare program that did not involve cooperation with the states and was not associated primarily with black, unmarried mothers, the Court brought real "bite" to its "rational basis" review and indeed struck down the offending classification.[372]

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369 *See* 397 U.S. 471, 476–87 (1970); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (declaring that it was "not the province of this Court to create substantive constitutional rights"—in this case the right to education—"in the name of guaranteeing equal protection of the laws"); Jefferson v. Hackney, 406 U.S. 535, 546–50 (1972) (applying rational basis review to "the legislature's efforts to tackle the problems of the poor").

370 413 U.S. 528, 529–33 (1973); *see also* U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 512–14 (1973) (striking down an eligibility provision of the Food Stamp Act of 1964 on the grounds that it lacked a rational basis).

371 Technically, this case involved the "equal protection component" of the Fifth Amendment's Due Process Clause, not the Equal Protection Clause of the Fourteenth Amendment, but in keeping with precedent, the Court applied the mode of equal protection analysis developed in Fourteenth Amendment cases. *Moreno*, 413 U.S. at 533–34.

372 *Id.* at 533–38. On the apparent disconnect between *Moreno* and the *Dandridge* line of cases, see, e.g., Mark S. Coven & Robert J. Fersh, *Equal Protection, Social Welfare Litigation, the Burger Court*, 51 NOTRE DAME LAW. 873, 885 (1976) (noting that in *Murry* and *Moreno* "the Court purported to apply the minimum rationality test, yet in result, seemed to apply a stricter standard"); Margaret Howard, United States Department of Agriculture v. Moreno*: Reinvigorated Equal Protection for Welfare Recipients*, 8 URB. L. ANN. 289, 290–92 (1974) ("There are two possible alternatives that explain [the result in *Moreno*]: either the Court is moving toward strict scrutiny in the welfare area or an evolution of equal protection doctrine is in progress.").

With the distance of time and the emergence of several other anomalous equal protection cases,[373] scholars have explained *Moreno* by reference to "unconstitutional animus": the Court will take a harder look at legislation evincing a "bare desire to harm" a politically unpopular group (in *Moreno*, "hippies").[374] The decision may also be understood, however, as part of a long tradition—visible at one time inside the administrative state but obscured from view by cases like *Dandridge*—of a more robust application of the Equal Protection Clause. As Justice Douglas suggested in his concurrence in *Moreno*, and as an administrator like A. D. Smith or Jack Tate would have agreed, the Constitution ought to protect the poor from being subject to different standards of behavior just because they are poor.[375] This lost understanding of constitutional equal protection would still have fallen short, to be sure, of what some poverty lawyers at the time wanted—namely, a guarantee of a minimally adequate income—but it would certainly have made a difference to the many Americans who took their cues from the laws and regulations of the welfare state, and the many who do so today.

373 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 626–35 (1996) (holding that a state constitutional amendment dealing with sexual orientation failed rational basis review); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–47 (1985) (finding that an ordinance failed rational basis review in a case involving discrimination against the mentally retarded).

374 *See generally* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2013) (using the idea of animus to explain a particular set of Supreme Court equal protection decisions, including *Moreno*).

375 *See* 413 U.S. at 544–45 (Douglas, J., concurring) (noting how the challenged law burdens poor people's right to associate with whom they choose).