

ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation



ERICA FRANKENBERG AND KENDRA TAYLOR

To understand the impact of the Elementary and Secondary Education Act (ESEA) and the Civil Rights Act in contributing to school desegregation, it is necessary to take an interbranch perspective that accounts for the ways in which interplay among the branches of the federal government occurred to further a policy agenda that would have been improbable had one branch acted alone. This paper examines the passage and implementation of the ESEA and the Civil Rights Act during the Johnson and Nixon years, considering how the legislative, judicial, and executive branches collaborated with each other to strengthen the impact of this legislation beyond what was initially conceived. Despite complex desegregation issues left unresolved, this period marks the only time when all branches of government employed their unique powers to implement and enforce desegregation, offering important insights into the ways in which the federal government can effectively accomplish progress in changing local practice on contentious civil rights issues.

Keywords: ESEA, Civil Rights Act, desegregation, interbranch, enforcement

The passage of the Elementary and Secondary Education Act (ESEA) in 1965 occurred shortly after the Civil Rights Act of 1964 became law. Together these laws responded to local intransigence and expanded desegregation across the South in ways that had not occurred prior to 1964. ESEA provided federal funds in such quantities to schools that Title VI of the Civil Rights Act, which had been viewed as inconsequential in congressional debates prior to its passage, became a critical tool in desegregating schools in the South. Without the Civil Rights Act, ESEA would have been unable to withhold funds from segregated districts, and conversely, Title VI of the Civil Rights Act would have been less effective without ESEA funds with which to threaten districts. However, the

Civil Rights Act (together with ESEA) is limited in furthering school desegregation because of the law's provisions and enforcement. These constraints were particularly visible in the years following the laws' passage when federal officials lacked the resources and expertise to fully carry out enforcement. Though the tools to desegregate schools may be available, their use is dependent on those in power, illustrating barriers limiting past, and likely future, efforts to furthering the rights of minorities through popularly elected officials.

The passage of the Civil Rights Act and ESEA in 1964 and 1965, respectively, in comparison with the failures of prior weaker bills, demonstrates the importance of the unique historical conditions that allowed for their pas-

Erica Frankenberg is associate professor at the Pennsylvania State University. **Kendra Taylor** is a doctoral student at the Pennsylvania State University.

The authors gratefully acknowledge the assistance of Penn State reference librarians Ellysa Cahoy Stern and Andrew J. Tig Wartluft. Direct correspondence to: Erica Frankenberg, euf10@psu.edu, Pennsylvania State University, College of Education, 207B Rackley Bldg., University Park, PA 16802; Kendra Taylor, kat5123@psu.edu, Pennsylvania State University, College of Education, 200 Rackley Bldg., University Park, PA 16802.

sage. The Civil Rights Act of 1964 emerged from a social movement against racial discrimination, which rose to a level of national consciousness demanding legislative action following the Birmingham crisis in 1963. ESEA passed as part of Johnson's legislative agenda bringing attention to the economic disparities in the country and the plight of the poor. Passing federal aid to education bills had been difficult prior to 1965 in part because of race, while enacting a strong civil rights bill had faced barriers due to a lack of public and political support and a southern filibuster. Key elements of the success of the legislative approach were the social and political context that allowed for expanding federal involvement and the foresight of those who crafted the acts in order to maintain their viability to affect local change well after the conditions that were favorable to their passage had disappeared.

Considering ESEA and the Civil Rights Act together demonstrates the possibilities and limitations of executive, legislative and judicial branch interplay at the federal level to further school desegregation. In American policymaking, it is not the edict of one branch alone that creates policy; rather it emerges from the interactions among all three branches of the federal government (Miller and Barnes 2004). We consider the ESEA and Civil Rights Act from an interbranch perspective in the context of the Johnson administration, when the acts were passed, and the Nixon administration, the start of conservative domination of the executive branch that limited school desegregation efforts. Under both administrations, desegregation advanced markedly from the decade following *Brown* when little progress was made. Ten years after *Brown*, just 2.3 percent of black students in the South attended a majority white school. By 1968, amid implementation of the Civil Rights Act and ESEA, that figure grew to 23.4 percent (Orfield 1978). We discuss conditions allowing for this progress, but also examine how enforcement efforts were thwarted by a lack of resources and, later on, by a lack of political will. Interplay between the three branches of government shifted depending on those in power following the passage of ESEA and the Civil Rights Act.

Once implementation of this legislation began, attacks that would substantially alter them were not able to pass through the change-adverse wheels of the federal system, but executive enforcement was more variable.

The coalition that passed the Civil Rights Act in 1964 coalesced around the need for federal intervention into the harsh state-sponsored segregation (for example, *de Jure*) in the South. The consensus disappeared, however, in the following years when the debate moved outside the South. The idea of federal intervention in nonsouthern regions—where the history of discriminatory policies left a legacy of residential, and thus school, segregation that was harder to prove under existing legal theories—was unpalatable to many. Despite the language of Title VI that allowed agencies such as the U.S. Department of Health, Education, and Welfare (HEW) to adopt a broad definition of discrimination to include *de facto* segregation, this issue was instead left unresolved—with long-lasting ramifications for contemporary segregation. Today, urban, and increasingly suburban, districts are still contested sites of desegregation. We trace the unraveling of the consensus that successfully dismantled *de jure* segregation in the mid-1960s, explain the conditions that contributed to the failure to address *de facto* segregation, and consider implications for future federal desegregation efforts.

CONTEXT AND PASSAGE OF THE CIVIL RIGHTS ACT AND ESEA

A decade of sluggish judicial progress in furthering desegregation after *Brown* suggested that segregation would not be eradicated solely through the judiciary. Yet, concerns about the proper federal role in desegregation prevented action for nearly a decade. A rapidly changing context allowed for two pieces of legislation that, when examined in tandem, affected school desegregation. The passage of the Civil Rights Act of 1964, by prohibiting federal funds from going to recipients that discriminate, removed a major impediment to passing ESEA that had doomed prior educational funding bills. Additionally, the civil rights movement more generally showed the need for the Civil Rights Act and raised awareness about unequal-

ity that provided an important rationale for targeting aid for disadvantaged students.

The Civil Rights Act of 1964

A decade after the *Brown* decision, little progress had been made in eradicating the segregated schools in many southern states. Because *Brown II* in 1955 remanded segregation cases back to district courts to devise the remedy, progress towards desegregation was halting; the Court did not again issue desegregation guidance until 1968. Instead of broad desegregation guidelines, it required private resources and plaintiffs in each district to legally challenge segregation. Under the Kennedy administration, the attorney general tried to bring in the federal government by filing several desegregation suits in districts receiving federal funding but the courts did not permit them to intervene without congressional authorization. In early 1964, fewer than 20 percent of districts in the South had begun to desegregate (Orfield 1969). A U.S. Justice Department official feared that the intransigence from many states was causing the federal system to fail because it required an “endless” chain of litigation on a “case by case” approach (Marshall 1962, 6).

In early 1963, desegregation action from other branches did not appear likely, but that quickly changed illustrating how popularly elected branches are more susceptible to public opinion and events, which is a benefit of involving all branches in the desegregation effort. In April 1963, President Kennedy dismissed a suggestion that federal funds to a project be cut off because funding was being distributed in a discriminatory manner. In the same month, the House summarily defeated two such amendments to educational funding bills (Orfield 1969). In May 1963, however, non-violent civil rights demonstrations in Birmingham, Alabama, and the vicious police response to it were broadcast via television and newspapers around the country and beyond. Seeing images of the brutality of local control in Birmingham helped the country understand the dangers of unchecked localism and the need for federal action on racial discrimination at

this point in time. In public opinion polls shortly after Birmingham, a majority of respondents reported that civil rights was the most pressing item on the national agenda, which was a dramatic increase from only months earlier (Klarman 2005). Dozens of bills were introduced in Congress, many of them calling for funding only desegregated districts. The Kennedy administration, sensing the policy window open for federal intervention, sent a strengthened civil rights bill with a range of proposals to demonstrate a comprehensive response to address the continued racial discrimination African Americans faced. In his June 1963 speech announcing the bill, Kennedy noted the importance of Birmingham: “The events in Birmingham and elsewhere have so increased the desires for equality that no city or state or legislative body can prudently choose to ignore them. The fires of frustration and discord are burning in every city, North and South, where legal remedies are not at hand.” With public support firmly behind civil rights, Congress was ready to show their support for civil rights and many members advocated for a bill stronger than the president’s (Orfield 1969).

Despite the initial support in the aftermath of Birmingham, southern congressional resistance to the proposed bill was fierce, and the debate and filibuster were lengthy. It was finally enacted on July 2, 1964. Segregation, of course, was prevalent in many aspects of public life and the Civil Rights Act of 1964 applied to areas such as voting and employment. Titles IV and VI bear directly on the desegregation of schools.¹ Title IV specifically pertained to schools—it commissioned the Coleman report on educational opportunity and provided for technical assistance grants and training for desegregating schools. It also allowed the U.S. attorney general to initiate lawsuits to compel desegregation in local districts, which was the Kennedy administration’s school desegregation priority in drafting the legislation. Although architects of Title IV intended for it to be applicable in both *de jure* and *de facto* segregated schools, language was added to obtain cloture on the Civil Rights Act that limited its

1. Title VII, focusing on employment, did relate to teacher desegregation efforts.

applicability in de facto segregated schools (House of Representatives Subcommittee 1963; Bolner and Shanley 1974). Title VI permits, but does not require, cutting off funds from agencies that are found to discriminate on the basis of race, color and national origin.

Title VI originated from the oft-proposed Powell Amendment, first suggested in a 1947 presidential report on civil rights. The amendment was aimed at using the force of the federal government to bring about desegregation by cutting off federal funds to any institution that was not in compliance with *Brown*. Representative Powell and the NAACP believed in the necessity of a legislative solution as there was “no other alternative to endless litigation” after *Brown* (Orfield 1969, 26). Originally, drafters of the bill added Title VI at the suggestion of some members of Congress; the administration was prepared to compromise on this title in order to gain the passage of other parts of the bill (Orfield 1969). Far from being eliminated, Title VI was strengthened, although it received little attention during congressional debate. Because little federal money was available for education in 1964, Title VI was expected to have relatively little impact. The way in which it was drafted allowed federal officials to cut off funds, but such action was at their discretion—not required. The Justice Department emphasized during Congressional debate that federal agencies likely already possessed such authority to withhold funds, and this was not conferring any additional federal authority. Indeed, a Justice Department official testified that it would not be used to establish federal desegregation standards because that would require, in his estimation, military intervention. In response to concerns in the House, judicial review or administrative hearings prior to fund termination were included as a safeguard against arbitrary fund termination.

The origins of Title VI indicate that it was seen as affecting practices beyond what was prohibited by the Constitution alone (Abernathy 1981). Yet it was ambiguous enough such that actors could have different interpretations of how it should be applied. Foreshadowing future debate, after testimony from a HEW secretary suggesting an expansive interpretation

of *discrimination* to include racial imbalance, Congress amended Title VI to allow federal agencies to determine what constituted discrimination. It removed language from Title IV that referenced action against racial imbalance (for example, de facto segregation more common outside the South), which the secretary had linked to his definition of discrimination referred to in Title VI (Bolner and Shanley 1974; Orfield 1969). *Racial imbalance* became a politicized term that, to its critics, came to mean achieving certain quotas of racial groups in schools regardless of the impacts such social planning had. To proponents of remedying racial imbalance, it came to mean equating racial imbalance with segregation (Bolner and Shanley 1974). The congressional compromise in wording acknowledged that as judicial interpretation of what was required by the Constitution changed, so too might the requirements of Title VI, and administrative agencies might even demand more than the Constitution. As an example, HEW had been clear in debates about the bill that they saw correcting racial imbalance as a goal of Title VI, which went beyond judicial interpretation at the time. Almost immediately after the Civil Rights Act was passed, Title VI was bolstered dramatically by the increasingly comprehensive understanding of what was required to protect the rights of black students and the passage of ESEA. Nevertheless, HEW did not fully exploit the ambiguity of Title VI to adopt an expansive understanding of discrimination as encompassing de facto segregation.

The Elementary and Secondary Education Act of 1965

The ESEA was a significant expansion in the role of the federal government in funding K–12 education, which had been the purview of state and local governments. Unlike education bills of the preceding decade that had failed to pass, this bill had several advantages. President Johnson had been elected in a landslide in late 1964, bringing with him a more liberal Congress. With the Civil Rights Act now law, the 1965 bill did not get conflated with racial politics that had made passage of previous education bills impossible (Meranto 1967, 132). A judicial review of ESEA’s legislative history noted

that “It is a fair assumption that Congress would not have taken this step [passing ESEA] had Title VI not established the principle that schools receiving federal assistance must meet uniform national standards for desegregation” (*U.S. v. Jefferson Co. Bd. of Ed.*, 372 F.836 (5th Cir. 1966), 851).

ESEA was part of Johnson’s broader Great Society. The Great Society, with an ambitious goal to cure and prevent poverty, contained a variety of legislative initiatives to improve the education, health, and job skills for low-income individuals. President Johnson believed that issues of educational inequality were intimately linked to race and poverty, and that blacks and Latinos were disadvantaged in the public school system as it existed (Orfield 2015). The rediscovery of the existence of poverty in America was part of a larger policy shift allowing for the passage of federal aid to education. Education was seen as key to breaking the vicious cycle of poverty and improving the lives of “the culturally deprived student” and “the socially impoverished student” (Meranto 1967, 18). ESEA can also be viewed as an indirect response to the civil rights movement by improving aid to black children, many of whom were also economically disadvantaged, without actually being race conscious (Meranto 1967). Just as the civil rights movement created an impetus for the Civil Rights Act by displaying the harsh nature of segregation, it helped create awareness about the inequalities for black students. With the erosion of segregation, white schools and administrators were now faced with the task of educating large numbers of poor African American students (Reed 2014; McGuinn and Hess 2005). For these schools, the challenges of desegregation were related to the challenges of educating students in poverty, and thus the incentive for complying with the HEW standards to continue to receive ESEA funds cannot be understated.

ESEA was signed into law in April 1965 and was almost identical to the bill Johnson proposed in his State of the Union address in January. The law’s drafters were successful in giving something to everyone, which headed off both opposition to the bill’s passage, but also repeal once it became clear how the ESEA

and Civil Rights Act would work together to attack segregation (Orfield 1969, 2015; McGuinn and Hess 2005). A key to the design of ESEA was that money was targeted to disadvantaged students regardless of what school they attended. Federal funds from ESEA went to every congressional district and most schools, though those with higher percentages of low-income students received more funds under Title I. By allowing aid to go to parochial schools enrolling low-income children, ESEA garnered the support of Catholics, a key Democratic bloc.

BRANCHES OF GOVERNMENT UNDER THE JOHNSON ADMINISTRATION

With the passage of the Civil Rights Act and ESEA, the Johnson administration was tasked with implementation. A complex interplay between the federal branches began. Court supervision of desegregation led to automatic compliance with the Civil Rights Act for ESEA funding, which meant that desegregation requirements should not differ drastically between the branches. The Office of Education within HEW was now charged with evaluating desegregation in thousands of districts across the South that had been resisting *Brown*. To accomplish this task, HEW issued guidelines for desegregation, which were used to evaluate the plans that districts submitted for compliance and fund eligibility. Secretary Gardner noted that as HEW determined how to enforce Title VI, they were “plunged into a situation where we had no experience” (Halpern 1995, 64). HEW initially largely adopted fairly minimal judicial standards. In 1966, the guidelines became more specific, requiring districts to increase the percentage of blacks transferring to formerly white schools. Districts with lower rates of desegregation had to show more growth. These guidelines, referred to black student transfers only, but were comparable (if not more extensive) to a typical court-ordered plan (Cascio et al. 2010). During later years of the Johnson administration, HEW strengthened its standards in advance of the courts. Over time, as the guidelines demanded more desegregation progress, tangible, long-lasting progress was accomplished in the South.

Table 1. Summary of HEW Compliance Statuses in Southern and Border States, 1966–1967

| Status | December 1966 | March 1967 | September 1967 |
|--|---------------|------------|----------------|
| Evidence of noncompliance | 54 | 25 | 1 |
| Evidence of noncompliance ^a | — | 9 | 8 |
| Deferred | 143 | 161 | 89 |
| Deferred ^b | — | 11 | 50 |
| Terminated | 26 | 17 | 58 |
| Total districts | 4,774 | 4,890 | 4,785 |

Sources: U.S. Department of HEW, 1966, 1967a, 1967b.

^aEvidence of noncompliance substantiated, negotiations being conducted, final approval of pending applications for federal assistance now being deferred by HEW—except no deferral is operative.

^bNo deferral is operative.

Impact of the New Laws

Contemporary accounts heralded the impact of the laws as accelerating desegregation (for example, USCCR 1966). Before ESEA, in 1964, federal education funding was \$176 million for the southern and border states. An addition of nearly \$590 million came from ESEA in 1966, making it such that districts could not risk fund termination without substantial disadvantage (*U.S. v. Jefferson Co. Bd. of Ed.*).

Overview of Laws' Impact

Many districts complied with Title VI of the Civil Rights Act in order to get federal funds, although this was not uniform across the South. As seen in the administrative procedure required to cut off funds, this was a last resort, and in many cases, threats of fund termination was enough to gain compliance. Periodic HEW compliance reports, testimony, and U.S. Commission on Civil Rights reports indicate that when threats were not enough, HEW deferred and terminated funds to districts not in compliance with HEW guidelines. For example, in the first year, 2 percent of nearly five thousand districts hadn't been certified to receive ESEA funds (Halpern 1995). In early 1966, sixteen districts had already been found in noncompliance and another twenty-three were pending (USCCR 1966). Later, Commissioner of Education Howe noted that thirty-seven districts had funds cut off in the fall of 1966 (Orfield 1969). Beginning in December 1966, HEW released re-

ports documenting compliance statuses across the seventeen southern and border states. At the three times covered by these reports, hundreds of districts were in different stages of investigation, fund deferral, or termination (see table 1). At each point, some 150 districts had funds deferred, and from seventeen to fifty-nine had funds terminated illustrating that HEW did use the Title VI fund termination mechanism.

Studies assessing the impact of conditional funding and HEW enforcement complement case studies in southern locales finding a changed response due to the threat of the loss of funds (for example, Orfield 1969). A study of more than nine hundred districts not under court supervision in 1966 concluded that federal funding from ESEA, conditional on desegregation compliance, helped move southern districts beyond token desegregation (Cascio et al. 2010).² This estimate found that conditional funding accounted for 36 percent of the movement beyond token desegregation from 1964 to 1966. Because of the relatively minimal HEW requirements in 1966, there wasn't evidence of widespread increases in desegregation.³ However, a small subset of districts had a substantial increase in the percentage of students in desegregated schools, which is perhaps due to the Civil Rights Act and ESEA giving these districts political cover to desegregate more than they felt the district's population would otherwise tolerate. At this time, the Civil

2. Defined as 2 percent of black students attending desegregated schools.

3. This analysis also found the ESEA and the Civil Rights Act furthered faculty desegregation in southern schools.

Rights Act and ESEA reduced the burden on the courts in furthering desegregation, which shifted back to the courts in 1970. Other analyses have reached similar conclusions about the effectiveness of HEW enforcement. A study analyzing school segregation in more than 1,300 southern districts in 1968 and 1970 found that racial segregation was lower in districts under HEW enforcement than under court oversight, after controlling for other district factors (Giles 1975). Yet, segregation fell more sharply in districts under court order, illustrating a weakening of HEW enforcement. Finally, a separate analysis of southern districts found those with more low-income students (for example, received more ESEA funding) were less likely to have had any desegregation by 1964, but had caught up to other districts by 1966 (Cascio et al. 2010).

Thus, studies conclude that when viewing desegregation across a variety of districts, the Civil Rights Act and ESEA made small but statistically significant improvements in school-level desegregation during the mid-1960s. Moreover, a small number of districts were investigated and in some cases, funds were deferred or briefly withheld. The pace of desegregation quickened in comparison to the prior decade of case-by-case litigation affecting relatively few districts.

Court Decisions

Court decisions also offer an example of the indirect effect of the Civil Rights Act and ESEA on school desegregation. The Fifth Circuit, which then had jurisdiction over much of the South, played a key role in furthering desegregation beyond what district judges had required (Bass 1990). In *Jefferson v. United States*, the court considered desegregation standards with respect to the HEW guidelines. This lengthy decision illustrates the complex interplay between the branches of the federal government as they confronted local resistance to *Brown*. *Jefferson* acknowledged that all three branches of the government are needed to “make meaningful the right of Negro children to equal educational opportunities. The courts acting alone have failed” (*U.S. v. Jefferson Co. Bd. of Ed.*, 847). Indeed, almost as if feeling rep-

rimanded by the Civil Rights Act, the decision stated, “We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation,” which was due to wide variation in rulings and requiring case-by-case litigation (852–53).

Because of the ability of districts to qualify for ESEA funding, the court held that court-supervision could not be less stringent than HEW guidelines so that the courts would not be used as a means to evade Title VI. While expressing the opinion that courts could go beyond what HEW required, the court found that the HEW guidelines were due deference because they had been crafted by experts (rather than judges) and were part of a coordinated strategy to address segregation. The *Jefferson* decision (like earlier decisions) emphasized the importance of Congress, as the people’s elected representatives, enacting the Civil Rights Act. The act and HEW guidelines, they said, “are belated but invaluable helps at arriving at a neutral, principled decision consistent with the dimensions of the problem” of undoing school segregation (*U.S. v. Jefferson Co. Bd. of Ed.*, 849). In fact, the decision noted that after HEW guidelines were announced, some districts that hadn’t desegregated tried to subvert compliance with HEW guidelines by getting a court order, because judicial standards varied. The decision directed district courts to evaluate proposed desegregation plans in light of standards articulated in *Jefferson* and the HEW guidelines. Thus, the guidelines helped to give courts “cover” to demand more stringent requirements in the face of charges of intervention by an unelected branch. Further illustrating interplay among the branches, the HEW guidelines led the way for the courts to invalidate freedom of choice plans. The courts had declined to forbid such plans although they were ineffective, but following the issuance of the 1966 HEW guidelines, the Court issued its 1968 ruling in *Green v. County School Board of New Kent County* (391 U.S. 430), making freedom of choice invalid. In this way, the Civil Rights Act and ESEA indirectly contributed to school desegregation that resulted from compliance with *Green* and subsequent decisions.

Backlash to ESEA and Civil Rights Act Implementation

As desegregation enforcement took effect, recognition of the major changes wrought by Title VI and the expansion of federal funding under ESEA grew, but the ability of these laws to affect school desegregation in states without de jure segregation was less clear. The Johnson administration's attempt to expand Title VI enforcement outside of the South resulted in a stinging rebuke. Backlash to enforcement began, as did ultimately unsuccessful efforts to repeal the legislation. However, the Johnson administration made concessions of virtually no enforcement outside the South and selective enforcement in the South that restricted the laws' desegregative impact, illustrating the limits of this approach even with a supportive executive.

Desegregation Enforcement Outside the South

The Office of Education's first attempt to withhold funds outside the South (Chicago) went poorly, with a subsequent understanding that enforcement should not address districts that had "racial imbalance." Chicago, like many midwestern or northern cities, had high levels of de facto segregation. Although there was increasing evidence that the adverse impacts of de facto segregation were similar to the de jure segregation in southern schools, the two forms of segregation were viewed in quite different legal and political terms. HEW responded to a complaint from a Chicago civil rights group that public agencies were maintaining segregated schools by withholding funds in fall 1965. A provision of Title VI enforcement required that HEW officials provide a written report within thirty days detailing the grounds for withholding funds (Halpern 1995), but HEW could not provide evidence for their decision to terminate funds or specify what was necessary for the funds to be reinstated. Further, the complaints did not demonstrate clear constitutional violations absent of evidence showing school board intent to discriminate (Orfield 1969). A settlement was reached in which HEW released the funds and removed investigators for two months while the school board reaffirmed its commitment to ineffective

resolutions and investigated school attendance boundaries, a political victory for the district.

The Chicago scandal highlighted the unresolved nature of Title VI in terms of de facto segregation. Top officials in the Office of Education debated about federal authority under Title VI, but ultimately concluded that the purview of Title VI did not address racial imbalance. In 1966, as reported in the bound Congressional Record, Commissioner Howe complained that when trying to address northern-style segregation, officials run into "quicksands of legal interpretation" and that when it came to de facto segregation, "[federal officials] can't do anything; we can only suggest and stimulate local school districts" (89 Cong. Rec. 25040). Despite failures in the non-South, the 1968 HEW guidelines did attempt to sanction some techniques common to de facto segregation. HEW withheld funds from at least one northern district, causing considerable controversy (Bolner and Shanley 1974). Cases outside the South were more painstaking due to the nature of proving de facto segregation and the lack of clear judicial or political support for doing so. The Johnson administration's Justice Department also began to bring nonsouthern desegregation cases (Bolner and Shanley 1974).

As a means to proactively address de facto segregation, in 1966 Senator Edward Kennedy proposed amending Title IV of the Civil Rights Act specifically to permit funds to assist districts facing racial imbalance in addition to desegregating districts. Regarding the proposed amendment, Kennedy was clear that de facto segregation was not caused by official action but resulted from the combination of residential segregation and school assignment based on residence (1996). He also specifically stated that his bill did not require "coercive" action but merely made resources available for non-southern districts interested in funds to help train teachers or design assignment policies to alleviate racial imbalance. The amendment initially seemed likely to pass, but increasingly lost support and did not get out of the Senate committee.

All told, at a time in which the Supreme Court had not explicitly extended desegrega-

tion beyond the South, some supporters of desegregation enforcement grew wary when non-southern cities were targeted. Although it was an open legal question as to whether the Fourteenth Amendment also required efforts to remedy racial imbalance where such patterns resulted from de facto residential segregation (itself caused, in part, by a variety of governmental actions), politically, the federal government was less ambiguous.⁴ Although enforcement action or threats would prove useful in addressing segregation in the South, under Johnson, Title VI would be interpreted largely as not applying to areas where de jure intent could not be proven.

Repeal?

As time passed from Birmingham, which had allowed the “extraordinary extension of Federal power embodied in the Civil Rights Act,” fear of big government overreach emerged (Orfield 1969, 361). The unique national moment where special conditions allowed the federal government to intervene in a way that created change in race relations began to fade. As enforcement proceeded, the HEW guidelines were strengthened. Token desegregation was no longer enough. Later guidelines—like court decisions—were skeptical of freedom of choice plans. Districts were increasingly required to restructure in a nondiscriminatory manner.

Commissioner of Education Keppel referred to ESEA as “put[ting] funds in such quantity at particular points so that it is possible to get leverage to raise the quality” in order to directly affect local practice (Orfield 1969, 314). One problem the Office of Education faced in 1966 with this “leverage” was that they had more power to affect local practice than the public believed was appropriate. Just as police response to nonviolent civil rights protesters in Birmingham shifted public opinion in support of the Civil Rights Act, subsequent violence helped break up the coalition supporting such federal action. In 1966, race riots occurred in a number of minority neighborhoods around the country. The nonviolent civil rights movement began to splinter, and the black power movement became more prominent.

These developments shifted white attitudes, lessening their support for continued federal involvement in civil rights issues.

As conservative influence grew in the House after the 1966 election, there was concern that ESEA would be altered due to fear of “big government.” Proposals to change ESEA that would remove federal oversight in certifying desegregation compliance were floated (Orfield 1969, 314). The Johnson administration responded—ultimately successfully—by pointing out who would be harmed if the funding were no longer based on the number of poor students (the South, big cities, parochial schools). They also “neutralized” the race issue by stripping Commissioner Howe of his enforcement power and designating staff in the HEW secretary’s office to monitor desegregation compliance. The ESEA was renewed for two years. The funding remained targeted to poor students and the GOP was not able to prohibit using federal money for busing.

Ironically, despite strengthening the HEW guidelines and the opposition in Congress that feared too much intrusion, the capacity of the Office of Education to enforce the guidelines was minimal. An assessment by the U.S. Commission on Civil Rights (USCCR) in February 1966 questioned the effectiveness of the Office of Education’s enforcement efforts because some districts that filed compliance and desegregation plans were actually not in compliance. The USCCR concluded that lack of capacity limited the Office to investigating complaints in districts in which no plan whatsoever had been filed; further, some accepted court orders were below the minimum HEW guidelines. Taken together, analyses suggested that enforcement efforts were extremely limited as the Office largely focused on the worst violations of desegregation (USCCR 1966; Orfield 1969). Additionally, it’s unclear as to whether HEW had enough data to be able to enforce its own guidelines (Cascio et al. 2010).

BRANCHES OF GOVERNMENT UNDER THE NIXON ADMINISTRATION

As the Johnson administration ended, desegregation across the South was expanding. How-

4. The courts later found HEW to have not enforced Title VI in thirty-three northern and western states.

ever, it was also becoming more complex outside the South and in urban areas, and had puzzled even the ardent integrationists of the Johnson administration. As these thorny questions took precedence, the lack of legal guidance stymied federal officials. Leadership and public support for desegregation fragmented as Nixon took office, removing important conditions for Title VI to be effective and the federal intrusion into local matters seem legitimate.

Changed Understanding of Desegregation

Nixon anchored his 1968 presidential campaign on the “southern strategy,” in which he appeased the white South by being openly critical of policies ameliorating racial discrimination implemented during the Johnson administration, particularly HEW policies involving busing (Halpern 1995). When campaigning, Nixon attacked “forced busing” and asserted that judges and bureaucrats should not be making decisions for local districts. He also disagreed with threatening fund cut-offs to coerce local districts to carry out what federal officials thought was best (Orfield 1978). Soon after his election, Nixon faced whether to continue to desegregate the rural South and whether to develop a plan for desegregating urban areas; on both he opposed desegregation progress (Orfield 1978).

Central to the debate over de facto segregation was forced busing, which affected desegregation politics during the Nixon years. Through opposing the use of transportation for desegregation and prioritizing the good faith efforts of local officials, Nixon envisioned a limited federal role in desegregation. He acknowledged that *Brown* was settled law, but argued other considerations should be taken into account aside from remedying segregation “root and branch” as the *Green* decision required. In an extensive statement on desegregation, he said,

I am dedicated to continued progress toward a truly desegregated public school system. But, considering the always heavy demands for more school operating funds, I believe it is preferable. . . to use limited financial re-

sources for the improvement of education—for better teaching facilities, better methods, and advanced educational materials—and for the upgrading of the disadvantaged areas in the community rather than buying buses, tires, and gasoline to transport young children miles away from their neighborhood schools. (Nixon 1970)

He also outlined principles to govern how HEW and the Department of Justice would approach desegregation. Two included using the neighborhood school as the default student assignment and not requiring transporting students beyond “normal geographic zones for the purposes of racial balancing.” He emphasized that neither the 1964 Civil Rights Act nor the 1966 ESEA amendments required transportation for racial balance. Nixon endorsed trying to make separate but equal while emboldening local officials’ resistance to federal enforcement. Additionally, he thought that schools were not responsible for ameliorating the effects of de facto segregation.

The Executive Branch’s Desegregation Efforts Recede

Title VI Enforcement

Nixon announced during his campaign that if elected he would pursue a different enforcement strategy under Title VI than his predecessor. The allowance for wide discretion in executive enforcement of Title VI is made possible through an ambiguous provision that stipulates administrators enforcing Title VI have the choice of terminating federal funds or enforcing Title VI by “other means authorized by law” (Halpern 1995, 33). This provision was discouraging to civil rights activists, who believed that given the option of whether to terminate funds, politicians would not use that device unless it were mandated. However, some southern congressmen and even liberals concerned with arbitrary executive power argued that Title VI gave too much influence to federal officials. Although Johnson’s use of Title VI to terminate funds illustrates that some politicians would use this device, he represents an anomaly.

In July 1969, the administration issued the

Mitchell-Finch policy statement, articulating their new strategy toward Title VI enforcement to avoid using the fund cut-off mechanism under Title VI in favor of using their discretion to pursue litigation, ultimately eliminating the potential for federal financial incentives to advance desegregation efforts (Cascio et al. 2010). Two key changes were announced in the Mitchell-Finch policy statement. First, the administration would seek to minimize the number of cases where funds would be terminated and instead would emphasize gaining voluntary compliance from violators. Only when voluntary compliance was impossible would the Justice Department initiate lawsuits to enforce Title VI. The second change was eliminating the timeline previously established by HEW for the desegregation of southern schools, previously set as the beginning of the 1969–1970 school year (Halpern 1995).

Changes in Federal Agencies: Office for Civil Rights and the Justice Department

The new political climate under the Nixon administration led the Office for Civil Rights (OCR)—established in 1967 within HEW to oversee Title VI enforcement—and the Justice Department to adapt their mission. The shift in tone from the Johnson administration to the Nixon administration caused OCR to reconsider what could be done in the new political climate (Halpern 1995). OCR began to expand its work on discrimination by including a diversity of social change issues, but it was notably not pursuing school desegregation. The key task that had consumed OCR at its conception under the Johnson administration was being pushed aside as the political climate changed under Nixon. Likewise the Justice Department also shifted its work, deemphasizing segregation. Although *de jure* segregation in the South was a focus, urban segregation elsewhere received almost no attention from the Justice Department.

The strategy that HEW developed under the Nixon administration for investigating racial disparities rested on comparisons between schools under a framework of equal opportu-

nity (rather than integration). Reviews of urban districts would include detailed attention to equal expenditures, courses, programs, and activities offered, and equality of health and food services (Orfield 1978). The assumption underlying HEW's approach during this period was that if equal resources were directed toward white students and minority students, the move would yield equal educational outcomes (see also Nixon 1970). Avoiding some of the most complex legal and political questions of *de facto* segregation, which was in line with Nixon's strategy announced in his March 1970 speech, was one of the ways the agency responded to the polarizing politics of busing often involved in urban segregation. The Justice Department was also coming down conservatively on evidence needed to prove unconstitutional segregation in urban areas (Orfield 1978, 2000). In some cases the Justice Department even acted against plaintiffs in desegregation cases. The attorney general, who is supposed to initiate litigation when Title VI is violated, gave low priority to desegregation and was against busing as a tool to achieve school desegregation. The effect was that both tools meant to enforce Title VI were absent or in weakened form under the Nixon administration (Orfield 1978).

Congress Prevents Greater Setbacks

Although executive enforcement was weakened, Congress continued, at the very least, to prevent additional rollback of federal support of desegregation while the courts also continued for a time to expand desegregation remedies. Southerners believed that congressional politics would change when other regions were forced to desegregate, and indeed antibusing fights previously headed by southern congressmen were now led by members from Michigan, Massachusetts, Colorado, and Delaware (Orfield 1978).⁵ Public opinion against busing was strong causing no real threat of political loss for non-southern members of Congress if they were against busing. Despite a breakdown in the civil rights consensus in Congress, and the

5. In each state there was a pending desegregation case that would involve widespread busing.

added challenge of the executive branch now hostile to civil rights, they were not enough to lead to major backsliding on civil rights legislation in Congress during the Nixon years. Ironically, although Congress had prevented virtually all civil rights legislation from passing for more than seventy-five years, the legislative tools used to thwart such legislation were now used to impede efforts to weaken or repeal civil rights legislation (Orfield 1978).

From 1970 through 1972, a number of anti-busing amendments and a constitutional amendment were introduced in Congress. During the 1970 renewal of ESEA, the Stennis amendment sought to require a common policy to address northern and southern segregation and an end to the legal distinction between de facto segregation and de jure segregation (Orfield 1975). Because de facto segregation had no legal remedy at that time, a common policy would mean that enforcement action would be prevented in the South. The White House tacitly supported this amendment, but it was ultimately altered in congressional conference to leave Title VI obligations intact. Congress directed HEW to separately develop national policies for both de facto and de jure segregation though congressional debate made clear the lack of consensus for enforcing action to remedy de facto segregation outside the South.

Ultimately, despite Nixon administration efforts to use the legislative process to impede desegregation, Congress extended and expanded ESEA as well as funding and strengthening the Emergency School Aid Act. ESEA was finally renewed in 1974 with a variety of somewhat contradictory amendments pertaining to desegregation. The most significant was that federal courts or agencies could not require districts to implement a desegregation plan that bused students beyond the nearest school. Although it had little direct effect on courts, this provision had the potential to restrict HEW's ability to enforce the Civil Rights Act, particularly because it sought to comply with the *Adams v. Richardson* litigation (480 F.2d 1159).

The Courts Lead on Desegregation, for a While

The time of receding executive enforcement of desegregation coincided, for a time, with increasing judicial expectations of what was required for school districts to remedy segregation and become a unitary, desegregated district. Ultimately, the courts' influence as a champion of desegregation began to wane as Nixon appointed four conservative justices, which changed the Court's desegregation jurisprudence through a series of 5–4 decisions. Nevertheless, drawing in part on HEW guidelines, the Court repeatedly stifled the Nixon administration's attempts to slow desegregation.

Early on, the Supreme Court furthered school desegregation and disappointed the Nixon administration's hopes that desegregation efforts would be constrained. The Fifth Circuit's *U.S. v. Hinds County School Board* decision (417 F.2d 852, 5th Cir.) in July 1969 required that an ineffective freedom of choice plan in a Mississippi district be replaced by the start of the school year. In August, however, HEW asked for a several-month delay in submitting proposed plans and indefinite delay in implementation (Doherty 1970).⁶ In its October *Alexander v. Holmes County School Board of Education* decision (396 U.S. 19), the Supreme Court declared desegregation delays ended and required immediate compliance. Two years later, the Court weighed in again, this time invalidating neighborhood assignment policies if they were not effective in desegregating schools, which was often the case due to segregated residential patterns. The Court endorsed a range of tools, including noncontiguous pairing of zones to help produce school diversity (*Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1). The Court's unanimous decision upholding widespread busing went against the Nixon administration's brief arguing for a slower approach to desegregation.

The Court's jurisprudence outside the South was more mixed. In its 1973 *Keyes v. School District No. 1, Denver, Colorado* decision (413 U.S. 189), a fractured court found Denver

6. HEW asking for a delay in desegregation process was a break from prior actions.

guilty of intentionally segregating students and required that Latinos also be desegregated. One of the missed opportunities was getting five justices to join an opinion holding no legal difference between de jure and de facto segregation, which would have had major implications for nonsouthern districts (Ryan 2010). Some justices agreed that the distinction should be abandoned but disagreed about bus-ing, which prevented a compromise majority opinion that would have eliminated the distinction (Jefferies 1994).

In 1973, the *Adams* case challenged the Nixon administration's lack of Title VI enforcement, seeking to limit the discretionary power that an administrative agency has to choose how and when to enforce the sanctions of a law. The Court found the Nixon OCR had not effectively been enforcing Title VI and later, in *Brown v. Weinberger* (417 F. Supp. 1215), that HEW had not applied Title VI outside the South. These decisions required a tighter timeline for investigating Title VI violations and other requirements to monitor desegregation compliance, but little evidence suggests that funds were actually cut off to noncompliant districts (Halpern 1995). Although the *Adams* ruling limited OCR's discretion on how to allocate resources toward investigation of complaints, it could not resolve the discretionary nature of Title VI. The mechanism that gave the provision the most power—fund termination—still depended on a president's approval, which carried substantial political risk, particularly outside the South.

The judicial branch's ability to further desegregation began to diminish with the 1974 *Milliken v. Bradley* decision (418 U.S. 717), which overturned a metropolitan desegregation plan that would have involved the city of Detroit and dozens of surrounding suburban districts. Such a decision limited the effectiveness of efforts in many areas, outside the South in particular, where boundary lines often separated students into smaller, homogenous districts. The *Milliken* decision was the first since *Brown* that limited desegregation efforts and it began a trend of others that lessened what was required of districts to eradicate segregation. This decision, with Nixon's appointees making up the majority, combined with the nonen-

forcement of Title VI effectively ended the active federal role in desegregation.

DISCUSSION

This examination of desegregation during the decade immediately after the Civil Rights Act of 1964 and ESEA were passed illustrates how legislation and executive action furthered desegregation after a decade following the *Brown* decision in which little desegregation progress occurred. The Johnson and Nixon administrations provide useful contrasts in understanding how the federal role can help further desegregation and what the limits of such approaches are.

Under both administrations, school desegregation expanded, albeit for different reasons. While Johnson was in office, the threat of fund cut-off and increasingly stronger HEW guidelines alongside the dramatically larger amount of federal education funding combined to change southern officials' resistance to desegregation to ensuring at least minimal compliance. During the Johnson administration, dozens of districts had their funds cut off, and more than a hundred districts were in earlier stages of the enforcement proceedings. As a result, the actual percentage of students in diverse schools in the South expanded in the 1960s (Cascio et al. 2010; Giles 1975; Orfield 1978). Courts were involved during the 1960s, but did not play as large a role as enforcement before 1970 (Giles 1975). However, as the threat of executive enforcement lessened during the Nixon administration, the courts had become increasingly unwilling to tolerate delays, particularly when they were being used by recalcitrant districts as a way to avoid more expansive desegregation requirements.

ESEA and the Civil Rights Act also indirectly affected court rulings. Because the HEW guidelines were the minimum required as part of a court desegregation order, they helped make judicial requirements more uniform across districts. Particularly during the later 1960s, HEW guidelines outpaced the courts' requirements; subsequent court decisions adopted the guidelines. Thus, though the consensus is the courts had a larger desegregation burden after 1970 (Cascio et al. 2010; Giles 1975), we might attribute some of the substance of judi-

cial holdings to the expertise HEW developed during the 1960s monitoring compliance for ESEA and the Civil Rights Act. Further, the laws gave support to lower court decisions after *Brown* that struggled to implement desegregation in the face of local resistance. These laws passed by the nation's popularly elected representatives, along with HEW guidelines, gave the federal courts as an unelected branch cover to issue decisions expanding what desegregation actions were required of districts.

This progress was limited, however, because of staffing and expertise during the Johnson administration, and of popular and political support during the Nixon years. Although filled with staff committed to integration, Johnson's HEW was vastly understaffed. Its ability to monitor compliance in thousands of districts, many of which were seeking to do the least possible desegregation, was limited. HEW, like the courts in the preceding decade, was confronting how to conceptualize what desegregation required across districts that were vastly different. Ambiguity remained as to whether Title VI could require more of districts than the Constitution did. One important question was whether to examine only intent (for example, de jure policies) or racial impact as well; differing opinions led to accepting ineffective freedom of choice or neighborhood school policies for a while. The question of intent versus effect also had implications outside the South, where racial imbalance was the result of de facto patterns. Given a greater burden under the Nixon administration on private lawyers, desegregation suffered without the resources and coordination of the federal government behind it. Even in the South, technical and legal questions remained as to what should be done in urban areas to desegregate after freedom of choice plans were invalidated. By the time the Court legitimated cross-town busing to fully desegregate schools, federal officials were restricted from suggesting it as an option to districts.

Further, an obvious limit to the success of desegregation efforts is the sustainability of enforcement efforts. Although enforcement may have been less than complete during the Johnson administration, it had largely desegregated the rural South, and the Supreme

Court preserved and extended these changes. The Nixon administration's Title VI enforcement strategy was a radical departure from the Johnson era. The Nixon administration's policies constrained OCR's investigations of school districts not in compliance with HEW guidelines and did not require HEW to terminate funds when school districts were found to be noncompliant. Despite the burden on the courts to enforce Title VI during the Nixon administration, administration policy limited the Justice Department's efforts to advance school desegregation through the courts, particularly when it came to de facto segregation outside the South.

IMPLICATIONS: THE ROLE OF FEDERAL LEGISLATION

What can we learn from this examination about how legislation can work with the courts to help desegregation? The courts are rightly recognized as the governmental branch most able to protect the rights of minority groups because it is an unelected, nonmajoritarian branch. Indeed, the *Brown* decision provided the legal framework for asserting that state action segregating students was unconstitutional. Yet, in part because the way in which *Brown I* and *II* were decided, progress in desegregation was scant for the next decade (Orfield 1969; *U.S. v. Jefferson Co. Bd. of Ed.*). Indeed, this decade illustrated the limits of the federal role (which was largely the federal courts) in affecting local practice as, for example, officials in the Justice Department were committed to desegregation but lacked the legal authority to intervene in any substantial way. Given current jurisprudence, the federal courts may not be the best arena for furthering racial integration.

Today, students of color are almost a majority in the nation's schools, and students attend schools stratified by race and poverty (for example, Orfield and Frankenberg 2014). What are the implications of these patterns of school segregation for our understanding of the federal role in both contributing to and remedying these trends? First, to the extent possible, civil rights legislation must be crafted to minimize variation in interpretation and implementation. The final text of the Civil Rights Act was altered in subtle ways to gain passage that

likely limited its impact. In particular, clarifying that Title IV authority did extend to racial imbalance and removing the phrase “other means authorized by law” from Title VI, which allowed the executive branch to avoid implementing fund deferral and termination, could have meant the laws had longer, more far-reaching effect. Second, the federal government has an important role not only in enacting policies to promote integration, but also in effectively enforcing them. As seen, the enforcement of the Civil Rights Act and ESEA were limited: staff capacity, incomplete evidence, and lack of expertise as desegregation cases grew more complex. Under the Nixon administration, the unwillingness to terminate funds greatly reduced the effectiveness of enforcement, putting the onus back on the judicial system. Thus, future efforts—especially if not embraced by local districts—require sufficient federal capacity and expertise as well as sustained political will to enforce legislation. Third, if the judicial system, particularly the Supreme Court, had clarified earlier ambiguous aspects of law pertaining to desegregation while an administration committed to enforcement efforts was still in office, it might have changed the scope of HEW enforcement efforts. A federal agenda would be boosted if courts found *de facto* segregation to be a compelling interest to justify integration policies (as four justices did in the 2007 *Parents Involved* decision).

Conditions Necessary for Legislation to Further Desegregation

A larger question remains as to whether some of the problems identified in the implementation of legislation mean that popularly elected branches will be fundamentally limited in their approach to desegregation. We conclude that such flaws are not inherent to federal legislation and efforts to change local practice around student assignment, though we do think it is likely to be challenging. First, the policy window for reforms is typically narrow; in this case, it took the televised assault on nonviolent protestors in Birmingham to galvanize public support in favor of unprecedented federal intervention. Even then, the bill had to overcome a lengthy filibuster before becoming

law. Thus, despite widespread public support, resistance was strong enough that it was hard to marshal a majority in Congress to gain approval. ESEA had a considerably easier time gaining passage the following year, given that it was providing needed financial resources (for example, being the carrot and not the stick of enforcement).

A year later, however, the policy window had already begun to close, and efforts such as Edward Kennedy’s attempt to amend Title IV of the Civil Rights Act to encompass racial imbalance failed. Later, public opinion had shifted such that cutting off funds to districts was seen as unreasonable, lessening the use of threats that were effective in Johnson’s HEW. This illustrates a disadvantage of seeking to enforce minority rights through popularly elected branches of government. Today, many Americans, particularly whites, profess a colorblind ideology in which they believe that racial discrimination no longer exists and therefore race-conscious policies are not needed to address existing racial inequalities, favoring instead policies that treat everyone equally (see, for example, Bonilla-Silva 2010; Frankenberg et al. 2015). Such beliefs make it difficult, unlike in the 1960s, to justify support for federal intervention to redress persisting (and rising) inequality.

We also saw the technical challenges of lacking expertise to implement the laws. HEW repeatedly revised its guidelines as southern districts found new ways to resist desegregation. Though judges deferred to HEW’s expertise, analysts questioned what experience HEW had in enforcing desegregation guidelines on such a wide scale. Given extremely limited staff capacities, the Office of Education focused on the worst districts or those that refused to submit a plan (Orfield 1969). Even if the plan was ineffective, districts were likely judged to be in compliance (USCCR 1966). Of course, judges were no more likely to have expertise than federal officials in judging the merits of desegregation plans. A benefit of HEW enforcement is that although enforcement proceedings could be drawn out, given that threats of cut-off were often enough to motivate action, they were quicker than many legal cases that extended years before plans were implemented. Thus,

the Civil Rights Act and ESEA, along with executive enforcement, came at a critical time to step into the void caused by the slow, piecemeal judicial process after *Brown*. They, in turn, promoted more far-reaching actions by the judiciary in subsequent years.

Finally, an important lesson is that it is unlikely that either piece of legislation would have had a remotely similar impact alone—it was through their combined effects that segregation was overcome in the South. This suggests future efforts to affect desegregation must be cognizant of ensuring that legislation is complementary and comprehensive to change local practice. Moreover, the story of federal desegregation efforts in the two decades after *Brown* illustrates the strengths and weaknesses of each branch in terms of responsiveness to certain kinds of arguments, decision-making process and criteria, and public-interest group influence, particularly in regard to protecting the rights of a minority group.

Moving Forward: Addressing De Facto Segregation

Many current-day challenges preventing further school integration have their origins in the pushback to Civil Rights Act and ESEA enforcement. The federal government has done little to further desegregation in the last four decades. In the 1960s, all branches of the federal government struggled with questions of how to treat de facto segregation outside the South. These questions splintered the congressional civil rights consensus, and HEW was unclear about technical and political aspects of proving de facto violations. The Supreme Court's first desegregation decision outside the South came in 1973, after the civil rights era had ended. Even then, the Court failed to clarify that both de jure and de facto segregation required districts to remedy such segregation (Ryan 2010). The consensus that the federal government should intervene to address de jure segregation led to the South being the most integrated region for black and white students by 1970, which remains true today (Orfield and Frankenberg 2014). Meanwhile, the legacy of the ambiguity about addressing de facto segregation through enforcement or judicial remedy means that de facto segregation

remains high. The North is the most segregated region for black students, and the only region where segregation has risen since the late 1960s (Orfield and Frankenberg 2014). Many areas also have high levels of segregation between districts instead of within districts—another dimension of de facto segregation.

Moreover, as the civil rights consensus dissolved in the late 1960s, although congressional allies staved off possible setbacks to civil rights enforcement during the Nixon administration through tactical moves, less focus was on challenging the narrative questioning the need for desegregation. The shift in enforcement under Nixon to focusing on equalizing resources rather than integrating black and white schools—a shift subsequently adopted by the courts—changed the framing about educational equality. Today, local politics reflect this framing and, at a time of economic stress with little overt federal support for integration, many districts are cutting transportation for students that is needed to ameliorate the effects of persisting residential segregation. *Brown* remains a cherished legal decision, but the federal effort to enforce the right it enshrined has been whittled away and whether the rights remain in practice is questionable for many students.

Our analysis suggests several avenues for the federal government to further desegregation. First, it could provide rhetorical framing of—public support for—the need for policies to address racial segregation in an ostensibly post-racial society. This has been done occasionally during the Obama administration, most prominently in the form of guidance about how districts could voluntarily pursue integration. The minimal funding to provide districts the opportunity to retain social science or legal expertise in designing new assignment plans came before this guidance and thus many districts adopted policies that may result in less integration (Frankenberg et al., 2015). Yet, as discussed, such messages from the federal government could give localities political cover to implement more far-reaching policies. Our second recommendation stems from the lack of coordination: one reason these two laws were so effective was that they worked in tandem and with other branches. Federal policy should be

aligned such that it does not create incentives working against school integration (for a discussion of federal policy conflicting with integration, see National Coalition for School Diversity 2014). Third, though enforcement efforts were limited in various ways during the first decade after the Civil Rights Act was passed—and despite a subsequent Supreme Court decision that has further limited the right of individuals to sue under Title VI—filing Title VI complaints with the federal government may still be a useful tool, particularly as the Obama administration recently outlined an expansive interpretation of complaints they would consider (see U.S. Department of Education 2014). Finally, a longer-term effort to clarify our understanding of discrimination to include de facto segregation could address Title VI's ambiguity and reinvigorate federal efforts to expand access to high-quality integrated schools.

Legislative and enforcement efforts played an under-recognized role in furthering desegregation across the South, but became more limited in their direct effect as the public perceived a lessened need for such efforts where segregation was de facto. Nevertheless, these efforts had a long-lasting impact and an indirect judicial impact in subsequent years. Together, they provide useful lessons for our contemporary understanding of how the federal government could continue to help increase the diversity of public schools.

REFERENCES

- Abernathy, Charles F. 1981. "Title VI and the Constitution: A Regulatory Model for Defining 'Discrimination.'" *Georgetown Law Journal* 70(1): 1–49.
- Bass, Jack. 1990. *Unlikely Heroes*. Tuscaloosa: University of Alabama Press.
- Bolner, James, and Robert A. Shanley. 1974. *Busing: The Political and Judicial Process*. New York: Praeger Publishers.
- Bonilla-Silva, Eduardo. 2010. *Racism without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America*, 3rd ed. Lanham, Md.: Rowman & Littlefield.
- Cascio, Elizabeth, Nora Gordon, Ethan Lewis, and Sarah Reber. 2010. "Paying for Progress: Conditional Grants and the Desegregation of Southern Schools." *Quarterly Journal of Economics* 125(1): 445–82.
- Doherty, Patric J. 1970. "Integration Now: A Study of *Alexander v. Holmes County Board of Education*." *Notre Dame Law Review* 45(3): 489–514.
- Frankenberg, Erica, Kathryn McDermott, Elizabeth DeBray, and Annie Blankenship. 2015. "The New Politics of Diversity: Lessons from a Federal Technical Assistance Grant." *American Educational Research Journal* 52(3): 440–74.
- Giles, Michael W. 1975. "H.E.W. Versus the Federal Courts: A Comparison of School Desegregation Enforcement." *American Politics Research* 3(1): 81–90.
- Halpern, Stephen C. 1995. *On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act*. Baltimore, Md.: Johns Hopkins University Press.
- House of Representatives Subcommittee No. 5 of the Committee on the Judiciary. 1963. "Civil Rights" 88th Congress, 1st session committee print. Washington: U.S. Government Printing Office. Available at ProQuest Congressional (accessed March 24, 2015).
- Jeffries, John C. 1994. *Justice Lewis F. Powell, Jr.* New York: C. Scribner's Sons.
- Kennedy, Edward M. 1996. "The Case for New Desegregation Legislation." *Equity and Excellence in Education* 4(3): 41–44.
- Kennedy, John F. 1963. "Radio and Television Report to the American People on Civil Rights," June 11, 1963. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. Available at: <http://www.presidency.ucsb.edu/ws/?pid=9271> (accessed July 17, 2015).
- Klarman, Michael. 2005. *Brown v. Board of Education and the Civil Rights Movement*. New York: Oxford University Press.
- McGuinn, Patrick, and Frederick Hess. 2005. *Freedom from Ignorance? The Great Society and the Evolution of the Elementary and Secondary Education Act of 1965*. Amherst: University of Massachusetts Press.
- Marshall, Burke. 1962. *Federalism and Civil Rights*. New York: Columbia University Press.
- Meranto, Philip J. 1967. *The Politics of Federal Aid to Education in 1965*. Syracuse, N.Y.: Syracuse University Press.
- Miller, Mark C., and Jeb Barnes. 2004. *Making Policy, Making Law: An Interbranch Perspective*. Washington, D.C.: Georgetown University Press.
- National Coalition for School Diversity. 2014. "Fed-

- eral Support for School Integration: A Status Report." Washington, D.C. Available at: <http://www.school-diversity.org/pdf/DiversityIssueBriefNo4.pdf> (accessed October 21, 2015).
- Nixon, Richard. 1970. "Statement About Desegregation of Elementary and Secondary Schools," March 24, 1970. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. Available at: <http://www.presidency.ucsb.edu/ws/?pid=2923> (accessed July 17, 2015).
- Orfield, Gary. 1969. *The Reconstruction of Southern Education: The Schools and the 1964 Civil Rights Act*. New York: Wiley-Interscience.
- . 1975. *Congressional Power: Congress and Social Change*. New York: Harcourt Brace Jovanovich.
- . 1978. *Must We Bus? Segregation and National Policy*. Washington, D.C.: Brookings Institution Press.
- . 2000. "The 1964 Civil Rights Act and American Education." In *Legacies of the 1964 Civil Rights Act*, edited by Bernard Grofman. Charlottesville: University of Virginia Press.
- . 2015. "Lyndon Johnson and American Education." In *LBJ's Neglected Legacy: Reshaping the Federal Government*, edited by Robert H. Wilson, Norman J. Glickman, and Laurence E. Lynn Jr. Austin: University of Texas Press.
- Orfield, Gary, and Erica Frankenberg. 2014. *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*. Los Angeles, Calif.: Civil Rights Project/Proyecto Derechos Civiles.
- Reed, Douglas S. 2014. *Building the Federal Schoolhouse: Localism and the American Education State*. New York: Oxford University Press.
- Ryan, James E. 2010. *Five Miles Away, a World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America*. New York: Oxford University Press.
- U.S. Commission on Civil Rights (USCCR). 1966. "Survey of School Desegregation in the Southern and Border States 1965–66." Washington: Government Printing Office.
- U.S. Department of Education. 2014. "Office for Civil Rights Resource Comparability Materials." Available at: <http://www2.ed.gov/about/offices/list/ocr/resourcecomparability.html> (accessed August 15, 2015).
- U.S. Department of Health, Education, and Welfare (HEW). Office of Education. 1966. "Status of Compliance Public School Districts Seventeen Southern and Border States: Report No. 1." Washington: Government Printing Office.
- . 1967a. "Status of Compliance Public School Districts Seventeen Southern and Border States: Report No. 4." Washington: Government Printing Office.
- . 1967b. "Status of Compliance Public School Districts Seventeen Southern and Border States: Report No. 7." Washington: Government Printing Office.