

# Beyond Equity: The Counterfactual Administrative State

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## INTRODUCTION

What kind of administrative state would we have, if the United States had been a true democracy earlier?

In this short essay, I begin to address that question. I argue that in light of the foregone democratic possibilities, the goal of equity asks too little of the administrative state.<sup>1</sup> A broader vision directs us beyond equity, toward institutional reimagination and transformation.

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1. A recent executive order defines equity as “the consistent and systematic treatment of all individuals in a fair, just, and impartial manner.” Exec. Order No. 14,091, 88 F.R. 10825 (Feb. 16, 2023).

The United States did not meet even minimal standards for egalitarian democracy until the late twentieth century, with the passage of the Voting Rights Act.<sup>2</sup> Until then, essentially all governing institutions were designed and implemented without the legitimate assent of the governed, due to the exclusion of women and racial minorities. That includes the Constitution and its amendments, particularly those that set forth the structure of the U.S. government, as well as many of the “super-statutes” that have indelibly shaped the American past and present. Among the critical statutes are those that created major arms of the federal government, including Cabinet departments, boards, bureaus, and commissions. Until at least the 1960s, none of those laws and institutions emerged under actual democratic conditions.

Even the most formal theories of American law call for those suffering illegal harms to be returned to the position they would have enjoyed, had the illegality never occurred.<sup>3</sup> It is impossible to reverse engineer the world as it would have been had the United States been a full-fledged egalitarian during the twentieth century, much less throughout earlier centuries. We cannot know, much less create, the precise governing institutions or programs that would have been designed under democratic conditions. Nonetheless, our inability to achieve perfect remediation (or even fully envision it), does not diminish the need to address the democratic illegitimacy of the current structures—and to consider how the foregone alternatives might have reshaped our polity.

Given the unknowable nature of that alternative, democratic world, how can we address the ongoing harm from living within structures that were undemocratically imposed? Such institutions resist popular change by design, so it is insufficient to call for any disgruntled groups to simply organize to overhaul them in the present.<sup>4</sup> Further, those governing institutions have shaped the political power and material status of minority groups in the present, directly impeding their members’ ability to effect change. Stuck as we are within the world of nonideal alternatives, we can still engage in the (necessarily imperfect) thought

2. Until women were enfranchised in 1920, a majority of the population could not vote. See U.S. CONST. amend. XIX. Until people of color were effectively enfranchised in the South by the Voting Rights Act, major portions of the country were not democratic in fact. See Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437; STEVEN F. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941*, at 108–09, 118 (4th ed. 2015).

3. See, e.g., JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 344–45 (2010) (describing the notion of “make whole compensation” as requiring “that the plaintiff’s compensatory damages should in principle be enough to return the plaintiff to the *status quo ante*—the condition she was in prior to the happening of the tort.”).

4. Democratic reforms to governing institutions face major obstacles, including the difficulty of amending structures created by Constitutional text, the minoritarian obstacles to achieving Congressional action to overhaul statutes, and the administrative state’s resistance even in the face of constitutional or statutory change. See, e.g., U.S. CONST. art. V (setting forth rules for constitutional amendment); *STANDING RULES OF THE SENATE*, R. XXII, S. Doc. No. 110-9, at 16 (setting forth rules for cloture); Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 625-29 (2013) (describing some of the sources of bureaucratic resistance to legal change). Even supermajorities have difficulty in achieving reform in the face of such obstacles.

experiment of considering what specific structures *might* have emerged under democracy. While this counterfactual exercise is speculative, it is a useful exercise of imagination nonetheless.

Imagining the counterfactual administrative structures and programs that democratic governance might have achieved serves multiple goals. Doing so casts our existing institutions in a different light—highlighting their contingency and the coerciveness of their imposition, thus prompting us to ask whether we need different ones. Further, imagining the democratic counterfactual helps to concretize the true scope of the harms that political exclusion imposed on communities of color and the nation. Such reflection may suggest aspirational lines of repair and transformation for the future.

Below, I suggest that the administrative state likely would have been more powerful, more centralized, and more generous in its redistributive aims, had the United States been an actual democracy earlier. People of color were both politically excluded and among those most likely to benefit from such administrative structures and programs. I illustrate this point with the case of federal aid to education. Beginning in the Reconstruction era, federal efforts to enact national aid to schools to help equalize schooling for all children failed for nearly a century; those failures rested, in part, on Black disenfranchisement in the South.

Thus, in the case of education, rather than simply aiming to make existing institutions more equitable, we should ask what a century, or even several more decades, of egalitarian school investment might have meant for poor Black and white children, for the administrative state, and for our politics. Such investments might have been transformative at all those levels.

One caution: my counterfactual is not meant to perfectly map what *actually* might have unfolded, much less prove but-for causation and resulting harms. Accurately performing either inquiry seems impossible. Rather, this counterfactual is meant to invigorate and deepen our collective sense of democratic loss, and by the same implication, our sense of democratic potential. We have so recently and imperfectly experienced democracy, that we cannot gauge its true potential as of yet.

### I. THE HARMS OF JIM CROW

Among the many harms to people of color during U.S. history were *democratic harms*. African Americans and other racial minorities were systematically excluded from political participation, before and after the enactment of the Fifteenth Amendment. As a result, they did not have a voice in designing and ratifying basic governance institutions, both those set up in the original Constitution and any revised in pre-1965 amendments, and those created by Congress through statute during those centuries.

In an important 2008 article, Jack Chin and Randy Wagner made a fundamental point regarding the Reconstruction era, emphasizing that Black Americans

were not “discrete and insular minorities” at all in many states.<sup>5</sup> Rather, they formed the majority in three Southern states in 1880, and a substantial plurality in four others.<sup>6</sup> Given African Americans’ majority or near-majority status in those states, Chin and Wagner argued: “The major unrecognized harm that African Americans suffered was the loss of their legitimate domination of the electoral system.”<sup>7</sup>

In a democratic system, Chin and Wagner argued, “the African American majority would have shaped educational policy, economic and criminal justice policy, and other aspects of state government in the South.”<sup>8</sup> In the Reconstruction era, state governments that included African American leaders “implemented policies designed to lead to economic and social advancement: education and protection against discrimination from private actors.”<sup>9</sup> Had Black voters retained their legitimate democratic role, such policies might have persisted and improved Black and other poor people’s wellbeing in significant ways stretching into the present. Chin and Wagner further argued that federal policy could have shifted as well.<sup>10</sup>

Among such legacies of democratic exclusion, the administrative state figures significantly. Whether one traces the modern administrative state to the New Deal or earlier, Black and other Americans of color were denied their rightful voice in shaping key federal institutions and policies.<sup>11</sup> At each stage of the state’s development through at least the 1960s, national officials from both major parties would have faced significant pressure to choose other paths, had democracy functioned as it should have.

In past work, I have noted how various institutions in the administrative state were designed to coexist with and maintain white supremacy.<sup>12</sup> Administrative design, wielded in that way, entrenched Jim Crow by ensuring that federal agencies would not pursue racial egalitarianism in any way that fundamentally threatened the status quo. Withholding and carefully constraining statutory powers, ensuring accountability to Congressional Democrats (particularly long-serving Southern Democrats in key positions of power), obscuring accountability to presidents who might pursue racial reform, tailoring agencies’ services and thus their constituencies to stakeholders in the existing system—all such methods helped to preserve white supremacy.<sup>13</sup>

5. Gabriel J Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C. R.-C.L. L. REV. 65, 66 (2008).

6. *Id.* at 66, 81.

7. *Id.* at 66.

8. *Id.*

9. *Id.* at 67; *see also id.* at 100–105.

10. *Id.* at 105–107.

11. *See* DESMOND KING, *SEPARATE AND UNEQUAL: AFRICAN AMERICANS AND THE US FEDERAL GOVERNMENT* (Revised ed. 2007); HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE* (2008).

12. *See generally* Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924 (2020); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847 (2018).

13. Milligan, Plessy, *supra* note 12, at 939–47; Milligan, *Subsidizing*, *supra* note 12, at 859–72.

The opposite could have occurred. Instead, political leaders might have designed institutions that would have furthered and entrenched economic equality and racial equality to a much greater extent. Under conditions of actual democracy, the public might have asked that and more of the federal government. That public would have included African Americans, with their significant political share in many Southern states, along with their role as potential swing voters.<sup>14</sup>

## II. BLACK AMERICANS AND SOCIAL POLICY

Arguably, the American administrative state would be more powerful and its social welfare programs more generous, had the United States been a true democracy during the first half of the twentieth century. Egalitarian democracy, inclusive of the poorest Americans, might have produced a social democracy that could assure a minimum foundation for citizenship.

From the turn of the twentieth century onward, reform movements sought and obtained new national policies meant to protect the poor, working, and middle class. Yet even so, American politics remained stacked against certain egalitarian reforms.

People of color were disproportionately poor and working class, and needed the redistributive social programs that were proposed and, in some cases, implemented during the twentieth century.<sup>15</sup> But they lacked adequate democratic voice in selecting Congress and the president, the institutions that enacted those programs. In fact, those who advocated racial inequality had a disproportionate voice in designing those programs, due to the power of the whites-only Democratic party in the South, its white primaries, and other means of disfranchisement sustained by law and extralegal violence.<sup>16</sup> Under those conditions, those who were disenfranchised were those with the most to gain from national institutions with the power to promote equality.

Early Black activists urged social investments to fight poverty, as well as an end to race discrimination. Throughout the twentieth century, civil rights organizations and Black leaders pushed for robust social welfare programs that would benefit all poor and working-class Americans. Dona Cooper Hamilton and Charles Hamilton detail that “dual agenda” in their book of the same name.<sup>17</sup> They write that civil rights organizations prioritized three aims in their social policy campaigns: (1) “preference for a universal social welfare system” rather than a two-track model split between social insurance and stigmatized, means-tested

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14. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, And States*, U.S. CENSUS BUREAU, Working Paper No. 56 (2002).

15. See, e.g., James P. Smith & Finis Welch, *Race and Poverty: A Forty-Year Record*, 77 AM. ECON. REV. 152, 152-53 & tbl. 1 (1987) (showing extremely high proportion of Black working men and women earning poverty-level wages in 1940).

16. See, e.g., SITKOFF, *supra* note 11 at 34-35, 57-58, 78-104 (2008).

17. DONA C. HAMILTON & CHARLES V. HAMILTON, *THE DUAL AGENDA: RACE AND SOCIAL WELFARE POLICIES OF CIVIL RIGHTS ORGANIZATIONS* (1997).

programs, (2) full employment as a core policy goal, and (3) “federal hegemony over social welfare programs” rather than state or local control.<sup>18</sup> Each was driven by leaders’ concern for Black interests and vulnerability to state- and local-level discriminatory administration. Nonetheless each also was intended to, and would have, benefited low-income families of all races.<sup>19</sup>

### III. THE CASE OF EDUCATION

Consider education, one example of an area in which the federal administrative state could have evolved quite differently under democratic conditions. Throughout American history, access to educational opportunity has been highly unequal, across race, region, and class. From Reconstruction through the 1960s, reformers waged major legislative battles to enact a program of federal funding, aimed at equalizing educational opportunity throughout the nation. Yet in each instance those failed. Had they passed, a stronger federal Department of Education and a more robust, egalitarian set of supports for the public schools throughout the nation could have developed much earlier.

Instead, major federal aid legislation did not emerge until 1965, with the Elementary and Secondary Education Act, and a Cabinet level Department of Education was not created until 1980.<sup>20</sup> Those victories came against the backdrop of long-term legislative failure. And we still lack a national commitment to achieving equal school funding and opportunity for all children.<sup>21</sup>

Multiple education reform drives took place between Reconstruction and the 1960s, when repeated iterations of federal aid bills came before Congress with substantial support but failed to pass. The South’s high poverty rates, low wealth, and inadequate educational outcomes figured in all of those debates. Black Americans were concentrated in those Southern states throughout that entire period.<sup>22</sup> Their schools, segregated and unequal, were most in need of federal funds, despite some attempts by Northern philanthropies to support Black schools in the South.<sup>23</sup>

18. *Id.* at 4.

19. *Id.* at 4–5.

20. Before 1980, the Office of Education was housed at various times within the Department of Health, Education, and Welfare (1953–1979), the Federal Security Agency (1939–1953), and the Department of Interior (1868–1939). See *Records of the Office of Education, 12.1 Administrative History*, NAT’L ARCHIVES, <https://www.archives.gov/research/guide-fed-records/groups/012.html>. [<https://perma.cc/VM86-5XNA>]

21. See Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1353–57 (2009); Kimberly Jenkins Robinson, *Introduction*, and *A Congressional Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 3–7, 186–202 (Kimberly Jenkins Robinson ed., 2019).

22. See Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, And States*, U.S. CENSUS BUREAU, Working Paper No. 56 tbl. A-17 (2002).

23. See BUREAU OF EDUC., DEP’T OF THE INTERIOR, *NEGRO EDUCATION: A STUDY OF THE PRIVATE AND HIGHER SCHOOLS FOR COLORED PEOPLE IN THE UNITED STATES* 9–12 (1917), <https://eric.ed.gov/?id=ED542635>.



From its origins in 1909, the NAACP included national aid to education among its priorities.<sup>24</sup> Its early leaders “believed the only way [Black Americans] would get a fair share of educational opportunities was with the support of federal money impartially distributed.”<sup>25</sup> The group also, of course, challenged the existing massive disparities in school spending between white students’ and Black students’ schools in the South.<sup>26</sup> That knowledge fueled the organization’s fight to ensure equal spending mandates, along with enforcement powers, in any federal aid to education legislation.<sup>27</sup>

### A. *The Blair Bills*

In the first major aid drive, during the 1880s, Senator Henry Blair (R-NH) sought to enact an education bill providing substantial federal funding for states, allocated according to illiteracy rates, a formula that would have heavily favored Southern states.<sup>28</sup> The bill passed the Senate three times, but never reached a vote in the House.

Educational spending was highly unequal at the time, from a low of \$0.87 per child in North Carolina to a high of \$18.47 in Massachusetts in 1881, with ten of sixteen Southern states spending less than \$2.00 per child annually.<sup>29</sup> In the South, school terms were often very short and teacher pay and training were minimal.<sup>30</sup> Illiteracy was very high in the South, among both whites and Blacks (37% overall, compared to a national rate of 17%).<sup>31</sup> For Black Americans in the South the rates stood at 75% in 1880—unsurprisingly given slaveholding states’ bans on literacy for enslaved people.<sup>32</sup>

Over the course of the 1880s, Blair’s bill was revised to give states greater control of the funds, while still including a prohibition on discrimination in allocating funds between Black and white schools.<sup>33</sup> Because the South stood to benefit so

24. See, e.g., Nat’l Ass’n for the Advancement of Colored People, Minutes of Executive Committee Meeting, Jan. 3, 1911, in Papers of the NAACP, Part 01: Meetings of the Board of Directors, Records of Annual Conferences, Major Speeches, and Special Reports, <https://congressional.proquest.com/histvault?q=001412-001-0043>; CHARLES FLINT KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, (vol. I 1909–1920), at 189 (1967).

25. KELLOGG, *supra* note 19, at 193.

26. *Id.* at 137; see also W.E.B. Du Bois, *Postscript*, THE CRISIS, Feb. 1930, at 65 (excoriating the disparities and calling for federal aid with nondiscrimination requirements); WALTER FRANCIS WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE 143 (1995) (writing that challenges to “the gross inequalities” in school spending by race existing in the 1930s represented “a continuation of the struggle we had begun in Atlanta two decades before—the first to be carried out in a determined and organized fashion. . .”).

27. Kellogg, *supra* note 19, at 137.

28. Daniel W. Crofts, *The Black Response to the Blair Education Bill*, 37 J. S. HIST. 41 (1971); Allen J. Going, *The South and the Blair Education Bill*, 44 MISS. VALLEY HIST. REV. 267 (1957).

29. Going, *supra* note 23, at 268–69.

30. See Crofts, *supra* note 23, at 47.

31. Going, *supra* note 23, at 270–71.

32. *Id.* at 271; on anti-literacy laws, see HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM (2007).

33. Crofts, *supra* note 23, at 43–44; Going, *supra* note 23, at 273–74.

greatly, and because Southerners appeared confident that they could avoid federal “control,” support was relatively strong among Southerners, including among many Democrats.<sup>34</sup> In fact, Southern supporters argued that the region’s educational needs were the responsibility of the entire nation, at least in providing schooling for emancipated African Americans.<sup>35</sup> At the same time, for Blacks in the South who had already seen Reconstruction’s demise, historian Daniel Crofts wrote, the Blair bill “was the one politically promising piece of national legislation which offered something [they] wanted.”<sup>36</sup>

Northern and border Democrats accounted for the majority of opposition.<sup>37</sup> In Congress, Democrats opposed to protectionist tariffs stymied the bill’s prospects; Speaker of the House John Carlisle (D-KY) and his allies refused to allow the Blair bills to come to a vote in the House each time it passed the Senate, apparently out of fear that increased federal spending might trigger tariff increases.<sup>38</sup> During the 1880s, support for the reform gradually fell, until the fourth iteration of Blair’s bill failed to pass even the Senate in 1890 and the drive ended. It appeared that whites in the South cooled to the idea of the bill in part because of its potential for lifting educational prospects for Blacks, as well as increased resistance to federal intervention.<sup>39</sup> Republican support for Black civil rights also fell, leading to the measure’s ultimate inability to pass even in the Senate in 1890.<sup>40</sup>

### *B. Smith-Towner and Successor Bills*

After the failure of the Blair bills, some supporters did not lose sight of the goal. W.E.B. DuBois advocated federal aid to Southern schools in his writing and to the Niagara Movement in the 1900s.<sup>41</sup> But another federal aid drive did not materialize in earnest until after World War I.<sup>42</sup>

The WWI draft had exposed functional illiteracy rates that were shockingly high: nearly 25% of all draftees could not read a newspaper or write a letter home.<sup>43</sup> Those rates were worse in the South. For example, a 49% functional

34. Going, *supra* note 23, at 276–81, 288, 290.

35. *Id.* at 269, 280.

36. Crofts, *supra* note 23, at 44–45.

37. *Id.* at 44; Going, *supra* note 23, at 288–89.

38. Crofts, *supra* note 23, 55 n.52; Going, *supra* note 23, at 282; Jeffery A. Jenkins & Justin Peck, *The Blair Education Bill: A Lost Opportunity in American Public Education*, 35 *STUD. AM. POL. DEV.* 146, 159 (2021).

39. Crofts, *supra* note 23, at 49; Jenkins & Peck, *supra* note 33, at 163–64.

40. Jenkins & Peck, *supra* note 33, at 164–65.

41. Crofts, *supra* note 23, 64.

42. A push for federal aid to vocational education culminated in the passage of the Smith-Hughes Act in 1917. See Paul H. Douglas, *The Development of a System of Federal Grants-in-Aid II*, 35 *POL. SCI. Q.* 522, 522 (1920).

43. That “functional illiteracy” standard applied during the wartime draft was stricter than that previously used by the census, which produced lower estimates of illiteracy. See Nat’l Educ. Ass’n, *The Prevalence of Illiteracy*, in *THE REFERENCE SHELF: THE TOWNER STERLING BILL* 28, 31–32 (Rev. ed. 1924); see also Frank Pierpont Graves, *The Controversial Subject of Federal Control in Education*,



illiteracy rate was found among South Carolina draftees in one set of exams, while a 40% illiteracy rate was found among African American draftees from Virginia in another set.<sup>44</sup> The Bureau of Education traced the illiteracy rates uncovered by the draft to a simple cause: “inequalities in educational opportunities” including “inequalities in taxable wealth from which school revenues were derived.”<sup>45</sup> One state spent \$12 per student, and other \$80. Some states required nine months of school; at least one required less than six.<sup>46</sup> State aid to localities had traditionally been based solely on population; only in the 1920s were states beginning to try to equalize by accounting for different localities’ differing abilities to raise sufficient revenue.<sup>47</sup>

State-level figures did not reflect the racial gaps in Southern states’ education spending, which were vast by that period. In 1917, a Department of Education report had found that Southern states spent on average 29 cents on education for each Black student for every \$1 spent on white students.<sup>48</sup> In South Carolina, the ratio was 14 cents for each \$1 spent for white students, and in Georgia it was 18 cents.<sup>49</sup>

After the war and throughout the 1920s, the National Education Association (NEA) repeatedly backed bills creating a Cabinet-level Department of Education and providing significant federal funding targeted at illiteracy, teacher training, physical education, and “Americanization” of immigrants.<sup>50</sup> Along with the NEA these bills had the support of the American Federation of Labor, the American Federation of Teachers, and women’s groups.<sup>51</sup> The NEA legislation was first introduced in 1918 by Senator Hoke Smith (D-GA) and Rep. Horace-Towner (R-IA); that original iteration was thus referred to as the Smith-Towner bill, with subsequent changes as the sponsors shifted.<sup>52</sup>

129 ANNALS AM. ACAD. POL. AND SOC. SCI 95, 95 (1927) (“In [1918], as a result of revelations from the draft, we found some most unhappy shortcomings in our educational system, which forced us to pause in our complacency and take thought.”).

44. Nat’l Educ. Ass’n, *supra* note 38, at 34.

45. BUREAU OF EDUC., DEPT. OF INTERIOR, A BIENNIAL SURVEY OF PUBLIC SCHOOL FINANCE IN THE UNITED STATES, 1920–1922, at 2 (1923).

46. *Id.*

47. *Id.* at 20.

48. See BUREAU OF EDUC., *supra* note 22, at 9–10; see also ROBERT A MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880–1950: AN ECONOMIC HISTORY 19 (1994) (explaining that the 1917 report relied on states’ spending on teachers’ salaries as “the most reliable and widely available figures” for comparing education funding on Black versus white schools).

49. BUREAU OF EDUC., *supra* note 22, at 185, 471.

50. Lynn Dumenil, “*The Insatiable Maw of Bureaucracy*”: Antistatism and Education Reform in the 1920s, 77 J. AM. HIST. 499 (1990). Among other requirements, the NEA proposal required a minimum school term of 24 weeks and English as the primary language of instruction, even in private schools. *Id.* at 500.

51. Douglas, *supra* note 37, at 538 n.4; Charles H. Judd, *Federal Department of Education*, 7 AMER. BAR ASS’N J. 63, 63 (1921).

52. Later iterations included the Towner-Sterling, the Sterling-Reed, and the Reed-Curtis bills. Graves, *supra* note 38, at 96. NAACP leader Walter White described original co-sponsor, Georgian Senator Hoke Smith thus: “that amazing contradiction of courageous and intelligent opposition to the

Not all of the supporters' motives were benign. Alongside the illiteracy exposed by the wartime draft, in that era of rising xenophobia, proponents of federal aid also argued in explicitly racialized terms about the political "menace" presented by Southern and Eastern European immigrants who were insufficiently "Americanized." Some supporters of the bill held their nose even as they recognized the ugly alliances with nativists and racists that lay behind the bill—the KKK was among the groups backing it,<sup>53</sup> along with fraternal orders like the Masons.<sup>54</sup>

In reaction to such prejudiced motives, Catholic leaders mounted a strong opposition to the bill, recognized its implied attack on parochial schools. Catholics argued against the bill primarily by attacking its centralization of power and possible unconstitutionality.<sup>55</sup> Other opponents included "states' rights politicians" and conservatives opposed to strengthening the federal bureaucracy. They argued that enacting national aid for schools would threaten federalism, bring about harmful standardization of education, and politicize school policy.<sup>56</sup> Some leaders in wealthier states resisted the call to subsidize poorer states.<sup>57</sup>

In a bid to consolidate support, federal aid's proponents sacrificed greater federal control for political backing. Like the Blair bill, an early version of Smith-Town included some measure of federal supervision (modeled on the new Federal Board for Vocational Education). But "the objections were so violent that the drafting commission reversed itself completely" and included "the most extreme formulas against federal control."<sup>58</sup> That shift elicited a scathing editorial from Florence Kelley, one of the NAACP's founders, in *The Crisis*. She wrote that the bill as written would "legalize discrimination" and do so "with a federal law and one hundred million federal dollars a year."<sup>59</sup> While "Federal aid is absolutely necessary" she stated, "this bill must be fundamentally rewritten, or it will do more harm than good."<sup>60</sup> Congress had to be pressed to alter the bill to safeguard Black education in the South, Kelley argued.

South's economic ills and at the same time advocacy of ruthless suppression of the Negro." See WALTER FRANCIS WHITE, *A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE* 6 (1995).

53. See David Chalmers, *The Ku Klux Klan In Politics in the 1920's*, 18 *MISS. Q.* 234, 242–43 (1965) (linking Klan's support for the bills with "the national phase of its campaign against parochial schools" and suggesting that "the Klan's enthusiastic advocacy probably hurt [the legislation's] chances of passage.").

54. Dumenil, *supra* note 43, at 499; see also ADAM LAATS, *THE OTHER SCHOOL REFORMERS: CONSERVATIVE ACTIVISM IN AMERICAN EDUCATION* 54–55 (2015) (emphasizing the KKK's focus on the bill's Americanization provisions, while describing the organization's push at the state and local level to fund white schools at the expense of Black ones).

55. John Whitney Evans, *Catholics and the Blair Education Bill*, 46 *CATH. HIST. REV.* 273, 297–98 (1960).

56. Dumenil, *supra* note 43, at 499; William D. Guthrie, *Federal Government and Education*, 7 *AMER. BAR ASS'N J.* 14, 14–15 (1921).

57. Graves, *supra* note 38, at 96 (describing richer states' experience with federal aid as "paying out five or six dollars for every one they received back").

58. Judd, *supra* note 44, at 63.

59. Florence Kelley, *The Sterling Discrimination Bill*, *THE CRISIS*, Oct. 1923, at 252.

60. *Id.* at 255.

In the end, no version of the bill was enacted. Thus in the 1920s, there remained only a small federal Office of Education, “innocent of all real powers.”<sup>61</sup> And the status quo of inequality persisted, with, in the Bureau of Education’s description, “[t]he majority of the States . . . financing their schools under the district system. The story of this system wherever found is the same: Inequalities in ability to produce school revenue, inequalities in effort and zeal, inequalities in educational opportunities.”<sup>62</sup>

### C. *The Harrison-Fletcher Bills*

In 1936, another drive for federal aid to education began, again backed by the NEA with sponsors Senator Byron Harrison (D-MS) and Representative Brooks Fletcher (D-OH).<sup>63</sup> The next year, Senator Hugo Black (D-AL), signed on as co-sponsor. At hearings the NAACP and other groups testified in favor of federal aid to education, but only if the legislation were revised to require equitable expenditures without racial discrimination.<sup>64</sup>

That year, a North Carolina senator reported that “the bill would pass if brought to a vote.”<sup>65</sup> However, the White House moved to head off that possibility; Roosevelt’s opposition to new federal spending on education doomed the bill’s various iterations between 1936 and 1940.<sup>66</sup>

Throughout this period and beyond, the NAACP had to grapple with complex legislative maneuvering. In some cases, opponents putatively backed equality mandates in the bills, but did so as a strategy to kill the legislation. In the 1940s, for example, *The Crisis* charged that a midwestern Republican, Senator William Langer (R-ND), had killed aid to education legislation by attaching an overly robust antidiscrimination amendment, which would have mandated equitable distribution not only of federal education funds, but also of state ones.<sup>67</sup> Supporters believed that even if Southern legislators might have accepted equalization of federal school spending, they would never vote for mandatory equalization of state spending.

While federal aid legislation continued to be proposed during the postwar period, no bill succeeded. Rep. Howard Smith (D-VA), powerful chair of the House Rules Committee, blocked federal aid to education through the early 1960s.<sup>68</sup> In April 1965, President Lyndon Johnson finally signed the first major federal aid to

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61. Graves, *supra* note 38, at 95.

62. BUREAU OF EDUC., *supra* note 40, at 29.

63. Martha H. Swain, *The Harrison Education Bills, 1936-1941*, 31 MISS. Q. 119, 120–22 (1977).

64. Charles Henry Thompson, *Editorial Comment: The Harrison-Black-Fletcher Bill Makes Its Debut*, 6 J. NEGRO EDUC. 129 (1937).

65. Swain, *supra* note 56, at 123.

66. *Id.* at 124–28.

67. *Politicians Win, Education Loses*, THE CRISIS, Nov. 1943, at 333–34. Supposedly, Southerners were ready to support the bill even with an antidiscrimination mandate attached to the federal funds. *Id.*

68. Stephen Gettinger, *Fulfilling the Great Society*, CQ MAGAZINE, June 16, 1995, at 1615 (“[In 1965] Chairman Howard W. Smith of Virginia was a still-powerful enemy not only of civil rights bills, but also of federal aid to education (inspiring the in-house slogan ‘no rules for schools’).”).

education bill in the one-room Texas schoolhouse that he once attended.<sup>69</sup> Johnson signed the Voting Rights Act four months later.<sup>70</sup>

#### IV. WOULD RACIAL DEMOCRACY HAVE BROUGHT DIFFERENT RESULTS?

Perhaps. During each of the pre-WWII reform drives described above, Black Americans' votes could have significantly shifted the political calculus within the South and the nation. Given the great need for school funds in the South and the robust backing for federal aid among Black organizations, one might predict that those voters would have demanded that their representatives back federal aid.

When the Blair education bills were proposed in the 1880s, disfranchisement was not yet complete in the South, but Black voters were subject to violence and elections were marred by fraud. In the 1880 presidential election, the Black vote was still somewhat close to the proportion of whites voting in most Southern states.<sup>71</sup> But Mississippi had suppressed the Black vote dramatically by then, and the disparity in Black-white vote was significant in Georgia and South Carolina.<sup>72</sup> Throughout that decade, Democratic fraud and violence helped maintain Democratic rule in most states, despite significant Black voting persisting.<sup>73</sup> During that period, the opposition parties in the South supported both the Black vote and public education.<sup>74</sup>

In 1890, when Republicans finally attained unified control of the national government, seemingly assuring passage of a bill the party's platform supported, the Blair bill went down to defeat even in the Senate. Northern Republicans could no longer sustain their role in a coalition supportive of Black education via school reform for the South.<sup>75</sup> As for Southern Democrats, at least one "no" vote (or abstention) came from deep South states with majorities or near majorities of African Americans: Alabama, Georgia, Louisiana, Mississippi, and South Carolina.<sup>76</sup> In a counterfactual universe with greater democratic guarantees, Southern legislators representing states made up of nearly 50% to 60% Black residents would have been unlikely to oppose a bill garnering near-universal Black support, had those residents been able to vote unimpeded and in proportionate numbers.

69. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27; Gettinger, at 1615.

70. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

71. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910*, at 14-15 tbl. 1.2 (1974); *see also Id.* at tbl. 1.4 (estimates for voting in gubernatorial elections in early 1880s).

72. Kousser calculated the portion of adult white males versus adult Black males not voting in those three states as follows: Mississippi, 33% versus 66%; Georgia, 44% versus 61%; and South Carolina, 4% versus 30%. *Id.* at 15 tbl. 1.2.

73. *Id.* at 26.

74. *Id.* at 25 (discussing Republicans' alliances with Independent movements in the South).

75. Jenkins & Peck, *supra* note 33, at 164-70.

76. *See* Jenkins & Peck, *supra* note 33, at 166 tbl. 10; Gibson & Jung, *supra* note 22, at tbl. A-17.

During the 1920s and 1930s, when the Smith-Towner and Harrison-Fletcher bills gained strong support, African American disfranchisement in the South was sweeping. Devices like literacy tests and poll taxes also blocked poor whites from the electorate, who would have benefited from federal aid for schools as well.<sup>77</sup>

Blocked from wielding Black Americans' rightful political power in the South, Black leaders and civil rights groups backing federal aid to education faced difficult dilemmas in those decades. As a preliminary, they had to determine whether to support such aid, even if it strengthened the overall system of segregation, since Southern Democrats' power meant that no legislation attacking school segregation directly would pass. Even accepting that compromise, they knew that to accept aid without equality mandates would simply widen the immense gap between Black and whites schools in the South. Thus they had to simultaneously advocate the aid but only on the condition that Southern states' distribution of the funds be monitored for fairness. That further narrowed their ability to form viable coalitions. Given the alliances of economic conservatives, Catholics, and opponents of federal power over schools that opposed the aid, African Americans could not thread the needle to secure enactment.

Of course, in the 1930s, it was Roosevelt's opposition to new spending that provided the immediate obstacle to seeing federal aid enacted. But Roosevelt likely would have seen matters differently, had he operated within a political system fully accountable to Black voters. The same can be said for all legislators, of both parties.

## V. THE WORLD AS-IT-IS

In the past, of course, educational spending was severely unequal between states and districts, and by race. Less has changed than one might think.

In the present, education spending varies massively by state.<sup>78</sup> In 2021, for example, Vermont spent more than twice as much money per pupil (\$23,586) than Idaho (\$9,053) and Mississippi (\$10,170).<sup>79</sup> Southern and Western states have consistently spent very low amounts per student.<sup>80</sup> Historically most states have failed to provide additional funding for high-poverty districts. In recent years, that has improved slightly, but two-thirds of states still provide the same, or less, funding for high-poverty districts—exactly the opposite of what they

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77. See Kousser, *supra* note 71, at 56-62 (discussing impact of literacy tests); *id.* at 70-72 (poll taxes).

78. See, e.g., U.S. CENSUS BUREAU, 2021 PUBLIC ELEMENTARY-SECONDARY EDUCATION FINANCE DATA tbl. 20 (2021), <https://www.census.gov/data/tables/2021/econ/school-finances/secondary-education-finance.html> [<https://perma.cc/U98X-5ZSC>]

79. *Id.*

80. E.g., EDUCATION LAW CENTER, *Making the Grade 2022: How Fair Is School Funding in Your State?* 9-10 fig. 1a, 1b (2022), <https://edlawcenter.org/research/making-the-grade-2022.html> (providing per-student spending levels by state (based on state and local funds), adjusted for differing labor market costs). [<https://perma.cc/8RAZ-72EM>]

should be doing to equalize educational opportunity.<sup>81</sup> Race also continues to predict school investment.<sup>82</sup>

Obviously it is hard to reconstruct the foregone human, material, and democratic costs of federal investment in and equalization of education over many decades. But such interventions might have had immense impacts on wealth, wellbeing, and democratic participation.

Economists studying the Jim Crow South, for example, have found very significant returns from equalizing schools in even such minimal ways as length of term and students per teacher, interventions that narrowed gaps in literacy rates and wage rates, both for that generation and later ones.<sup>83</sup> They also found that being impacted by educational integration itself in the 1960s had a subsequent positive impact on Black workers' wages. Every generation that benefited from higher, and more equal school investments could have passed increased human and financial capital to their children, in ways that would have compounded over time. Given how material inequality dictates much of our democratic voice, those types of gains could have significantly altered the course of our politics. Education also directly impacts political participation—in a counterfactual, democratic system, the efficacy of poor and working class people's votes would have been augmented by federal investments in education, raising turnout and increasing those voters' knowledge and sophistication.<sup>84</sup> Insofar as education impacts both wealth and political participation, equalizing education spending could have drastically improved minority and working class communities' ability to wield proportional political power over many decades.

Early passage of federal education reform would also have shifted the structure of the American administrative state. While local educational governance would likely have remained a key element in the overall design of U.S. schools, passage of the proposed reform legislation could have created a robust Department of

81. *Id.* at 16 fig. 2C (showing slight rise in number of states providing more aid to high poverty school districts, from 14 states in 2008 to 17 states in 2020). In 2020, 12 states provided equivalent funding to school districts regardless of poverty, and 19 states provided less funding to high-poverty districts. *Id.*

82. *Closing America's Education Funding Gaps*, CENTURY FOUNDATION, fig.1 (July 22, 2020), <https://tcf.org/content/report/closing-americas-education-funding/> [<https://perma.cc/GFP2-6UAJ>]; Chris Hacker et al., *Majority-Black school districts have far less money to invest in buildings — and students are feeling the impact*, CBS NEWS (Sep. 14, 2023), <https://www.cbsnews.com/news/black-school-districts-funding-state-budgets-students-impact/>. [<https://perma.cc/VX59-CNCD>]

83. See, e.g., Orley Ashenfelter, William J. Collins & Albert Yoon, *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AM. L. ECON. REV. 213 (2006); David Card & Alan Krueger, *School Quality and Black-White Relative Earnings: A Direct Assessment*, 107 Q. J. ECON. 151 (1992); Robert A. Margo, *Educational Achievement In Segregated School Systems: The Effects of "Separate-but-Equal"*, 76 AM. ECON. REV. 794 (1986).

84. For evidence that education is not simply correlated with higher voting rates, but itself tends to increase voting, see Peter Thisted Dinesen et al., *Estimating the Impact of Education on Political Participation: Evidence from Monozygotic Twins in the United States, Denmark and Sweden*, 38 POL. BEHAVIOR 579 (2016); Alexander K. Mayer, *Does Education Increase Political Participation?*, 73 J. POL. 633 (2011); Rachel Milstein Sondheimer & Donald P. Green, *Using Experiments to Estimate the Effects of Education on Voter Turnout*, 54 AM. J. POL. SCI. 174 (2010).



Education from Reconstruction or the early to mid-twentieth century onward. That Department would have been charged with equalizing school spending across the nation, a mission that might have radically altered the federal education bureaucracy's culture and goals, away from passive deference to Jim Crow and toward active support for equality. In the current status quo, the Department of Education prominently pursues the goals of antidiscrimination legislation, but we do not see a department that is intended to actually equalize educational investment or opportunity. What would such an agency look like, and how would it impact our democratic capacities? It is worth imagining.

## VI. BEYOND EQUITY

On the day President Biden took office in 2021, he issued an executive order calling for all federal agencies to advance racial equity.<sup>85</sup> That was a dramatic shift from his predecessor, who had targeted agency efforts at “diversity, equity, and inclusion” training for their own workforces.<sup>86</sup> The Biden administration's subsequent equity initiatives included workforce training and infrastructure investments in underserved communities, loan relief for farmers experiencing past discrimination, augmented student loan relief, new federal partnerships with HBCUs, new regulations for “affirmatively furthering fair housing,” broadband subsidies for Native Tribes, criminal justice reform initiatives, strengthened civil rights enforcement in environmental policy, extending Medicaid for better post-partum coverage, and heightened enforcement of Title VI's nondiscrimination mandates for federally funded programs.<sup>87</sup>

Efforts at racial equity are well-meaning, and many are critical. Equity can assure nondiscrimination moving forward, and it may achieve a more just distribution of resources in the future. In other words, it may help with catch-up. But it is not ambitious enough. It does not address the ways in which the underlying institutions shape (and have shaped) politics, and how alternative ones might have led in different directions, political and material.

For example, requiring agencies to justify actions that disproportionately harm minority communities is a positive, needed step. A “disparate impact” approach limits negligent or heedless harms. It may help to ensure that today's inequalities do not automatically become future inequalities. But disparate impact policies allow ongoing inequalities so long as those are justified by some institutional need. Further, they cannot reach into the past and correct for prior harms that are not captured by disparate impact metrics.

Therefore, “equity in the administrative state” is too modest of a goal. Grafting a set of civil rights goals and structures onto a preexisting administrative state is a

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85. Exec. Order No. 13,985, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 25, 2021).

86. Exec. Order No. 13,950, 85 Fed. Reg. 60683, (Sep. 22, 2020).

87. DOMESTIC POLICY COUNCIL, DELIVERING ON EQUITY, ACCESS, AND OPPORTUNITY FOR THE AMERICAN PEOPLE 2–9 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/02/Equity-EO-Agency-Highlights.pdf>. [<https://perma.cc/9FN3-5XPP>]

limited reform at best. Left in place are existing institutions, including the “rules of the game” that structure how change can occur, and who can achieve it, as well as the rules determining the stakes of all politics, i.e., “who gets what.” Democratic exclusion and racial oppression distorted all of those institutions and rules for most of U.S. history. Part of what was lost when African Americans and poor whites were excluded were structures and policies that could have fostered a more egalitarian, opportunity-rich society. We cannot recreate that counterfactual polity now, but considering it may help us to envision, build, and entrench institutions that foster egalitarian democracy going forward.