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Racism Didn't Stop at Jim Crow

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BOOK REVIEWS

Racism Didn't Stop at Jim Crow

Richard Rothstein's history of the racist housing policies of governments—yes, even liberal ones—is searing, revealing, and embarrassing.

BY SAMUEL R. BAGENSTOS FROM FALL 2017, NO. 46

The Color of Law: A Forgotten History of How Our Government Segregated America by Richard Rothstein • Liveright Publishing • 2017 • 368 pages • $27.95

Nearly 50 years ago, the Kerner Commission famously declared that "[o]ur nation is moving toward two societies, one black, one white—separate and unequal." The picture has changed distressingly little since then. In the 1950 Census, the average African American in a metropolitan area lived in a neighborhood that was 35 percent white—the same figure as in the 2010 Census. In 2010, the average white American still lived in a neighborhood that was more than 75 percent white. America's largest metropolitan areas—particularly, but not exclusively, in the North—continue to score high on many common measures of racial segregation. And racial segregation inhibits African Americans' economic and educational opportunities—even health is worsened by it.

In the 1950s, segregation was a topic of public importance. Now, for much of the public, the persistence of segregation remains in the background—not a topic that is much noted or discussed. Periodically, residential segregation bursts into the wider public consciousness—as in 2014 and 2015, when the police killings of Michael Brown in Ferguson and Freddie Gray in Baltimore led to riots that shined a spotlight on the intense levels of segregation in the St. Louis and Baltimore metropolitan areas. But soon enough, it drifts back into the background.

Housing segregation is taken for granted, in part, because it is naturalized. It has been 100 years since the Supreme Court's *Buchanan v. Warley* decision invalidated zoning ordinances that mandated housing segregation—a decision that came nearly half a century before the Court held school segregation unconstitutional in *Brown v. Board of Education*. The Court followed *Buchanan* with the 1948 *Shelley v. Kraemer* decision that held racially restrictive covenants unenforceable. And the Fair Housing Act, adopted in the wake of the assassination of Dr. Martin Luther King in 1968, has prohibited racial discrimination in private housing transactions for nearly half a century.

If segregated housing patterns remain, it is tempting to believe that those patterns are the natural result of economics and private choices about where people prefer to live. If African Americans do not live in the same neighborhoods as whites because they cannot afford to live in those neighborhoods, or because of self-segregating choices, that may be a problem. But, the view goes, it is not a problem of race discrimination for which the government is responsible.

This is precisely the view that the Supreme Court has taken in its desegregation jurisprudence. And it is also the view that underlies today's conservative attacks on the Fair Housing Act. When now-HUD-Secretary Ben Carson said that the Obama Administration's fair housing regulations were "social engineering," this is what he meant: They were artificial interventions into a market that would naturally lead to some level of residential segregation.

The Color of Law is basically an extended—and highly detailed—brief against that view. Richard Rothstein, a research associate at the Economic Policy Institute and longtime analyst of domestic policy issues, shows that the current pattern of residential segregation results not from private choices or from mere economics, but from a long history of pervasive, intentionally discriminatory government actions that continued well past *Buchanan*, *Shelley*, and the Fair Housing Act. (Rothstein focuses entirely on black-white segregation; he does not address racial discrimination against Latinos or Asian-Americans.) These actions came from every level of government—local, state, and federal. They began in earnest in the first decades of the twentieth century. Although some of these actions ceased in the 1960s and 1970s,

others continue to this day. Interlocking in a tight web, these actions destroyed integrated neighborhoods, created and defended segregated neighborhoods, and deprived African American families of opportunities to acquire wealth. Today's residential segregation is the direct result of those practices.

Ultimately, Rothstein argues, "We have created a caste system in this country, with African Americans kept exploited and geographically separate by racially explicit government policies. Although most of these policies are now off the books, they have never been remedied and their effects endure."

Rothstein's book is essential reading for anyone who wants to understand how our nation became—and remains—so divided by race. The book offers reasons to be skeptical of recent suggestions that class, rather than race, is the essential divide in American society. It highlights the role of officials from across the political spectrum—Republicans and Democrats, conservatives, liberals, and progressives—in entrenching racial segregation. And although Rothstein does not extend his analysis so far, *The Color of Law* has important implications for the Supreme Court's doctrine of racial remedies.

The argumentative style of *The Color of Law* is best described as the deployment of overwhelming force. Rothstein offers a mass of evidence demonstrating seven interlocking strands of government discrimination that caused today's patterns of segregation.

One strand was public housing. The New Deal agencies that developed public housing projects—notably the Public Works Administration—practiced strict racial segregation. Although the agencies claimed to be simply respecting existing housing patterns, Rothstein shows that they often created new segregation where it did not exist before. The PWA, for example, "designated many integrated neighborhoods as either white or black and then used public housing to make the designation come true—by installing whites-only projects in mixed neighborhoods it deemed 'white' and blacks-only projects in those it deemed 'colored.'" These decisions accelerated segregation, both among those displaced by the construction of new housing projects

and among those newly in the minority in their once-mixed neighborhoods—groups that often moved to areas in which members of their own race predominated. Racial segregation in public housing continued after World War II, with strong support from federal and local officials. By the 1960s, when few whites remained in public housing, federal, state, and local officials began consistently to place new developments in areas that were already heavily minority, thus further entrenching segregation.

Although courts ultimately write legal doctrine, neither judges nor lawyers are the source of constitutional change; social movements are.

A second strand was race-based local zoning laws. As African Americans migrated to cities in Southern and border states after the end of Reconstruction, those cities began to enact ordinances mandating racial segregation in housing. In its 1917 *Buchanan* decision, the Supreme Court held these ordinances unconstitutional. But many localities failed to comply with *Buchanan*, and others adopted new zoning laws that did not mention race but nonetheless aimed to promote racial segregation. These laws excluded apartment buildings from middle-class white neighborhoods, allowed undesirable land uses (like factories or bars—and, later, toxic waste sites) only in neighborhoods where blacks happened to live, rezoned particular areas from residential to commercial to stop the expansion of black neighborhoods, and so on. The result was both to promote segregation and to ensure that African Americans would live in overcrowded, unhealthy neighborhoods that lacked the amenities available where whites lived. The federal government encouraged these practices, most notably in 1921, in a model zoning code published by a committee chaired by then-Commerce Secretary Herbert Hoover. Local manipulation of zoning and land-use laws to keep black families out of largely white communities continues to this day.

A third strand was explicit race discrimination in federal programs backing private mortgages. The Federal Housing Administration and the Veterans Administration —which guaranteed most of the private mortgages that catalyzed the suburbanization

of America following World War II—refused to guarantee loans in integrated neighborhoods. Indeed, they typically refused to guarantee loans to African American buyers at all. It was not until 1962 that the agency stopped "financing subdivision developments whose builders openly refused to sell to black buyers."

As a result, in many areas African Americans who could afford houses were limited to certain neighborhoods—those that were already heavily black, or those that were quickly turning, with the help of unscrupulous "blockbusters," from all-white to all-black. Blockbusting dramatically depressed property values in newly black neighborhoods, as incumbent white owners sold in panic. The blockbusting real estate agents purchased the houses at deep discounts, then jacked up the price and sold them to black families. But because of the FHA's discrimination, the black families often could not get mortgages even if they had the economic means to qualify for them. Instead, they purchased their houses on a contract-sale system. Under that system, buyers obtained title after making payments for 15 to 20 years. But no equity accumulated during that period, and if the resident missed a payment the seller could repossess the house and sell it to another buyer on the same terms.

A fourth strand was "urban renewal" or "slum clearance" projects conducted by local governments, often with the aid of federal funds. The small city of Hamtramck, Michigan, in 1959 adopted what it called a "program of population loss" targeted at black neighborhoods. Using federal dollars, the city cleared out those neighborhoods to make way for expansion of a Chrysler plant and for construction of an interstate highway leading to the plant. The Hamtramck experience was replicated many times throughout the country, as local governments used federal funds to build highways that drove out black residents.

A fifth strand, in many parts of the country, was school segregation. In areas where schools were segregated by law before Brown v. Board of Education, local governments used school siting decisions to create and reinforce segregated housing patterns. Just as with the New Deal public housing programs, these governments would place black schools in heavily black neighborhoods and white schools in heavily white neighborhoods. Because the schools often did not provide transportation, families would essentially be forced to move to the neighborhoods surrounding the schools designated for their race.

A sixth strand was the failure of local law enforcement to protect African Americans who moved into formerly white neighborhoods. Throughout the country, police tolerated and even encouraged "cross burnings, vandalism, arson, and other violent acts to maintain residential segregation."

The seventh and final strand was a set of government policies that limited the earnings and wealth of African Americans. New Deal and war-era government programs drove African Americans into the lowest-paying jobs, and the National Labor Relations Board continued to certify whites-only unions until 1964. But because the Civil Rights Act adopted in that year explicitly protected prior seniority systems, the law locked in the disadvantage that decades of discrimination had caused black workers.

Besides loss of wealth, housing discrimination also increased the cost of living for black Americans. For example, when Ford opened a plant in Mahwah, New Jersey in 1955—the same auto plant made famous in the Bruce Springsteen song *Johnny 99*—discriminatory zoning and other practices made it impossible for many black workers to find housing nearby. Many were forced to drive "sixty to seventy miles each way."

In addition to its direct effects, then, housing discrimination effectively imposed a tax on blackness. Sometimes, the tax was explicit, as in the many cities in which local officials engaged in discriminatory property assessment. By "overassessing properties in black neighborhoods and underassessing them in white ones," those officials taxed African Americans at higher effective rates than whites.

This highly truncated summary barely begins to suggest the mass of evidence that *The Color of Law* deploys. But the writing is never slow or tedious. To the contrary, Rothstein makes the presentation of statistics come alive. It helps that he has a strong eye for the telling anecdote.

Some of these anecdotes are just amazing. During the New Deal, black workers for the Civilian Conservation Corps who were restoring the Gettysburg battlefield had to bunk 20 miles away because "the town's residents objected to having the African American crew living in the vicinity." A "new birth of freedom," indeed.

Rothstein also tells us about the Mereday family, an African American family that left South Carolina during the Great Migration and settled near other African Americans in Hempstead, Long Island. Through a series of interesting turns, Robert Mereday, the youngest of four brothers who made the trip North, gets hired during World War II as one of the first black employees at the local Grumman Aircraft plant. He saves his money and, after the war, opens his own hauling business. He gets a contract to haul drywall to the Levittown development—then under construction—which helps provide a comfortable living to him and several family members who work for him.

But although they helped build this icon of suburban development, the Meredays could not live there. Levittown barred African Americans. And, indeed, the policies of the federal agencies that guaranteed the mortgages for the development explicitly required race discrimination.

To overcome the continuing effects of the long-running and densely interlocking web of official discrimination would require massive government actions today. This was essentially the argument of Ta-Nehisi Coates's widely read "Case for Reparations." (As Rothstein reveals in his author's note, Coates himself played a key role in bringing *The Color of Law* to publication.)

In his final chapter, Rothstein offers a series of solutions—even the most modest of which might seem utopian. Among them: a federal program that would purchase the next 15 percent of houses that are for sale in Levittown and similar neighborhoods, then sell them to qualified African Americans at the price for which they sold when they were built. More generally, Rothstein proposes "federal subsidies for middle-class African Americans to purchase homes in suburbs that have been racially exclusive." He also proposes a ban on zoning ordinances that prohibit multifamily housing, and a law requiring municipalities to make "a positive effort to integrate low- and moderate-income families into middle-class and affluent neighborhoods" —perhaps backed by the denial of the federal mortgage tax exemption to houses in locales that are not providing "their fair share of low- and moderate-income housing." To promote the integrationist potential of federal housing voucher programs, he proposes increasing funding to guarantee that vouchers are available to all who fall below an income threshold—and to ensure that the vouchers pay enough

to enable their recipients to rent in middle-class neighborhoods. And he proposes a ban on landlords discriminating against voucher holders—a rule that currently applies only in a few jurisdictions—as well as tax incentives for landlords to rent to voucher holders. Finally, he proposes that new construction of federally supported low-income housing should take place only in "integrated, high-opportunity neighborhoods."

The Color of Law is a major achievement. After Rothstein's meticulous and comprehensive presentation of the case, it is simply impossible to believe that today's housing segregation reflects mere private choices. There is evidence the book has already had a significant impact on the law—and indeed had such an impact even before it was published. Rothstein's research—presented to the Court in an important amicus brief—played a significant role in the Supreme Court's 2015 decision that the Fair Housing Act reaches beyond intentional discrimination to practices with an unjustified discriminatory impact on housing opportunities. That decision was unexpected by many Court-watchers. It preserves an important —though limited—legal tool for attacking exclusionary zoning and other practices that entrench residential segregation.

But the broader implications of *The Color of Law* may be even more significant. Rothstein frames his argument in constitutional terms. He contends that the pervasive web of official discrimination violated the government's constitutional obligations under the Fifth, Thirteenth, and Fourteenth Amendments. For the most part, this legal analysis is uncontroversial. Although courts might not have recognized it at the time, the overwhelming majority of examples Rothstein adduces are of government discrimination that courts today would hold to have violated the Constitution. For the most part, Rothstein is careful to frame his legal claims as modestly as possible, so that even conservatives could embrace them. Even if one takes a very narrow view of the government's obligations to avoid discrimination, he is saying, the government repeatedly and extensively breached those obligations. And because conservatives argue that the role of race discrimination remedies is to provide corrective justice—redress for individuals who were the victims of discrete acts of discrimination—he argues that even conservatives should agree that the

government today has a constitutional obligation to undo the extensive effects of its longstanding segregation. But constitutional doctrine, as developed in the Burger, Rehnquist, and Roberts Courts, is quite far from recognizing the point.

The Supreme Court's doctrine of constitutional remedies takes what the late legal scholar Alan Freeman called the "perpetrator perspective." It focuses intensely on identifying the particular actor—whether an individual or a unit of government—who violated the Constitution. Only *that* actor, and not anyone else, must remedy the constitutional violation. Other actors, who may have benefited from the violation but have not been proven to have caused it, are treated as essentially innocent bystanders. Once the perpetrator is identified, the law seems to impose a powerful remedial obligation: the perpetrator is required to eliminate both the constitutional violation and any consequences that flowed from it—to undo the effects of the violation "root and branch." But the focus on a particular perpetrator severely undercuts that obligation, because it essentially presumes each unit of government innocent until it is proven responsible for a particular instance of segregation.

Although Rothstein does not frame his argument as a critique of the Supreme Court, *The Color of Law* demonstrates that the Court's entire doctrinal apparatus is misconceived—and unduly limits our ability to overcome the effects of our longstanding and pervasive segregation. Segregation did not result from the discrete decisions of particular government actors, it resulted from a densely interlocking web of decisions made over decades by actors at all levels of government. As an analytic, historical, and sociological matter, it is basically impossible to isolate the effects of any particular decision from all of the rest of them. Because these decisions by federal, state, and local governments have decisively shaped every community in this country, suggesting that any municipality could be an innocent bystander with no responsibility for overcoming the legacy of segregation ignores reality.

To be fair, it is not as if the justices are entirely ignorant of this point. Even one as committed to the Court's perpetrator perspective as Justice Scalia recognized that past government discrimination had an effect on current residential patterns. But at some point, he argued, the courts must treat the slate as cleared. Otherwise, government actors would have a perpetual obligation to overcome the sins of the past and could never focus on solving the problems of today.

The Color of Law makes clear that the price of that sort of thinking is steep, as the sins of the past *caused* many of the problems of today. Although the recent *Inclusive Communities* decision suggests that units of government have the power to act voluntarily to overcome the legacy of segregation so long as they do not themselves classify individuals on the basis of race, the status of that proposition is uncertain as the Court becomes more conservative. And even if the Court does stand by *Inclusive Communities*, that will not save some of Rothstein's most far-reaching proposals from being unconstitutional. Most notably, under current law—even after *Inclusive Communities*—there is very little chance that courts would permit the government to subsidize African American buyers in heavily white neighborhoods.

But all this only underscores the imperative of organizing a broad and deep political movement to force the nation to recognize and make good on its constitutional debt to African Americans. Although courts ultimately write legal doctrine, neither judges nor lawyers are the source of constitutional change. Rather, constitutional change comes from social movements that put pressure on political parties and government actors. When political conditions are ripe, and a coalition embracing a social movement's goals takes power, judges who come from that coalition will be open to embracing the movement's constitutional agenda. That is what happened in each of the great twentieth-century advances in constitutional equality: when the Supreme Court embraced the goals of the African American Civil Rights Movement in the 1950s and 1960s, and when it embraced the goals of Second Wave Feminism in the 1970s and 1980s. The imperative today is to work to ensure that the goal of overturning our nation's legacy of racial segregation has a key place in the progressive coalition, so that when the coalition next takes power it will be poised to take meaningful steps to achieve that goal. For many years, issues of racial

segregation took a back seat to other progressive priorities. Perhaps the most painful of Rothstein's examples along these lines that of liberal Senators Paul Douglas and Hubert Humphrey working to defeat an anti-segregation amendment to a 1949 public housing bill, with Douglas condescendingly explaining to his "Negro friends" that defeating the amendment was "in the best interests of the Negro race" because the amendment would generate opposition to the bill from Southern legislators. Time and time again, progressive advocates have chosen to pursue other goals at the expense of overcoming housing segregation.

A class-not-race approach can only address some of the effects of our legacy of government discrimination.

Today's progressives must not make the same mistake. It will be tempting to seek to avoid the racial aspects of segregation and instead to seek remedies that focus on overcoming economic and class divisions. Such a class-not-race approach can only address some of the effects of our legacy of government discrimination. And, if history is any guide, it is likely to provoke nearly as much of a backlash as would a forthright approach that explicitly addresses race. George Romney's controversial early-1970s open-housing efforts aimed directly at economic, not racial, integration. That did not stop white suburbanites from rebelling, precisely because they believed that racial integration would be the consequence.

The Color of Law is a call to action for a new constitutional movement to own up to the long history of official discrimination throughout the country—a history that persisted long after slavery, and existed even in places that never had Jim Crow laws. It should also prove to be an important resource for that movement. Widespread ignorance of the history of official discrimination—reinforced by elementary and secondary school textbooks that actively mislead students about the source of segregation—creates one of the most significant barriers to effective political action in this area. As Rothstein asks in his conclusion, "If middle and high school students are being taught a false history, is it any wonder that they come to believe that African Americans are segregated only because they don't want to marry or because they prefer to live among themselves?". By offering a persuasive and detailed account of the shameful legacy of government-imposed segregation, Rothstein provides a crucial tool for overcoming that ignorance.

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