Michigan Law Review

Volume 79 | Issue 4

1981

Apartheid in America: A Historical and Legal Analysis of Contemporary Racial Segregation in the United States

Michigan Law Review

APARTHEID IN AMERICA: A HISTORICAL AND LEGAL ANALYSIS OF CONTEMPORARY RACIAL SEGREGATION IN THE UNITED STATES. By *James A. Kushner*. Arlington, Va.: Carrolton Press. 1980. Pp. 187. $12.

Despite numerous Supreme Court decisions and the civil rights legislation of the past decades, residential segregation pervades the United States, and the degree of racial separation is increasing. The Burger Court has not responded to this challenge with the idealism of former Courts. Characteristic of its attitude is Justice Stewart's comment that racial isolation stems from "unknown and perhaps unknowable causes."[1] *Apartheid in America* challenges this view from an historical and legal perspective and, in the end, rejects it. Kushner's book catalogues many of the causes of segregation and proposes desegregation remedies. The dialogue it will inspire should offer a timely respite from judicial cynicism.

The first part of the book examines the historical antecedents of today's dual society. Its focus is government policy and action, from which, Kushner argues, racial isolation has emerged. Kushner starts with the nineteenth century, during which blacks resided in a dispersed pattern in American cities. In this era Kushner discovers the roots of segregation. He finds that the industrial revolution produced an atmosphere of confrontation among competing laborers. Blacks responded to labor tensions with a "self-imposed concentration" (p. 13). At the same time, public works projects destroyed integrated neighborhoods while the racially restrictive covenant shaped resettlement into a segregated pattern.

Turning to the twentieth century, Kushner indicates a series of federal and local policies that accelerated the pace of segregation. The federal government facilitated the development of white suburbia after World War II through the provision of mortgage financing (pp. 21-22) and funds for highways and utilities (p. 23). Local housing programs increased segregation as municipal authorities provided blacks with "separate but equal"[2] (p. 31), but nonetheless cheap, housing (pp. 32-35). Congress's response to urban decay — its slum clearance and urban renewal programs — ended up contributing to segregation. Federally funded community development ef-

1. Milliken v. Bradley, 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring).

2. Plessy v. Ferguson, 163 U.S. 537 (1895) (enunciating "separate but equal" as the fourteenth amendment test in approving separate railway cars for blacks).

forts, for example, sacrificed urban neighborhoods and forced displaced persons into racially segregated housing markets (p. 38). Even as government programs pushed blacks into ghettos, white suburbs remained segregated through state action and inaction. On the one hand, "innovative" zoning ordinances excluded low income families from suburbs (pp. 44-50).[3] On the other, realtors, uncontrolled by state regulators, intentionally excluded blacks from white neighborhoods while mortgage bankers "redlined" blacks into isolation (p. 54). Kushner completes his government policy analysis with a look at federal and state taxation schemes. He concludes that tax policies accelerated suburban plant location and residential development and simultaneously eroded the cities' tax base.

The second part of *Apartheid in America* analyzes judicial decisions from *Dred Scott*[4] to *Bakke*[5] and concludes that Supreme Court actions have facilitated and legitimized racial segregation. Kushner finds the recent decisions in *Milliken v. Bradley*[6] and *San Antonio School District v. Rodriguez*[7] more "pernicious" than *Plessy v. Ferguson*:[8] *Milliken*'s refusal to grant inter-district relief, combined with *San Antonio School District*'s approval of the property tax system of school financing, has perpetuated separate but "unequal" school systems (p. 83). Kushner also decries the limited potential of judicial remedies to relieve urban segregation. He downplays the Supreme Court's approval in *Hills v. Gautreaux*[9] of an order directing HUD to develop lower income housing in Chicago surburbs (p. 85). Desegregation, Kushner argues, requires the absence of traditional land use controls (which the courts continue to sustain (pp. 86-90)) and abundant government subsidies (which instead remain meager).

While Kushner praises the positive effect of "favorable" civil rights decisions in the South (p. 94), he bitterly condemns the Court's test for equal protection violations which requires plaintiffs to prove discriminatory purpose.[10] Kushner criticizes the test as too narrow

3. *See, e.g.*, Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

4. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) (blacks held not to be "citizens" and thus could not claim any constitutional rights).

5. Bakke v. Regents of the Univ. of Calif., 438 U.S. 265 (1978).

6. 418 U.S. 717 (1974).

7. 411 U.S. 1 (1973).

8. 103 U.S. 537 (1895).

9. 425 U.S. 284 (1976).

10. Kushner contrasts the standard for constitutional violations with that for violation of the Civil Rights Acts. Under the latter, a practice having a disproportionate impact on minorities is invalid unless that impact is justified by rational business necessity. P. 97. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

to remedy the "overwhelming majority of acts of racial discrimination" (p. 102). To prove intent the plaintiff must either demonstrate the actor's subjective discriminatory purpose or present evidence of conduct that is so outrageous that an inference of discriminatory purpose is unavoidable. Kushner would instead predicate liability on the "substantial certainty" that discriminatory effect was the "natural and foreseeable consequence" of the disputed action. He then illustrates this "natural and foreseeable consequences with probable certainty" test by applying it to zoning statutes (pp. 105-07).

Unfortunately, the illustration only demonstrates the flaws of the test. Kushner uses the "substantial certainty" requirement to qualify the "natural and foreseeable" standard. He recognizes that his test overcompensates for the restrictive Supreme Court approach; he attempts to draw the line between the Supreme Court's subjective intent/outrageous conduct test and the foreseeability/disproportionate impacts standard by adding "substantial certainty" to the latter. The result, says Kushner, is "foreseeability with bite." What Kushner's test boils down to, though, is a measurement of the objective probability of disproportionate impact. Although Kushner requires an awareness that the conduct at issue is substantially certain to have discriminatory effect, he is willing to infer such awareness from the objective likelihood of impact (p. 106). Such an inference renders the "natural and foreseeable" requirement superfluous, since all substantially certain effects would also be foreseeable. To find the middle ground, Kushner should have proposed a "substantial certainty" test alone.

Part III reviews various proposals for new legislative and judicial remedies for segregation. Kushner urges Congress to extend the standard for racial discrimination that now applies under the Civil Rights Act to all fourteenth amendment violations. He also believes that appropriate legislation could alleviate the discriminatory effects of twentieth century federal programs. Finally, Kushner urges the Supreme Court to reconsider its interpretations of the fourteenth amendment.

Apartheid in America will disappoint readers who seek an exclusively legal analysis of residential segregation. To those who want to revive congressional initiative and Supreme Court idealism, however, Kushner's book is an interdisciplinary invitation to reevaluate the causes of segregation and the nation's failure to end it.