

2024

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Recommended Citation

Richard Rothstein, *JUST ACTION: HOW TO CHALLENGE SEGREGATION ENACTED UNDER THE COLOR OF LAW*, 46 W. New Eng. L. Rev. 93 (2024), <https://digitalcommons.law.wne.edu/lawreview/vol46/iss2/2>

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REMARKS

JUST ACTION: HOW TO CHALLENGE SEGREGATION
ENACTED UNDER THE COLOR OF LAW

RICHARD ROTHSTEIN*

Thank you for that introduction and thank you for inviting me to give this presentation to you today.

As you may know, in 2017 I published *The Color of Law*.¹ Its purpose was to demolish the myth of *de facto* segregation, something we all think we know, a term we all use, a term I always used. The idea is that the reason we're so residentially segregated in this country—most areas, either being predominantly white, or predominantly black—the reason we're so segregated is because of private activity.² That's what *de facto* segregation describes—bigoted white homeowners or landlords refusing to sell or rent to African American buyers or renters.³ Or private businesses, banks, realtors, developers, and insurance companies discriminating in how they carried out their purely private sector activities.⁴ Or maybe because people just like to live with each other of the same race, we feel more comfortable that way. Or maybe it's only because of income differences, economic differences; African Americans, for the most part, have lower incomes than whites and so can't afford to live in middle-class white neighborhoods.⁵

All of these individual, personal, bigoted actions, private sector actions, are what we seem to think has created segregation. We tell ourselves that what happened by accident can only unhappen by accident: there was no intentionality on the part of the government in creating the

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1. Throughout these remarks, I refer to concepts discussed in two of my books. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (W. W. Norton & Company 2017) (hereinafter *THE COLOR OF LAW*); RICHARD ROTHSTEIN & LEAH ROTHSTEIN, *JUST ACTION: HOW TO CHALLENGE SEGREGATION ENACTED UNDER THE COLOR OF LAW* (Liveright 2023) (hereinafter *JUST ACTION*).

2. *THE COLOR OF LAW*, *supra* note 1, at Preface, VII, XVII (W. W. Norton & Company 2017). Editors' note: These Remarks are lightly sourced to assist readers with further learning about the ideas discussed in these transcribed Remarks.

3. *Id.* at VII, VIII.

4. *Id.* at XVII.

5. *Id.* at 152.

segregation.⁶ It's de facto. *The Color of Law* is not a hidden history, but a forgotten history of how the segregated nature of American society was explicitly created with racial intent by federal, state, and local governments, with policies so powerful in the twentieth century that they still determine not only the racial landscape but the overall racial inequality in this country today.⁷

Our racial segregation is an unconstitutional system. It's an unlawful system. It was implemented by the federal government primarily, and by other governments on a racially explicit basis in violation of the Thirteenth and Fourteenth Amendments to the Constitution.⁸ And as such we have an obligation to remedy it.⁹

I'll begin by describing one of the most powerful policies that the federal government implemented in order to create the segregation with which we're all familiar. In the immediate post-World War II period, two federal agencies, the Federal Housing Administration and the Federal Veterans Administration implemented a program to move the entire white working-class and middle-class populations out of urban areas into single family homes in all-white suburbs from which African Americans would be prohibited from living.¹⁰ At the time, we were a manufacturing economy.¹¹ We were making things. Most employment was either in factories or in factory-related services like banks.¹² The people who worked in these places, factories, banks, and insurance companies had to live in the urban areas where the factories were located and the factories had to be located near deep-water ports and railroad terminals, so they could get their parts and ship their final products.¹³ So, in the mid-early twentieth century, we had both blacks and whites living in urban areas, working in factories that were also located in those urban areas. I'm not suggesting that it was a fully integrated situation, although there were many more integrated neighborhoods in downtown areas than there are today. But the federal government decided it was going to move the whites out of those urban areas into single-family homes in all-white suburbs. It was a racially explicit program.

The Color of Law uses the example of Levittown, a place with which I imagine many of you are familiar, a giant subdivision east of New York

6. *Id.* at Preface.

7. *Id.* at 176.

8. *Id.* at Preface.

9. *See generally*, JUST ACTION, *supra* note 1.

10. *See generally*, THE COLOR OF LAW, *supra* note 1, at Chapter 2.

11. *Id.* at 21.

12. *Id.*

13. *Id.* at 5.

City, probably the largest one built in the post-World War II period, 17,000 homes built in one place.¹⁴ As I said, we weren't a suburban country at that time; the only people living in suburbs prior to this federal program were the affluent.¹⁵ The federal government, though, decided to move the non-affluent whites to these suburbs.¹⁶ William Levitt, the builder of this project, could never have assembled the capital to buy the land and construct this project.¹⁷ No bank would lend it to him.¹⁸ They thought it was a crazy idea—who was going to want to live in these suburbs? The only way that Levitt could assemble the capital to buy the land and build these homes was to go to the federal government—the Federal Housing Administration and Veterans Administrations that worked collaboratively—submit his plans for the project, the construction materials he was going to use, the layout of the streets, the architectural design of the homes, and a required commitment by the Federal Housing Administration and Veterans Administration that he would never sell a home to an African American.¹⁹ The Federal Housing Administration and Veterans Administration even required that Levitt place a clause in the deed of every home, prohibiting resale to African Americans or rental to African Americans.²⁰

This was not the action of rogue bureaucrats working in the FHA or VA. It was a racially explicit program written in the housing manual of the Federal Housing Administration.²¹ The manual was distributed to appraisers all over the country, whose job it was to recommend or not recommend projects that were requesting federal bank guarantees. The manual said that you could not recommend for a federal bank guarantee a developer's proposal to build a project that would sell to African Americans.²² The manual went so far as to say that you couldn't even recommend an all-white project for a federal bank guarantee if it was going to be located near where African Americans were living because, in the words of the manual, "that would run the risk of infiltration by inharmonious racial groups."²³ That's what the federal manual said.²⁴ This notion of *de facto* segregation is utter nonsense. We have an

14. *Id.* at 68–73.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 72–74.

22. *Id.* at 83–84.

23. *Id.*

24. *Id.*

unconstitutional system of segregation in this country, designed to ensure that blacks and whites could not live near one another in any metropolitan area.

The homes in Levittown are only one example. They're in every metropolitan area, in New England and the Midwest and the South and the West, everywhere. These subdivisions sprung up, suburbanizing the nation's white population.²⁵ The homes at the time were inexpensive, designed for returning war veterans, for working-class, middle-class families. They sold at the time for about \$9,000 apiece. In today's money that's about \$100,000. Any worker, anybody (including returning war veterans) with a job in the post-war boom, and both blacks and whites had those jobs, could afford a home for \$100,000. For veterans, no down payment was required, and for all there were low Federal Housing Administration interest rates on their mortgages.²⁶ Anybody could afford that kind of home, but only whites were permitted. African Americans were prohibited.

Now the whites who bought those homes were looking for a place to live. We had a housing shortage. They didn't expect to get rich by buying one of these very inexpensive homes. But what happened in the next couple of generations is those homes appreciated in value. And you cannot buy a home today, not in Levittown, not in any other suburb of this country, for \$100,000. They sell for \$300,000, \$400,000, \$500,000, and in some places a million dollars or more.²⁷ The white families who bought those homes gained over the next couple of generations wealth from the equity appreciation of their homes, the inexpensive homes that they bought. They used that wealth to send their children to college. They used it to take care of temporary emergencies, temporary unemployment, or a medical issue. They used it to subsidize their retirements. And, most importantly, they used it to bequeath wealth to their children and grandchildren, who then had down payments for their own homes.

African Americans were prohibited by explicit federal policy from participating in this program that generated wealth. The result is that today, African American incomes on average are about 60% of white incomes.²⁸ There's a whole story behind that—many federally racially explicit policies, but their income ratio is about 60%. You would think that if the income ratio is 60%, African American household wealth would also be on average about 60% of white household wealth. But in reality,

25. *Id.* at 100.

26. *Id.* at 70.

27. *See generally, id.* at 182.

28. *Id.* at 184.

while African American incomes average about 60% of white incomes, African American wealth is only about 5% of white wealth. That enormous disparity between a 60% income ratio and a 5% wealth ratio is almost entirely attributable to an unconstitutional federal housing policy that was practiced in the mid-twentieth century and that has never been remedied. And if we take our constitutional obligations seriously, then we have an obligation to remedy it because it underlies the racial inequality that exists in this country to date. This wealth gap not only perpetuates racial segregation and locks African Americans into poorly resourced urban neighborhoods, it also underlies other inequality, less access to health, less access to transportation, and good jobs. All of this is a residual and a continuing impact of federal policy. And that's just one policy. *The Color of Law* describes policy after policy followed by the federal government, and state and local governments as well, to impose segregation on an unconstitutional basis on the African American population.²⁹ I don't have time to go into many of these other policies now; they are documented in *The Color of Law*.³⁰

Readers of that book, and there were many, the book sold a million copies, as well as people who attended lectures like this that I gave, had a similar question after reading it or after hearing me speak. And that question was, "What can we do about it now?" We know this history now. We know it's an unconstitutional, unlawful system of segregation. What can we do to fix it?" Well, you know I'm an old man. I wanted to retire, but I figured I had to write another book to answer this question. So, I recruited my daughter, Leah Rothstein, who knows more about current housing policy than I do (I was a journalist), to co-author a new book called *Just Action*.³¹ And this new book, *Just Action*, describes what can be done in a local community level, in every community in this country, to redress racial segregation.³² Our assumption in writing this book *Just Action* is that there is no political will today in this country to enact national policy that's going to combat the racial inequality that we created—we, our country, our government created. But once you create a system of segregation, once you place two races in two different places, there are many, many local policies that may not have created the segregation, but that sustain and reinforce it. And local organizers, local committees, local activists can take concrete steps to create the pressure needed to redress segregation at a local level, step by step, maybe in small

29. *Id.* at 184.

30. *See generally, id.*

31. *See* JUST ACTION, *supra*, note 1.

32. *Id.*

ways at first, but that accumulate to a real impact, and perhaps a national movement to finally confront our unconstitutional legacy of apartheid.

So let me, in the few minutes I have left with you, describe just a few of the policies that *Just Action* recounts and recommends that you, as citizens, not just as students, can take steps to implement.

I mentioned before that once you have two unequal populations you can have policies that are not racially explicit, but that reinforce their inequality. One is our property tax system. You may not realize it, but African American homeowners pay property taxes at a higher rate relative to the value of their homes than white homeowners do.³³ There are many reasons for this, but perhaps one of the more important is that white neighborhoods appreciate in value faster than black neighborhoods, for a variety of reasons. Most cities and counties don't reassess properties every year.³⁴ In some cases, they wait ten years to fifteen years, to reassess properties.³⁵ The result is that the tax rate that African Americans pay is higher than the tax rate that whites pay relative to the value of their homes, because as the property values in white neighborhoods increase faster, the assessed value of those homes is farther below their real market value than the assessed value of homes in black neighborhoods. The result is that African Americans are paying a tax based on their assessed values closer to the real market value of their homes than the rate that whites are paying on their assessed value, which is farther below the market value of their homes. That's just one example. Now, that's not a federal policy. The inequality in neighborhoods was created by the federal government as I described before, but property tax assessments are a purely local issue. It has nothing to do with the federal government. And if we're going to redress it, we need to do it at the local level. The existence of this discriminatory property tax system is not a mystery. Property tax assessors know it. They just don't have an obligation to fix it unless somebody forces them to do so. And that's what a local group can do.

Another example of a race-neutral-on-its-face policy that discriminates against African Americans because of pre-existing inequality is our credit scoring system.³⁶ As you know, if you buy a home and want a mortgage, what you need to do in order to get a bank or a credit union or other financial institution to issue a mortgage is show that you have repaid past loans on time. You have to demonstrate that if you had, for example, a previous mortgage, you hadn't missed mortgage payments.

33. *Id.* at 4.

34. *Id.* at 146-47.

35. *Id.*

36. *Id.* at 73-80.

Well, in this country, because of the history I described before, 70 percent of all white households own their own homes. Only 40 percent of black households own their own homes. When somebody is going to buy a home and seek a mortgage, a white applicant is more likely than a black applicant to have had a previous mortgage. The credit reporting agencies have a record of who has paid a mortgage on time. The banks (there are a relatively small number of banks and mortgage companies that issue mortgages) can transmit data of their borrowers' payment records easily, electronically, without much effort. If you have owned a previous home, and you've paid your mortgage on time, you get a good credit score and can get a low interest rate and eligibility for a mortgage for a new home. But if you haven't owned a previous home, and you've been a renter all your life, and paid your rent on time every single month for your entire adult history, you get no boost to your credit score for paying your rent on time. Mortgage payments are counted, not rental payments.³⁷ It's a discriminatory system. And because African Americans are less likely to have a record of faithful mortgage payments, they find it more difficult to qualify for a mortgage, and if they do qualify, they get a higher rate because their credit score isn't as high.

This is something that again can be remedied at a local level. Local banks could be required by a community group by public pressure, at the local level, to consider the rental records of applicants for their mortgages, to make inquiries to determine whether they are good credit risks.³⁸ Of course, it's harder when there is a small number of banks and major financial institutions that issue mortgages. There are hundreds of thousands of landlords, so there's no way to do it automatically, as they do for mortgages. But for individual mortgage applicants, a bank or credit union can look into their rental records for their loan applications and minimize the discriminatory system. Banks and credit unions won't do it unless there's public pressure from a local group.

There are many other campaigns that we describe in *Just Action* that local groups can undertake. We generally divide them into two categories. One is to improve the conditions in existing low-income, mostly African American neighborhoods in this country, which would redress some of the consequences of segregation.³⁹ The second is policies that open up exclusive white neighborhoods to African American residents.⁴⁰ These

37. *Id.* at 75.

38. *Id.* at 79.

39. *Id.* at Chapters 6–9.

40. *Id.* at Chapters 10–12.

are two sides of the same coin. We need to do both if we're going to redress segregation.

I'll give you one final example before I close. In 2019, and this is on the web—you can find it easily—a newspaper called *Long Island Newsday*, the major newspaper on Long Island in New York, conducted what we call “paired testing” of real estate agents.⁴¹ It consists of sending home buyers, one black, one white, to a real estate agent, sending them at closely related times, but not the same time: a couple of days apart, perhaps. These are actors or volunteers who are pretend-buyers. The whites and the blacks come with identical financial records, identical ability to afford the home, identical interests, and identical professional backgrounds. An editor at *Long Island Newsday* went so far as to go to Nordstroms and buy identical handbags for the black and white testers.⁴² The testers wore hidden body cameras, buttonhole body cameras to record their interactions with the real estate agents (most states permit this one-way recording).⁴³ What *Long Island Newsday* reported was that in 50 percent of the interactions between black applicants for homes—customers of the real estate agents—and the agents themselves, the applicants received discriminatory treatment.⁴⁴ They were shown different homes, shown homes in different neighborhoods than white homeowners with the same qualifications.⁴⁵ They were given different information about the neighborhoods they were interested in. Fifty percent received discriminatory treatment.

Now black homebuyers who go to a realtor and seek information about a home purchase usually have no way of knowing that they were discriminated against. They don't know that another homeseeker, who was white, received different and better information about homes for sale. So the only way to identify this unlawful discrimination is with a paired testing program like *Long Island Newsday* conducted. The result is that the real estate industry continues to reinforce segregation. There's no reason to think that if 50 percent of the realtors on Long Island, New York, are discriminating in interactions with black home seekers, that it's not going on in every community in the country, yours, or any other one. This is a subject for action on the part of local civil rights groups to reform the real estate industry. You can only do it with a paired testing program. It doesn't have to be done by a local newspaper. There are fair housing centers in every large community in the country, that have the capacity to

41. *See id.* at 209–17.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

do paired testing.⁴⁶ They do not have the funds to do it. They have small grants from the federal government. But the testing is expensive, even if the volunteers don't cost much. Unless the centers have the funds to support this kind of program they're not going to identify the realtors who are discriminating; and if the discriminators are identified, to pursue legal action against them. This is another thing that's purely in the control of local community groups. It's not a federal issue. It happens, though, in every community and should be redressed.

There are many other policies that we describe in *Just Action*, that local groups can undertake, that you can undertake as citizens in your own communities, to begin the process of redressing segregation.⁴⁷ I hope you'll take a look at some of the suggestions that we make in the book. Get together with other citizens in your communities who are anxious to do something about this outrageous system of apartheid that we have. And be motivated to move our country forward in a more equal and less discriminatory fashion. With that, I want to thank you for your attention, and I do hope that I've inspired you a little bit to take steps that you can learn more about in this book, *Just Action*.⁴⁸

46. *E.g., id.* at 230.

47. *See* JUST ACTION, *supra*, note 1.

48. *Id.*