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An Off-Color History: How The Color of Law Misrepresents The Origins of Racial Segregation

Richard Walker

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Richard Rothstein's *Color of Law*^[1] has made quite a splash and is widely praised for its no-holds barred look at American racism. Rothstein has toured the country lecturing about the book, has been interviewed on National Public Radio and other outlets many times, and has been widely praised and cited by mainstream liberals – and even some on the left.

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Rothstein is correct to attack the systematic racism that has long plagued this country and to lay bare the way our cities have been racially segregated – and continue to be to this day. This is not exactly news, but it is an important truth that bears repeating for every generation. So, to the extent that it helps educate the young and especially white Americans about certain harsh realities, *The Color of Law* serves a good purpose. This country's sorry record on race needs to be aired as an essential part of our urban history.

On the other hand, Rothstein is wrong in ways that mislead readers about the causes and course of racial segregation. His errors of theory and fact seriously undermine the value of the book as a work of historiography and are a disservice to progressive politics today. Indeed, Rothstein ends up bolstering conservative positions on several fronts, starting with the idea that racism is not a structural element of US civil society and that government is the problem not the solution. Whatever his good intentions, Rothstein's dubious scholarship has some very bad, if unintended, consequences.

Rothstein's central argument – as stated in the subtitle of the book – is that the federal government imposed the modern racial order on this country in the 20th century, particularly residential segregation. The first fundamental error of this thesis is that it underestimates the power of White Supremacy as the ruling order of the United States from its foundation. Rothstein spends precious little time on the history of white dominance over American society and how it was imposed in the 18th and 19th centuries, with and without the aid of governments. The racial order of this country goes back to the colonial era and has been reinforced again and again by people of European heritage looking to strengthen and defend White Privilege. They have done so by keeping people of color – natives, Africans, Asians, and Latins – "in their place" economically, legally and geographically.

Rothstein could be forgiven for not replaying the history of racism in the US to concentrate on the 20th century, if he did not commit the sin of blithely dismissing the theory of "structural racism" derived from years of study of American history by race scholars.^[2] In its place he favors a purely legal theory of *de jure* racial segregation (p. xv). This approach naively reproduces prevailing legal doctrine that harkens back to Classical Liberalism, in which law is the foundation of the modern social order and that order is arrived at through a "social contract".^[3] This is the origin myth of bourgeois political theory, but it bears little relation to the reality of how modern state power has been constructed over the centuries.

Here lies Rothstein's second fundamental error, his theory that the state establishes the rules and civil society follows along. It is not news that US law and government have helped to impose and support a racist order, including racial segregation; this has been a normal function of the American state for three centuries. The US Constitution, for example, included the 3/5ths rule for counting slaves and the federal government backed fugitive slave laws. But why did this happen? Because the politics of the time were deeply influenced by the power of southern planters, supported by northern merchants and a large percentage of the white people, south and north. It took years of abolitionist agitation, slave struggles and a Civil War to change that. Then, after a brief period of Reconstruction when the federal government supported black freedom and political rights, the southern landowners and their henchmen reinstated black subordination throughout the states of the Old South. Bucking

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the racial order has been the exception, not the rule, of American governance.

Do states just make up the rules and then impose them on a reluctant people? No, laws, agencies and the whole apparatus of the state did not burst full-born like Athena from the head of Zeus; they were put in place piece by piece along with the development of modern capitalist societies and racial orders.^[4] In the process, they have mostly conformed to the existing social order and the will of the powerful who dominate civil society – unless they are seriously challenged from below. Indeed, class systems and racial orders *require* states to back them up through law, regulation, policing and terror, or else the repressed may rise up and return the favor. At one point, Rothstein observes that, "Without our government's purposeful imposition of racial segregation, other [private] causes...would have [had] far less opportunity for expression." (p. viii). That is most certainly true, but that is precisely why all governments are called upon by private actors to enforce their preferences. Civil powers alone aren't enough.

There are, of course, *dirigiste* states that lord over civil society and dictatorships where a small clique uses the state for its own ends. But the U.S. is not Russia or Zimbabwe. Rothstein completely misunderstands how government works in the United States and how state policy relates to private power. American government is famously "federalist", meaning that it splits power between the federal government and the states, the states and local governments, and among a slew of local governments: counties, municipalities, and special districts. Furthermore, political representation is based geographically, so that, as Tip O'Neill famously said, "All politics is local". The virtue of US federalism is the way it makes government accessible and dispersed; the drawback is that it puts the state at every level in the thrall of parochial interests and local power structures. So if, in fact, American society is racist, then we would expect that governments from the local to the federal would be likely to represent the prevailing racial order.

Thus, in the end, Rothstein achieves the opposite of what he apparently sets out to do. Instead of indicting America's racial order, he lets White Supremacy off the hook for its foul deeds.

And by putting the blame chiefly on the state, he bolsters the long-standing conservative case against government (and liberal policy makers) as the cause of social malfunction. The upshot of bad history is that Rothstein ends up blaming mostly the wrong people – federal policy makers – rather than the wealthy and the capitalists who actually rule this country and its many levels of governments. This plays right into the hands of Fox News and conservative ideologues.^[5]

Rothstein's wrongheaded approach undergirds the detailed history of 20th century housing policies that fills the bulk of *The Color of Law*. Again, his primary target is the federal government and the ways it enabled and even imposed segregation on localities in the 20th century. It is undeniable that federal promotion of zoning, mortgage guarantees and public housing mostly lined up with the prevailing practices of racial segregation and reinforced them in important ways, given the powerful reach of the feds and their money. But Rothstein's idea that this was *imposed* on reluctant localities is ludicrous.

This is not just a theoretical difference; Rothstein's empirics are faulty because he has to twist the facts to fit a bad theory. In order to make the case that the federal government imposed residential segregation, he cherry-picks examples of government agencies refusing to approve projects where white liberals were willing to live with black families or white developers wanted to build integrated housing. Yes, there were such instances, but they are notable precisely for being exceptional efforts to break through the color line.

In reality, the record of urban politics in the 20th century shows white people and their leaders getting the segregation they wanted with the help of local, state and federal governments. Not only were laws and regulations written and enforced with white preferences in mind, the consequences of governments not going along were clear. If whites didn't get the segregated neighborhoods they wanted, they were quick to protest, riot and resort to violence. Rothstein notes a few such cases but passes over them too glibly.^[6]

Furthermore, in telling the story of law and residential segregation, one cannot begin with public housing and zoning without first grasping the prior history of deed covenants, racial exclusion, and use restrictions reaching back to the 19th century, and without taking into account the power of the real estate industry as it developed in the early 20th century. Not only was racial segregation not new by the 1930s, it favored by upper class home owners and seen as the best business for an important sector of capital.

Deed covenants go back to the 1880s and grew out of the common law of nuisance. They were the first major way of protecting white and upper-class property from the intrusion of immigrants, industry and people of color. Covenants were built into the first large-scale developments of the 1900s and 1910s, such as Roland Park in Baltimore, the Country Club District in Kansas City, and St. Francis Woods in San Francisco. These were the work of the first "community builders", as Marc Weiss has dubbed them, who founded the powerful National Association of Real Estate Boards (NAREB), backed better planning, zoning and subdivision rules, and later created the Urban Institute. Most houses built before the 1960s still have such covenants on their deeds, even if they are now unenforceable.^[7]

Zoning goes back even farther. The first racially-targeted land use restrictions, which were aimed at the exclusion of Chinese laundries, appeared in the 1860s in Modesto and San Francisco. The reason developers and their upper class customers turned to zoning in the early 20th century was that deed covenants proved to be too piecemeal to protect their territories of privilege effectively. The first zoning laws were explicitly racial, but that was overturned by the US Supreme Court in 1917. It was only after the court, in the *Euclid v Ambler* decision of 1926, said that zoning was not an unfair taking of private property that the new, improved system of spatial ordering became universal among city governments. [8]

The *Euclid* decision points to another reason for separating industry, workers, pollution and other undesirables from the neighborhoods of the upper classes. Covenants and zoning were meant to protect class privilege, the single-family home and, above all, real estate values. Rothstein is wrong to dismiss these as mere excuses for racial segregation. He underestimates the power of America's commercial culture and the way the homes serve financial purposes of property owners. Not only are developers keen on profiting from land value appreciation, home owners always have one eye on house prices. [9]

Nearly everyone of importance in city-building and public policy in the early 20th century agreed on the desirability of racial segregation, whether it was from outright racism, for keeping the peace or upholding land values. [10] It wasn't just "white folks" in general but the entire real estate industry leading the way: bankers, builders, and brokers, plus all the supporting cast of architects, landscape architects, civil engineers, lawyers, and urban planners. Even the most progressive of urban reformers, such as Catherine Bauer, Clarence Stein, and Henry Wright, tolerated racial segregation in housing and urban development. [11]

The consequence of this consensus was that when the New Deal policies of public housing, mortgage rescues and federal mortgage insurance came along in the 1930s, they were following in a long-established tradition of racial segregation; they did not invent it. Furthermore, the laws creating key programs like the Home Owners' Loan Corporation (HOLC), the Federal Housing Administration (FHA) and Federal National Mortgage Association (Fannie Mae) were passed (and written) with the help of NAREB and the mortgage banking industry. The chief economist of NAREB, Homer Hoyt, wrote the regulations for the FHA that included redlining as a means of minimizing risk for lenders and investors. As Weiss has observed: "Since the mandate was to stabilize homeownership and reduce long-term insurance risk from a purely financial and actuarial perspective, redlining made economic sense, even if it was immoral as social policy". [12]

I have a further objection to *The Color of Law* in that Rothstein treats the New Deal as if Franklin Roosevelt and the New Dealers were just another bunch of racist white folks and that's all there is to it. The book even features FDR in the frontispiece, portraying him as central to the story of American racism. This is nonsense and a serious misrepresentation of the New Deal and what it tried to do for Americans. To begin with, most New Deal leaders, including Harold Ickes, Frances Perkins, Harry Hopkins and Eleanor Roosevelt, were profoundly *anti-racist*, and they made serious efforts to defy white supremacy and segregation. Moreover, they were pretty much the first federal officials to do so since Lincoln and Reconstruction.

As a result, many New Deal programs like the Civilian Conservation Corps (CCC), Works Progress Administration (WPA) and public housing (under the Public Works Administration and the US Housing Administration) were *not* segregated at the beginning. The CCC, for one, was gradually forced to segregate its camps due to local pressure from southern and rural communities. The WPA built thousands of integrated recreation facilities, including swimming pools, and there is ample photographic evidence of integrated WPA work teams, especially in service projects like sewing rooms, classrooms and clinics. The CCC and WPA employed over a million African Americans and other people of color, who were paid the same regardless of race. The New Dealers were well aware of the plight of African Americans and targeted them with programs for farm loans, housing, schooling and more. It is especially galling that Rothstein starts his book with an attack on public housing, which the New Deal tried to build in quantity for the first time in US history and which provided tens of thousands of new homes for people of color. Public housing has always been a pariah in American politics and Rothstein plays right into that prejudice. [13]

Needless to say, Roosevelt the man is not the same as the New Deal as a whole, and he should be judged on his own. FDR was a consummate politician who read the tenor of the times better than almost anyone else and was remarkably concerned about the plight of common people. He was neither racist nor particularly anti-racist (much to Eleanor's chagrin). Two of his worst decisions were the failure to back a federal anti-lynching law in the mid 1930s and the internment order for Japanese Americans in 1942. The former caved to Southern opinion to hold together the Democratic coalition in Congress and the latter to anti-Japanese sentiment and war hysteria on the West Coast. Roosevelt should be judged harshly on both counts, but this neither negates all his other contributions nor does it make the New Deal part of the seamless web of White Supremacy. [14]

To be sure, the New Deal was not the Civil Rights movement – which came a generation later – but nor was it just a handmaiden to the US racial order of the time. It tried to buck that order in many cases and fell in line with it in others; an overall judgement is neither black nor white. But to

condemn it from a position of juridical purity is ahistorical and misleading. While the New Deal's racial policies were seriously flawed, they played a significant role in nurturing the roots of the black liberation to come.^[15]

The upshot of Rothstein's perverse "hidden history" is a very public shaming of the New Deal, its leaders and its policies. This, too, conforms to popular conservative ideology that denigrates one of the most progressive moments in American history and government.^[16] Instead of this kind of whitewash, it is important to revisit the history of New Deal policies to see how and why it went wrong on race in cases such as Social Security, the National Labor Relations Act and housing policy, while still doing a great deal of good for ordinary Americans. Overall, the New Deal should be remembered as the time of the greatest federal effort in American history to support working people – millions of whom were not white.

A final complaint against Rothstein is that he only talks about racism in black and white, as if other people of color have not been its victims. It is a very East Coast view. Seen from the West Coast, the racial order has looked much different, and it was just as vicious in targeting Chinese, Japanese and Filipinos, among others. Rothstein may be correct that, overall, African Americans have suffered the most from White Supremacy, but one could give a good counter argument from the point of view of the genocide of native peoples. There is really no excuse for Rothstein's dismissive statement that "government-organized discrimination and even segregation of other groups, including Hispanics, Chinese and Japanese ...was of a lesser degree." (p. 233). The lack of a single mention of Asians, Chinese, or Indians/Native Americans in the index of *The Color of Law* is telling.^[17]

I want to end on the key point of where social change and racial progress comes from. The *Color of Law* is meant to educate us about the past, but in the end leaves us ignorant of how politics and power really work – which leaves us unable to see how to make the future look different. American racism and the racial order are not an unmovable barrier and they have been pushed back considerably since the middle of the 20th century. How was that done? Not by correcting the erroneous legal reasoning of the Supreme Court, as Rothstein seems to think. The final chapter of the book on "fixes" for segregation is all about law and policy, but taking those in isolation just won't do the job.

Major social change never comes without a fight and massive popular struggles that have brought about improvements in the conditions of working people and people of color over time. That is how the Civil Right movement arose in the interwar period and finally triumphed in the realm of law and policy in the 1960s, after years of hard work and mobilization. Good policies can help, of course, as they did during the New Deal or the 1960s, but a fundamental social revolution against White Supremacy can only come through political upheaval and conflict, led from below. Rothstein has almost nothing to say about any of that.

[1] Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*. New York: WW Norton. 2017

[2] Where to start? Some of my favorites are WEB Dubois, 1935. *Black Reconstruction*. New York: Atheneum Press; St. Clair Drake and Horace Cayton. 1970. *Black Metropolis: A Study Of Negro Life In A Northern City*. New York: Harcourt, Brace & World; Robert Blauner, 1972. *Racial Oppression in America*. New York: Harper and Row; Michael Omi and Howard Winant. 1986. *Racial Formation in the United States*. New York: Routledge & Kegan Paul; and Audrey Smedley. 1993. *Race in North America: Origin and Evolution of a Worldview*. Boulder: Westview Press.

[3] See e.g., John Rawls, 1971. *A Theory of Justice*. Cambridge, MA: Harvard University Press.

[4] For an interesting discussion of this, see Migdal, Joel. 2001. *State in Society: Studying How States and Societies Transform and Constitute One Another*. Cambridge, UK: Cambridge University Press.

[5] For a progressive analysis of segregation, see George Lipsitz. 2011. *How Racism Takes Place*. Philadelphia: Temple University Press.

[6] For a good new history of residential segregation, see Andrea Gibbons, 2018. *City of Segregation: One Hundred Years of Struggle for Housing in Los Angeles*. London: Verso.

[7] On covenants, see Robert Fogelson, 2005. *Bourgeois Nightmares: Suburbia, 1870-1930*. New Haven: Yale University Press. On NAREB, see Marc Weiss, 1987. *The Rise of the Community Builders: The American Real Estate Industry and Urban Land Planning*. New York: Columbia University Press; Jeffrey Hornstein, 2005. *A Nation of Realtors: A Cultural History of the Twentieth-Century American Middle Class*. Durham: Duke University Press.

[8] On zoning, see Sonia Hirt, 2014. *Zoned in the USA: The Origins and Implications of American Land-Use Regulation*. Ithaca NY: Cornell University Press.

[9] To say this is not to dismiss the power of White racism but to say that it was not the only force at work in the spatial ordering of US cities. One urban historian who understands both the racial and the financial side of segregation, even for working class home owners, is David Freund, 2007.

Colored Property: State Policy and White Racial Politics in Suburban America. Chicago: University of Chicago Press.

[10] The economic rationality of racial segregation and land use regulation was backed by the best land economists of the time, led by Richard Ely. Marc Weiss, 1989. Richard T. Ely and the contribution of economic research to national housing policy, 1920-1940. *Urban Studies*. 26: 115-126.

[11] Thanks to Marc Weiss for pointing this out to me in a personal communication, March 20, 2019.

[12] Weiss, personal communication, March 18, 2019. See especially Weiss, 1987. *The Community Builders*.

[13] For further evidence of New Deal inclusion, see the work of The Living New Deal project at: <https://livingnewdeal.org/what-was-the-new-deal/new-deal-inclusion/>

[14] On dealing with the Southern Democrats, see Katznelson, Ira. 2013. *Fear Itself: The New Deal and the Origins of Our Time*. New York: Liveright Publishing Corporation. On anti-Japanese agitation, see Roger Daniels, 1977. *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion*. Berkeley: University of California Press.

[15] Thomas Sugrue, 2008. *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North*. New York: Random House.

[16] A good example of using bad historical revisionism to disparage the New Deal is Amity Shlaes, 2007. *The Forgotten Man: A New History of the Great Depression*. New York: HarperCollins.

[17] On California's racial order, a good starting point is Tomas Almaguer, 1994. *Racial Fault Lines: The Historical Origins of White Supremacy in California*. Berkeley: University of California Press.

Richard Walker is Professor Emeritus of Geography at the University of California, Berkeley, and Director of the Living New Deal project. A shorter version of this article appears in **Jacobin Magazine** as [The New Deal Didn't Create Segregation](#).

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