Education, Justice, and Democracy

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CHAPTER 8

Racial Segregation and Black Student Achievement

Richard Rothstein

Introduction

Policymakers typically attempt to address the black-white achievement gap by school reform, notwithstanding consistent research findings that the performance of students in different schools varies less with school quality than with family, community, health, and other socioeconomic inequalities that bring disadvantaged children in general, and African American children in particular, to school less ready to learn, on average, than their middle-class and white peers.

Impediments to learning, including less sophisticated home literacy environments, lack of opportunity for high-quality early childhood care and education, poorer health and greater exposure to allergens and lead, less adequate housing and higher residential mobility, greater economic stress, more exposure to violence and crime, fewer constructive out-of-school activities, and fewer successful adult role models, all are exacerbated when large numbers of disadvantaged children are concentrated in racially isolated low-income neighborhoods with limited opportunities for exit—in short, ghettos.

Children attending ghetto schools less frequently benefit from positive influence from academic peers . They also suffer because of other children's learning impediments: for example, in schools with large proportions of mobile or absent students, the learning of stable and healthy students is also impeded because teachers must repeat material previously taught.

Children attending ghetto schools are less likely to be comfortable with standard English if their verbal interaction outside the classroom is

in subcultural dialect; they are then less prepared to participate as adults in the majority culture and economy. They will be excluded from social networks that accelerate access to and success in the broader world of work.[1]

Several school districts have implemented voluntary racial integration programs, usually involving busing black students to schools with predominantly white enrollment. Others attempt to camouflage racial integration policies by mixing students of different family income backgrounds.[2] These integration methods, however, are not practical for the most severely disadvantaged black children, who live in ghettos geographically distant from white communities.

Busing also has negative consequences. It undermines community attachment to neighborhood schools and limits parents' ability to be involved in children's schooling. Teachers and school leaders, especially those serving disadvantaged children, often go to great lengths to encourage parents to volunteer in schools, believing that students' achievement and behavior improves with greater parental attachment to schooling,[3] a belief confirmed by research.[4] Low-income parents in particular have great difficulty becoming involved in schools outside their neighborhoods. They may not have transportation to distant schools, and their work schedules or caring for other children may make involvement difficult in any event, and too difficult when schools are not nearby.

Efforts to organize parents to press school leaders for educational improvements also depend on a community relationship between parents and their children's schools.[5] The exercise of "voice" to effect improvement is inhibited, if not wholly prevented, when schools are far from children's and parents' residences.[6]

Therefore, effective school integration policy requires reducing the residential isolation of low-income black families. Busing can expose children to the positive influence of diversity, but only residential integration can promote this influence along with the positive effects of voice and participation. The benefits of residential integration make it a compelling public interest. But it is less rarely acknowledged that current residential patterns of racial isolation are unconstitutional products of state action. This chapter illustrates that claim.

Courts in the United States are at present unsympathetic to such arguments, and the near-term futility of making them has, unfortunately, dissuaded opponents of residential racial segregation from insisting it is unconstitutional. Instead, civil rights advocates often accept that neighborhoods, and therefore schools, are now segregated de facto, not de jure;

they urge that courts permit racially explicit integration programs only because of their academic benefits to both black and white students, not from constitutional obligation.

However long the hostility of courts to racial integration persists, the legislative and executive branches are also sworn to uphold the Constitution. Awareness of how state action has produced contemporary racial segregation should spur political as well as judicial officials to take remedial action.

In 2007 the Supreme Court found that school integration policies in Louisville, Kentucky, and Seattle, Washington, were unconstitutional because they considered students' race in assigning them to schools. A majority of justices agreed that government has a "compelling" interest in fostering school integration for its academic benefits. But a majority also concluded that the plans could not withstand "strict scrutiny" because they were not designed to remedy specific prior acts of racial discrimination by government.[7]

The Court acknowledged that racially identifiable housing patterns in these cities might result from "societal discrimination," but remedying discrimination "not traceable to [government's] own actions" can never justify racial classifications of students. "The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence. . . . 'Where [racial imbalance] is a product not of state action but of private choices, it does not have constitutional implications.' "

In 1974 Justice Potter Stewart asserted that black students were concentrated in Detroit, not spread throughout its suburbs, because of "unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears."[8] This is now the consensus view of American jurisprudence, reflected in the Court's Louisville-Seattle opinion.

Yet causes of contemporary segregation are in fact both known and knowable. Schools are segregated mostly because their neighborhoods are segregated, and these neighborhoods have been segregated by a century-long series of federal, state, and local policies to establish a racially segregated nation.

Two years before Justice Stewart's claim of ignorance, President Richard Nixon's annual housing report expressed a more sophisticated view. "Federal housing programs over the years," it said, "have contributed . . . to growing separation of the races, and to the concentration of the poor in

decaying urban cities. . . . [Federal housing] programs have contributed to these problems and in many cases intensified them."[9]

In some cases federal, state, and local policies to create and perpetuate segregation have been racially explicit. In other cases racial results were disguised but intended. In others, disparate racial impacts should have been apparent to policymakers, were apparent to some, and should have been avoided. In yet others, unintended racial consequences became apparent after policies were implemented, but not too late to take remedial action.

Over time, federal courts' views have shifted—first in one direction, then another, then back again—regarding whether constitutional violations require racially discriminatory intent, racially disparate impact, or both. But although proof of violations may not meet the narrow standards of contemporary federal justices, policies of the federal, state, and local governments have violated the civil rights of African Americans and in so doing created a segregated society.

In cases where the Court has belatedly banned segregationist policies, these policies did not become unconstitutional only when the Court so decreed. They were unconstitutional from their inception. A finding of unconstitutionality may preclude continuing such policies, but it does not itself undo their ongoing effects. Additional remedial action is constitutionally required, whether by court order or by legislative or executive action.

The courts, Congress, presidential administrations, and scholars have failed to devote serious attention to considering how long the effects of unconstitutional segregationist policies endure. Consider black communities that became rooted in ghettos created by ordinances prohibiting blacks from living elsewhere. Can these neighborhoods be deemed desegregated immediately on repeal of such ordinances? Surely not. Positive government action would be required (for example, by subsidizing only black residents of the affected metropolitan area to purchase homes in previously forbidden neighborhoods). But would such remedial policies continue to be constitutionally required a generation later? Two generations later? There can be no precise answer to such questions, but reasonable answers are possible that take account both of the slow pace with which social change can occur and of the need to place an end limit on public remedies.

In 1883, less than two decades after the abolition of slavery, the Supreme Court ruled that racial discrimination by privately owned theaters, inns, and similar facilities was not unconstitutional because the exclusions

of blacks were private acts, not state action regulated by the Fourteenth Amendment. Notwithstanding that these private acts were so pervasive that they effectively constituted a conspiracy to perpetuate the characteristics of slavery, Justice Joseph Bradley wrote for the court:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[10]

In the context of Reconstruction's wane, Justice Bradley's opinion was perverse or naive, but in principle his sentiment was correct. "There must be some stage" when remedial action is no longer justified, and the determination of what that stage should be is a challenge for sociologists and urban planners, who must judge reasonable rates of community change. But when we consider the full panoply of public policies pursued to segregate the nation, and their extensive duration, it seems reasonable to assume that the period needed to undo segregationist policies has, even now, not yet expired.

Judging the time needed to undo segregation, and the policies required, is distinct from the issue of reparations for past injustice, advocated by some. This chapter is concerned with measures needed to undo ongoing effects of segregationist policies—how to provide the next generation of children with the opportunity for integrated education, not how to compensate past generations for the harm of segregated education.

A fear of confusing desegregation with reparations, however, has been one reason the Court and scholars have been reluctant to consider necessary remedies, and it has partially motivated the Court's increasing conservatism in affirmative action cases: the Court has warned, for example, against a "mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[11] This appropriate caution can be carried too far. The success of past policies to create racial ghettos in American metropolitan communities may be precisely "unmeasurable," but historians and social scientists can clarify it sufficiently to justify reasonable active policies to undo this success.

Amnesia about the causes of residential racial segregation in American cities, whether deliberate or careless, has permitted the US Supreme Court, as well as policymakers and advocates, to adopt a formalistic and

ahistorical interpretation of the equality requirements of the Fourteenth Amendment, whose equal protection language was drafted specifically to complete the effective abolition of African American slavery. While the Thirteenth Amendment abolished slavery itself, the Fourteenth aimed to abolish all middle ground between slavery and full citizenship and participation in American society. Its targets were any government actions that impeded the path to full equality in all walks of American life.

Yet in the hands of contemporary opinion, this constitutional guarantee of a path to equality for African Americans has been perverted into a requirement for "color blindness" that obscures 150 years of such government-sponsored impediments. With government's role obscured, it is easy to conclude that African Americans' failure to achieve equality is attributable either to mysterious demographic and economic forces or to their own choices to self-segregate, perhaps abetted by white private citizens operating entirely independent of the governments they controlled. In such circumstances, "equality" is perversely deemed to demand the absence of government initiative to undo inequality. Yet, in truth, the most powerful enduring actions to ensure that African Americans could not travel the full path from slavery to full equality have been those of government: federal, state, and local.

There is today no widespread acknowledgment of government responsibility for contemporary racial segregation because historians, sociologists, and economists have, with rare exceptions,[12] focused on particular aspects of segregationist policy—either mortgage lending, or public housing construction, or highway routing, or police practices, or discriminatory provision of services, and so on. Government's responsibility for ongoing segregation, however, becomes unavoidably clear only when these policies are considered in combination, as they interact with and reinforce one another to create a state-established system of racial separation.

Racial Zoning

In the nineteenth century, both before and after the Civil War, neighborhoods in the North and South were not as segregated as they later became.[13] Partly this was because many black adults worked as servants in the homes of middle- and upper-class whites, and the propriety of servants' living close to their employers was unquestioned.

Early in the twentieth century, however, as black populations grew and the Jim Crow reaction to Reconstruction accelerated,[14] municipalities,

particularly those in border states, adopted zoning laws that restricted blacks to certain blocks or neighborhoods and prohibited them from others. The first such ordinance was adopted in 1910 in Baltimore, followed by Winston-Salem, Birmingham, Atlanta, Richmond, St. Louis, Dallas, and other cities.[15]

In 1917 the Supreme Court overturned the racial zoning ordinance of Louisville, Kentucky.[16] The case illustrates how far neighborhoods were integrated before twentieth-century segregation. Louisville's ordinance was designed to segregate gradually, without a radical uprooting of existing integrated blocks. The ordinance protected the right to remain in integrated neighborhoods of any African Americans who previously lived there, prohibiting only future sales or rentals to blacks on any block where a majority of residents were white. An exception was made for servants, who could continue to move near their employers. The case involved a black man's attempt to move to an integrated block where there were already two black households and eight white ones.

Although the Court found that the ordinance violated the Fourteenth Amendment, enforcement of similar ordinances continued after the decision. In 1927 the Court overturned a New Orleans law that permitted blacks to move to a white neighborhood only if a majority of white residents voted permission.[17] Birmingham continued to enforce its racial zoning ordinance until 1949; the Palm Beach ordinance was still in effect in 1958.[18]

Throughout the nation, many towns and suburbs excluded African Americans entirely by prohibiting their staying overnight. In some, black residents were forcibly expelled (or intimidated into fleeing, often by a lynching) after segregation intensified in the early twentieth century, and then signs were posted warning blacks away. Such signs, typically reading something like, "Nigger, Don't Let the Sun Go Down on You in [Name of Town]" have been documented in over 150 towns and suburbs in thirty-one states. As late as 1998, the central Illinois town of Villa Grove sounded a siren at 6:00 every evening to warn blacks to leave. A sign common in border state towns depicted a black mule, signifying that African Americans must leave before dark. Some such signs remained posted as recently as 2003. Although today the signs themselves are rare, many communities that expelled black residents by force in the early twentieth century, then subsequently prohibited them from remaining overnight, have preserved their acquired all-white status to the present.[19]

Many now do so by zoning ordinances, not explicitly racial, that exclude low-income persons by requiring minimum acreage and square footage or

by prohibiting multiunit structures. In 1977 the Supreme Court upheld zoning ordinances that barred low-income housing from communities, ruling that only dispositive racially discriminatory intent, not racially disparate impact, was unconstitutional.[20]

The Court's judgment that disparate impact alone is insufficient to justify a finding of unconstitutionality was reasonable. Virtually any economic legislation will have a disparate impact on blacks. Yet it is often impossible to disentangle racial from nonracial motives when communities attempt to create or preserve an exclusive middle-class environment. In some cases some community activists' racial bias coexists with others' class-based motivation.[21]

Nothing, however, prevents national or state legislatures from requiring inclusionary zoning to remedy the broader pattern of state-sponsored segregation, or simply as a matter of public land use policy.

Restrictive Covenants

More subtle than racial zoning or police-enforced policies to bar African Americans completely were restrictive covenants—private contracts either attached to or independent of land deeds, prohibiting future sales of property to nonwhites. Covenants began to spread about 1917, perhaps to evade the Court's Louisville zoning decision.[22] In 1926 the Supreme Court upheld covenants' legality and enforceability.[23]

Restrictive covenants were actively promoted by the federal government. The Federal Housing Administration's 1938 Underwriting Manual gave these instructions to bank appraisers who hoped to qualify loans for FHA insurance:

> Generally, a high rating should be given only where adequate and enforced zoning regulations exist or where effective restrictive covenants are recorded against the entire tract. . . . [D]eed restrictions should be imposed upon all land in the immediate environment of the subject location. . . . Recommended restrictions should include . . . [p]rohibition of the occupancy of properties except by the race for which they are intended.[24]

Restrictive covenants became commonplace in Chicago, Los Angeles, Washington, Columbus, Detroit, and other cities, attached to sale agreements in new subdivisions. In established areas, neighborhood associa-

tions formed to enlist (and pressure) existing residents to sign. By 1944 in Chicago, 175 white neighborhood associations actively enforced covenants that barred sales or rentals to blacks.[25] Between 1943 and 1965, 192 such associations were organized in Detroit.[26]

A 1947 survey of over three hundred housing developments in Queens, Nassau, and Westchester Counties, New York, found that 80 percent of developments of seventy-five units or more, and 48 percent of developments of twenty units or more, had covenants barring black purchasers or renters.[27] Deeds cited the FHA rule as requiring the restriction. Levittown, a 1947 Nassau County development of 17,500 homes, is considered by social historians to be a visionary solution to housing problems of returning war veterans, but developer William Levitt refused sales to blacks, and each contract included a provision prohibiting such resales in the future.[28]

The US Commission on Civil Rights concluded that the FHA had been a "powerful enforcer" of restrictive covenants and that nationwide segregation was "due *in large part* to racially discriminatory FHA policies in effect during the post–World War II housing boom."[29]

In 1948 the Supreme Court, reversing its 1926 decision, ruled that restrictive covenants could not legally be enforced by state or municipal authorities.[30] Compliance was slow. In 1950 the FHA announced it would no longer insure mortgages with new restrictive covenants, but it would continue to insure properties with preexisting covenants. The FHA also continued to insure properties with covenants that were not explicitly racial but that required sale approvals by neighbors or community boards.[31]

Although the 1948 ruling prohibited states from enforcing racially restrictive covenants, not until 1972 did a lower federal court rule that the covenants themselves were illegal and could not be recorded.[32] Suggesting how long it make take for the effects of restrictive covenants to recede, by 2000 Levittown was still only 0.5 percent black, compared with 10 percent for Nassau County as a whole and 20 percent for the adjacent county of Queens.[33]

Public Housing

Federal policy enforced segregation in public housing programs initiated during the Depression, World War II, and the war's aftermath. Harold Ickes, administrator of the New Deal's National Industrial Recovery Act, established a "neighborhood composition rule"—public housing projects

could not alter the racial composition of their neighborhoods.[34] In 1944 Ickes's successor as head of the National Housing Agency stated that little could be done to provide housing for black families because no open sites were available in neighborhoods they traditionally occupied.[35]

In 1949 the Senate and House each considered and defeated proposed amendments to the Housing Act that would have prohibited segregation and racial discrimination in federally funded public housing programs.[36]

Local governments administering federal housing funds maintained similar policies. In 1945 Detroit mayor Edward Jeffries's reelection campaign warned white voters that housing projects with black residents would be located in their neighborhoods if his opponent was elected. In 1948–49, the Detroit city council held hearings on twelve proposed public housing projects in outlying (predominantly white) areas. Jeffries's successor, Albert Cobo, vetoed all twelve; only housing in predominantly black areas was approved.[37]

In 1971 construction of 120 low-rise townhouses began in Whitman Park, an all-white neighborhood of Philadelphia. (The neighborhood had once been integrated, but land clearance for the proposed public housing over a decade earlier had displaced all black residents.) A formally organized white neighborhood association, the Whitman Area Improvement Council, demonstrated at the site, blocking construction workers and equipment. Police declined to intervene, and when the company obtained an injunction against the demonstrators, police refused to enforce it. A state judge then barred the construction company from returning to the site, and Philadelphia mayor James Tate ordered the work to cease.

African Americans awaiting public housing then filed suit. As the suit dragged on, a new mayor, Frank Rizzo, stated he would make no compromise because "people in the area felt that black people would be moving into the area if public housing were built." He referred to public housing as "black housing" and vowed he would not permit it in "white neighborhoods."

Meanwhile, the Department of Housing and Urban Development (HUD) rejected requests to pressure Philadelphia by withholding other federal funds. In 1977 a federal appeals court ordered the city to permit construction to resume. The neighborhood association then delayed construction further by demanding new environmental impact studies; the Whitman Park project eventually was completed in 1982, nearly a quarter century after black residents' homes had been demolished to clear the land.[38]

In 1976 the Supreme Court found that the Chicago Housing Authority (CHA), with the complicity of federal housing agencies, had unconsti-

tutionally selected sites to maintain Chicago's segregated pattern.[39] The Court ordered HUD to henceforth locate housing in predominantly white areas of Chicago and its suburbs. The HUD—CHA response was to cease building public housing altogether. No units have been constructed in Chicago since the Court's decision. Instead, the CHA now issues Section 8 housing vouchers, but only a small number have been used to place black families in predominantly white communities.

In the years leading up to the final ruling, the CHA and HUD simply refused to comply with settlement agreements and lower court decisions. In 1971, for example, CHA officials proposed sites for new housing that included some predominantly white areas. Unlike the high-rises it had built to concentrate blacks in the ghetto, these proposals were for low-rise, scattered-site housing. Still Mayor Richard J. Daley rejected them, saying that public housing should go only "where this kind of housing is most needed and accepted."[40]

Faced with similar resistance elsewhere, federal authorities acceded to segregationist demands. In 1970 HUD secretary George Romney proposed public housing units for a Detroit suburb, but the attorney general ordered him to withdraw his initiative. President Nixon stated, "I believe that forced integration of the suburbs is not in the national interest" and issued a formal policy vowing that "this administration will not attempt to impose federally assisted housing upon any community." Later, President Gerald Ford's solicitor general expressed the government's opposition (in the Chicago case) to placing public housing in white communities: "There will be an enormous practical impact on innocent communities who have to bear the burden of the housing, who will have to house a plaintiff class from Chicago, which they wronged in no way."[41] Thus the federal government described nondiscriminatory housing policy as punishment visited on the innocent.

By 1970, public housing authorities had built 250,000 units in the nation's twenty-four largest metropolitan areas. Of these only one project had been constructed outside a central city, a Cincinnati project where seventy-six low-rent units were built in an existing African American suburban enclave.[42] In 1984 a team of investigative reporters visited federally funded public housing projects in forty-seven cities nationwide. The reporters found that the nation's nearly ten million public housing residents were almost always segregated by race and that every predominantly white-occupied project had facilities, amenities, services, and maintenance superior to those of predominantly black-occupied projects.[43]

Home Purchases

Where no restrictive covenants were attached to deeds, the FHA still refused to insure mortgage loans to black applicants for purchase of homes in white neighborhoods. The FHA's redlining rules made blacks ineligible for insurance in white areas, made both blacks and whites ineligible in integrated areas, and permitted insurance of only a very few mortgages to blacks in predominantly black areas. This FHA policy went beyond other New Deal housing programs that, as noted above, would place federally sponsored integrated public housing in neighborhoods that were already integrated. In Chicago, for example, one federally sponsored public housing project, the Jane Addams Homes, was open to both black and white tenants because the neighborhood was already integrated.[44]

When the Veterans Administration was authorized by the GI Bill also to insure mortgages, it adopted the FHA's redlining policies. With most residential mortgages insured by either the FHA or the VA, these federal rules are probably more responsible than any other factor for metropolitan segregation, with whites in federally insured homes in the suburbs and blacks crowded into central cities with few opportunities for escape.

FHA policy not only excluded blacks from suburbs but impoverished the urban ghetto population. In many cities, black employment rates in urban industry were high in the 1950s and 1960s, but because African Americans could not buy homes in the suburbs as did newly secure white workers, blacks' desire to escape crowded urban conditions spurred their demand for single-family or duplex homes on the ghetto's outskirts. Because these black middle-class families were a captive market with limited alternatives, the homes were priced far above their otherwise fair market values.

Typically, speculators and real estate agents colluded in blockbusting, a scheme in which speculators purchased homes in borderline black-white areas, rented or sold the homes to black families, persuaded white families already living in these areas that their neighborhoods were turning into black slums and that prices would soon fall precipitously, then purchased the panicked whites' homes at bargain prices. Typical blockbusters' tactics included hiring black women to push baby carriages through white neighborhoods, hiring black men to drive cars through white neighborhoods with radios blasting, and making random telephone calls to homes in white neighborhoods asking to speak to "Johnnie Mae."[45]

Because black families desperate for housing could not qualify for mortgages under FHA policy, the speculators sold these newly acquired properties to blacks at inflated prices, expanding the ghetto. Speculators sold these homes on an installment plan where no equity accumulated from the black purchasers' down payments or monthly payments. These "contract" sales typically provided that ownership would transfer to purchasers after fifteen or twenty years, but if a single monthly payment was late, purchasers could be evicted, having accumulated no equity. The inflated prices made it all the more likely that payments would be late. Owner-speculators could then resell the homes to new contract buyers.

The FHA redlining policy necessitated the contract sale system for black homeowners unable to obtain conventional mortgages, and the system created the conditions for neighborhood deterioration. A contemporary author whose father was a Chicago attorney caught up in the system described it like this:

> Because black contract buyers knew how easily they could lose their homes, they struggled to make their inflated monthly payments. Husbands and wives both worked double shifts. They neglected basic maintenance. They subdivided their apartments, crammed in extra tenants and, when possible, charged their tenants hefty rents. . . .
>
> White people observed that their new black neighbors overcrowded and neglected their properties. Overcrowded neighborhoods meant overcrowded schools; in Chicago, officials responded by "double-shifting" the students (half attending in the morning, half in the afternoon). Children were deprived of a full day of schooling and left to fend for themselves in the after-school hours. These conditions helped fuel the rise of gangs, which in turn terrorized shop owners and residents alike.
>
> In the end, whites fled these neighborhoods, not only because of the influx of black families, but also because they were upset about overcrowding, decaying schools and crime. They also understood that the longer they stayed, the less their property would be worth. But black contract buyers did not have the option of leaving a declining neighborhood before their properties were paid for in full—if they did, they would lose everything they had invested in that property to date. Whites could leave—blacks had to stay.[46]

This contract system was widespread not only in Chicago, but in Baltimore, Cincinnati, Detroit, Washington, DC, and elsewhere. From 1958 to 1961, when Chicago's West Side neighborhood of Lawndale was changing

from predominantly white to predominantly black, over half the homes there were purchased on contract, as was approximately 85 percent of all property sold to blacks in Chicago.[47]

The FHA's refusal to insure conventional loans to black home purchasers was thus an important cause not only of racial segregation but of black impoverishment. Federal redlining policy, and the resulting contract system, made it impossible for black families to accumulate wealth—as white families with similar incomes could do—making it all the more difficult for them to break out of isolated ghettos once the FHA abandoned redlining in the mid-1960s.

Licensed Real Estate Agents

Real estate agents have been licensed by state governments since the 1920s. Licenses are difficult to obtain, requiring courses and study to pass an examination. State authorities can, and do, revoke licenses for violations of the extensive regulations that govern agents' behavior. When states license real estate agents whose practices create or maintain segregation, the states effectively sanction these practices.

State-licensed real estate agents have consistently violated black home buyers' rights, as in the blockbusting practices described above that not only exploited white and black buyers alike, but ensured that border areas surrounding black ghettos could not remain integrated.

The 1928 Code of Ethics of the National Association of Realtors stated: "A realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in that neighborhood." In 1939 the association published a guide for agents illustrating the types of persons to whom homes in white neighborhoods should not be sold, such as "a colored man of means who was giving his children a college education and thought they were entitled to live among whites."[48] Blockbusting, of course, was a clear violation of industry rules, but a violation in support of the rules' underlying segregationist purpose. Realtors' norms were logical applications of the FHA's redlining policy.

The 1968 Fair Housing Act made racial discrimination in housing and the Realtors' rules unlawful (although discrimination was already a violation of constitutional rights when practiced by state-licensed agents). Yet enforcement of the act's prohibitions has been weak. It has mostly fallen

to nongovernment civil rights organizations to identify discriminatory practices, usually by sending matched black and white teams of investigators to real estate offices, posing as potential buyers. Testers today continue to identify commonplace segregationist real estate tactics: steering white buyers to homes in predominantly white communities and black buyers to homes in predominantly black communities; failing to show blacks properties that are shown to whites; making disparaging comments to prospective buyers considering purchases in integrated or other-race communities; failing to follow up on phone calls or visits from prospective black purchasers, and similar practices.

Bank Lending and Federal Mortgage Guarantees

As real estate agents are licensed and tightly regulated, banks are even more so. Redlining by both state and federally chartered banks continued long after the VA and FHA ceased requiring it. A study of bank lending procedures done by the Federal Reserve Bank of Boston in 1990 found that area banks discriminated against minority borrowers relative to similarly qualified white borrowers.[49]

Recent discriminatory activity by the federally regulated banking sector has had a devastating economic impact on the black community, increasing its segregation. During the housing bubble that began in the late 1990s and continued through 2007, banks exploited African American home buyers and homeowners by charging them higher interest rates than similarly situated whites and by aggressively marketing exploitative financial products (known as subprime loans) to African Americans who were misled about their costs. The Department of Justice concluded that "the lenders who peddled the most toxic loans targeted [segregated] communities,"[50] but there was little or no effort at enforcement when the practices were ongoing.

The result has been a high rate of foreclosure and home loss in predominantly African American communities, greater than the rate in predominantly white communities. When a community has a high foreclosure rate, the values of all homes in the community decline, largely because foreclosed homes are vacant for extended periods and then poorly maintained by banks, casting a pall over neighboring properties. Empty homes invite vandalism and crime. Each foreclosure causes a decline of about 1 percent in the value of every other home within an eighth of a mile.[51]

When an African American family in a predominantly black community loses its home in foreclosure, its capital accumulation is reversed, and future opportunities to move to a more integrated suburb are lost.[52] A high African American foreclosure rate can reinforce racial stereotypes held by whites and make them less willing to remain in an integrated neighborhood for fear it will deteriorate as well.

Legitimate subprime loans were designed for higher-risk borrowers, with higher interest rates to offset the risk. But when banks marketed these loans to unsophisticated borrowers, they structured them as adjustable rate products, with low initial "teaser" rates and unadvertised much higher rates later, usually after two years. When the higher rates kicked in, borrowers were frequently unable to make payments, and foreclosure followed. Subprime loans also characteristically carried high prepayment penalties to prevent borrowers from refinancing to a prime loan with a lower rate when their financial situation improved or interest rates declined. Some subprime loans also had negative amortization—requirements for initial monthly payments that were lower than needed to cover interest costs, with the difference then added to the outstanding principal.[53]

Banks marketing loans to unsophisticated borrowers also pressured them to refinance unnecessarily, charged excessive closing costs, and ignored traditional underwriting criteria regarding the borrowers' ability to repay. Because of regulators' failure to ensure market transparency, banks had little interest in protecting themselves against borrowers' defaults because they could easily sell the loans on the secondary market. There speculators sold them, in turn, to unsuspecting investors who had no reason to mistrust rating agencies' judgment that the loans' prices on the secondary market reflected their relative safety.

So long as home prices continued to rise, borrowers with subprime loans could continually refinance at new low teaser rates (though with new closing costs) and avoid default. But, as is well known, once the bubble burst, the teaser rates disappeared and the rate of foreclosures climbed.

By 2002, 25 percent of all subprime loans had been made to African Americans, who were about three times as likely to have them as similarly qualified whites.[54] In Buffalo, New York, the most extreme case, three-quarters of all loans to African Americans were subprime; in Chicago, borrowers buying homes in predominantly African American census tracts were four times as likely to have a subprime loan as borrowers in predominantly white census tracts.[55]

Regulatory failure by the Federal Reserve, the Office of the Comptroller of the Currency, and the Department of Housing and Urban Develop-

ment, as well as the deep involvement of the quasi-public Fannie Mae and Freddie Mac,[56] thus made government complicit in this exacerbation of segregation. By 2008, 55 percent of black mortgage holders nationwide had subprime loans, compared with 17 percent of white mortgage holders.[57] Black borrowers were more likely to have loans with high rates and prepayment penalties than whites with similar characteristics.[58] The disparity was greatest in more segregated communities.[59]

A 2005 survey by the Federal Reserve found that nearly one-quarter of higher-income black borrowers had subprime mortgages, four times the rate of higher-income white borrowers. This is further indirect evidence that federally regulated lenders and brokers specializing in subprime lending probably targeted predominantly black communities.[60]

About 50 percent of all borrowers with subprime loans would have qualified for lower-rate conventional loans.[61] Typically, brokers received a bonus for steering borrowers (disproportionately but not exclusively African American) to subprime loans even when they qualified for conventional rates. The bonus, called a "yield spread premium" (YSP), was based on the difference between the lowest rate a borrower qualified for and the rate actually charged.

The state of Illinois and the cities of Baltimore and Memphis have sued one bank, Wells Fargo, claiming that their jurisdictions lost substantial tax revenues because epidemics of foreclosures resulting from discriminatory subprime lending contributed to the collapse of assessed value in segregated communities. One bank employee testified she was instructed to solicit borrowers in heavily African American zip codes because residents there "aren't so savvy." Another testified that bank officers referred to subprime loans as "ghetto loans."[62]

State-Sanctioned Violence and Discriminatory Policing

State and local governments used force to preserve residential segregation in two ways: by failing to protect black families from violence (or tacitly encouraging such violence) when these families have attempted to move to predominantly white neighborhoods, and by police harassment of black motorists or pedestrians who enter predominantly white neighborhoods.

I noted above that Philadelphia police refused to protect the construction of public housing in a white neighborhood. Most police inaction (or inadequate action) has involved failure to protect black families moving to white neighborhoods from more serious violence—firebombings,

shootings, rock throwing, assaults, and vandalism. Such incidents numbered in the thousands. From mid-1944 to mid-1946, there were forty-six firebombings of the homes of blacks in white communities bordering Chicago's African American ghettos.[63] Similar violence took place in Louisville, Atlanta, Cleveland, Cincinnati, Dallas, Miami, Los Angeles, and elsewhere.[64] In Detroit alone there were more than two hundred such incidents in the two decades following World War II.[65]

In 1942 the Federal Works Agency built a Detroit housing project for black workers. Because they felt it was too close to their white neighborhood, two hundred white demonstrators blocked black families from moving in. Police refused to intervene, and a riot ensued. Police made little effort to protect the black movers; of approximately one hundred arrests during the riot, only three were of whites. Of the thirty-eight people hospitalized, only five were white.[66]

In 1964 a white civil rights activist in Chicago mayor Richard J. Daley's home neighborhood rented an apartment to African American college students. A mob gathered and pelted the building with rocks. Police entered the apartment, removed the students' belongings, and told the students on their return from school that they had been evicted.[67]

Leaders of violent anti-integration mobs, often easily identified leaders of neighborhood organizations, were rarely prosecuted. A 1925 mob that threatened to firebomb the home of a black family who had moved into a previously all-white Detroit neighborhood numbered five thousand. Mobs that gathered to prevent blacks from moving into white neighborhoods in Chicago in 1947 and 1951 were equally large.[68]

A US Senate committee report, considering the 1968 Fair Housing Law, noted that local officials frequently failed to prosecute racial violence intended to maintain segregation and concluded that "acts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights."[69]

Move-in violence has continued more recently. In 1991 the Justice Department took jurisdiction in a case involving white cross-burners who attempted to drive black families out of a predominantly white area of Dubuque, Iowa, after state and local prosecutors made only token efforts at prosecution. In 1998 black residents of a housing project in a white neighborhood of Boston sued the city for failing to protect them from racial violence and harassment.[70]

Move-in violence not only has affected black pioneers subjected to such incidents, its chief impact is to intimidate other African Americans from

attempting to integrate neighborhoods. Survey data reporting that black respondents prefer to live in predominantly black neighborhoods more likely result from this history than from black preference for self-segregation.

Discriminatory Provision of Municipal Services

Segregation has been exacerbated by municipalities that have provided fewer and less adequate services to neighborhoods where black residents predominate. Those neighborhoods then deteriorate, causing a loss of property value and keeping black families from accumulating equity to move to predominantly white neighborhoods or suburbs. The deterioration is also a disincentive for whites to purchase homes in these neighborhoods and stimulates remaining whites to leave. And the image of a slum neighborhood makes whites fear the effects on their own communities if they permit black families to move in.

Robert Moses, organizer of public services for New York State and New York City in the 1920s and 1930s, refused to build parks in black neighborhoods, asserting that blacks were dirty and would not keep them clean. He built only one playground in all of Harlem, claiming that land there was too expensive, yet he built many in other neighborhoods where land was more expensive. Moses believed African Americans did not like cold water, so to discourage them from using a public swimming pool in a white area only a few blocks from the ghetto, he kept this pool unheated while heating other pools throughout the city. Moses built Riverside Park, along the Hudson River: in its southern section, where few black families lived, he developed the park with tennis courts, promenades, and playgrounds, but similar expenditures were not made in the northern portion adjoining the ghetto. In 1943 a grand jury concluded that lack of recreational facilities, compared with other areas of the city, contributed to a Brooklyn ghetto's high crime rate.[71]

In a 1971 Mississippi case, a Federal Appeals Court found that

> nearly 98% of all homes that front on unpaved streets in Shaw are occupied by blacks [while those fronting on paved streets are occupied by whites]. Ninety-seven percent of the homes not served by sanitary sewers are in black neighborhoods [while those with sanitary sewers are in white neighborhoods]. Further, while the town has acquired a significant number of medium and high intensity mercury vapor street lighting fixtures, every one of them has been installed in

> white neighborhoods. The record further discloses that similar statistical evidence of grave disparities in both the level and kinds of services offered regarding surface water drainage, water mains, fire hydrants, and traffic control apparatus was also brought forth and not disputed.[72]

In 2008 a federal jury awarded $11 million in damages to residents of a Zanesville, Ohio, African American neighborhood denied municipal water service for fifty years while white neighborhoods received it. As late as the 1980s, an official of the public regional water authority asserted that "those niggers will never have running water."[73]

Remedies

This chapter has offered accounts from the literature to illustrate the many aspects of government-sponsored segregation. Although it is not yet possible to demonstrate that these accounts reflect systematic practices in many if not most locations, further documentation by scholars would be worthwhile to make a more convincing case. Before memories are lost, interviews with African Americans who experienced residential segregationist policy should be a priority.

Space does not permit me to describe several other federal and state policies whose intent or effect was to create and preserve segregation. Among these are decisions about the location of school district boundaries and school attendance zones; urban renewal policies that reduced the supply of black housing while removing black residents from neighborhoods that white policymakers found desirable for other uses; federal interstate highways whose routes created impermeable barriers between black and white neighborhoods; and public transportation policies that eased the commutes of whites to good jobs in urban centers but not the commutes of blacks to suburban industrial jobs.

Neighborhood racial segregation partly results from the relative poverty of black families, who continue to be consigned to urban ghettos because they cannot afford homes in more affluent white-dominated suburbs. This income inequality has not resulted merely from race-neutral economic forces or private discrimination. Public policy has had the intent and effect of denying African Americans employment that would give them enough income to escape ghettos and upgrade housing to suburbs.

Among these were federal employment policies that barred African Americans from managerial civil service grades;[74] federal certification of

the exclusive bargaining rights of labor unions that barred blacks from membership; denial of education and training for nonmenial jobs to qualified black veterans in the administration of the GI Bill;[75] and minimum wage, collective bargaining, and Social Security legislation that purposely excluded from coverage occupations where blacks predominated—agriculture, for example.[76] Such policies are also part of the nexus of interwoven state action that created and perpetuates racial ghettos.

Each of the policies described in this chapter promoted and preserved segregation. In combination, they constitute a system of state-sponsored residential segregation, with school segregation an inevitable consequence.

Although policies to integrate communities and schools should not be restricted to those ordered by courts, neither should judicially ordered remedies be excluded. Judges can, and should, order race-conscious public policies for integration, because they are necessary to undo the lasting effects of state-sponsored segregation.

Effective remedies must be metropolitan in scope, not restricted to a single city or suburb. Many cities, towns, and suburbs, as a direct result of state-sponsored segregation, are racially homogeneous, or nearly so; efforts to undo this segregation require regulations and incentives that result in mixing racial populations across municipal boundaries. Suburbs within metropolitan areas cannot be considered "innocent" of participation in the system of racial segregation, because their residential and economic growth was based on public policies of segregation.

Remedies cannot be effective if limited to a single jurisdiction within a metropolitan area, because such areas are integrated economically, if not racially. Thus, for example, as several jurisdictions have discovered, inclusionary zoning ordinances enacted in a single city or suburb are ineffective, because if there is a demand for housing, developers can easily build elsewhere in the area. If an entire county or even state is covered, however, developers could meet demand only by appropriate inclusionary development.

Many civil rights advocates believe that the Supreme Court's *Milliken* decision made metropolitanwide remedies impossible. There the Court refused to approve a plan that required predominantly white suburbs to accept black students transported from Detroit, on the grounds that because no evidence was produced that any suburb intentionally segregated the schools within its own borders, no suburb could be deemed responsible for segregation and so could not be forced to participate in plans to remedy segregation practiced within the city of Detroit. But this

interpretation of *Milliken* does not account for Justice Stewart's observation in his concurrence (in which he deemed the causes of segregation to be "unknown and unknowable"):

> This is not to say, however, that an interdistrict remedy would not be proper, or even necessary, in other factual situations. Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, by transfer of school units between districts, *or by purposeful, racially discriminatory use of state housing or zoning laws*, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.[77]

And he added in a footnote:

> The Constitution simply does not allow federal courts to attempt to change that situation [i.e., segregation of Detroit students from students elsewhere in the metropolitan area] unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist. No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity.[78]

But such a record would have been, and continues to be, easy to make.

In the 1976 Chicago public housing case, Stewart wrote the majority opinion and stressed that the *Milliken* decision did not preclude a metropolitanwide remedy if there was a metropolitanwide constitutional violation. In the Chicago case, civil rights groups proved that HUD and the CHA (authorized to build housing throughout the Chicago metropolitan area) had committed metropolitanwide constitutional violations, and therefore a metropolitanwide remedy was appropriate.

Stewart narrowed the impact of his Chicago ruling by permitting HUD to issue Section 8 housing vouchers in lieu of building suburban public housing. As a result, although vouchers were issued to African Americans living in segregated Chicago public housing, relatively little metropolitan integration resulted.

Curiously, few civil rights cases seem to have been brought in the past thirty-five years to take advantage of Justice Stewart's implicit invitation to prove metropolitanwide violations to support metropolitanwide remedies. Advocates have usually restricted their complaints to school issues,

failing to claim that racial imbalance in schools primarily results not from school policy but from state-sponsored residential segregation. But the Court's position is consistent with the necessity of legislative as well as judicial action to craft statewide or national remedies to cure statewide or national violations. Remedies to promote integration could include policies on school district and school attendance boundary setting and pupil assignment; inclusionary residential zoning; public housing and housing subsidy policies; transportation policy; and aggressive regulation of bank, real estate, and fair employment practices.

Summary

The national consensus that school segregation now results only, or primarily, from demographic and economic forces is flawed. Students in both northern and southern communities are now racially isolated substantially as a result of explicit public policy, racially motivated. This public policy has, over the past century, ensured the segregation of residential communities. Notwithstanding the availability of some voluntary school choice, the racial composition of schools necessarily reflects the racial composition of their communities. If neighborhoods have been segregated de jure, it is meaningful to describe a neighborhood-based school system as also segregated de jure.

It follows that not only does racial isolation in schools today reflect poor educational policy, it also reflects unconstitutional segregation. Remedying a constitutional violation is the responsibility of all branches of government, not the judicial branch alone.

Yet for policymakers to consider remedial policies, Americans must confront the widespread lack of appreciation of how far the segregation of American society reflects public policy, and not merely race-blind demographic and economic forces.