



## Righting Wrongs In America

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Across the United States, governments at all levels participated in the segregation and consequent impoverishment of African Americans. For 100 years, from the end of the Reconstruction period following the Civil War to the 1970s, federal, state, and county administrations discriminated against African Americans in housing and employment. The effects of this discrimination haunt the US to this day, and demand remedy by the governments that participated in it.

So argues Richard Rothstein in his new book, *The Color of Law*. Rothstein aims to show that racial segregation in the US was not de facto but rather de jure—that is, a product of government action, sanctioned by the law. He argues that segregation is unconstitutional under the Fifth, Thirteenth, and Fourteenth Amendments and that anyone harmed by breaches of these laws is entitled to a remedy.

Rothstein details a number of government abuses. Staring during World War I and expanding during the New Deal era, the federal government became involved in public housing. African



Americans were given separate, lower-quality housing, which was built specifically in already black neighbourhoods. Following World War II, the federal government subsidised suburban real estate developments, including by insuring mortgages. But this guarantee was not extended to African Americans, who were deemed uniformly to be a credit risk. Subsidies for developers were not available where the developments included potentially risky occupants, including, explicitly, African Americans. To prevent white property owners from later selling or leasing to African Americans, many properties were sold with a racial covenant limiting legal occupation to 'caucasians'. Segregation was reinforced by the placement of black schools and hospitals in black neighbourhoods. All of this took place against a background of violence, with local communities intimidating those African Americans who sought integration and local police often refusing to enforce the law to protect African Americans.

These government actions did untold harm to African Americans at the time. They were denied the opportunity to purchase homes, access jobs, and live freely and in peace. Rothstein argues that this harm has also been visited on the children of those people, and subsequent generations. By denying African Americans the chance to acquire homes, the government prevented them from building up intergenerational wealth. Moreover, segregation forced African American students into worse schools and worse jobs. The harms done to black families were compounded over time as they fell ever further behind white families who were able to take and build upon the opportunities government provided. As such, if you are born into an African American family now, you are likely to be considerably worse off than you otherwise might have been had governments not acted to reinforce racism in American society.

Rothstein argues that it is the responsibility of today's US Government (and *ipso facto* today's American people) to repair the damage done to African Americans' relative standing in the economy. It is not enough just to set race-neutral laws now, though that should be done. New housing developments, for example, should be required to set aside spaces for low-income tenants. Zoning restrictions that prevent the construction of affordable homes in middle and upper class suburbs should be removed. Because they favour white property owners, tax deductions for mortgage insurance and property taxes should be abolished. Lastly, Rothstein argues the harms of segregation also justify positive discrimination in favour of African Americans in employment and university admissions.

These proposed remedies are the weakest part of Rothstein's argument. As he concedes, the costs of remediating the harms of segregation will not fall evenly upon non-black Americans, and the benefits will not necessarily go to the most-deserving African Americans:

African Americans benefiting from an affirmative action boost may not be those who most need it because of segregation. White students who are rejected by an elite university due to affirmative action, but who otherwise would have been admitted, may not be precisely those who owe their qualifications to the legacy of privilege that segregation bequeathed.

Surely, though, this is the constitutional equivalent of arguing that two wrongs make a right. As



Rothstein has described it, segregation is the product of governments' failure to treat individuals equally. And yet his remedies do precisely that. To distinguish the two cases—the unequal treatment of blacks that led to the harm, and the unequal treatment of non-blacks entailed by the remedy—one would have to say that what really matters is the relative position in society of the people affected. That is, one would have to abandon the principle of equality before the law itself.

This point is made clearer still when we consider the issue of causation. Governments cannot trace the circumstances of living African Americans to the actions taken by governments in the past. In between those actions and today, decisions made by governments and by African Americans themselves have intervened to affect the present. To sustain a clear chain of causation, it is necessary to stipulate that those interventions are not morally or legally important, occurring as they did in an environment created by the original sin of government-backed segregation. The only way that this can be true is if we deny the agency of those involved; their decisions were products of circumstance and thus not properly attributable to them. Equality before the law and personal responsibility are connected: the denial of one is the denial of the other. Far from restoring the dignity of African Americans, arbitrary remedies reinforce their formal inequality and diminished agency.

Underlying the case for remediation is an interesting claim about the nature of the individual self. In a liberal society, you are not your race, sex, class or any other description that might be applied to you. Your identity is prior to your circumstances. As meritorious as this sentiment is, it is not literally true. Were you not the child of your parents, for example, you would not be you, you would be someone else. Our liberal sense that there are universal abstract rules that apply to all of us equally is rooted in our own experience of the world as it really is, and the assumption that that experience is generalisable. It is an act of profound empathy. So when Rothstein claims that Americans generally owe a duty to African Americans specifically, he implies that it is not true, in American society, that any American can imagine himself in the place of any other American. Instead, to be black or white or otherwise is something essential to a person. And this precludes the imaginative engagement with the lives of others that gives rise to shared rules. This racial essentialism undermines the moral equality upon which the claim for reparations depends.

Of course, Rothstein's case does rely on the shared existence of a shared American identity, embodied in the government that committed the wrongs in question. But appealing to this identity, the common experience it represents, and the bonds of empathy and obligation it creates, is inconsistent with remedial costs that fall arbitrarily on some Americans but not others. If the case for reparations turns on a shared American identity, then most of Rothstein's proposed remedies are unfair. But if it turns on a claim about the essential difference between types of Americans—as it must, if causation is to be made out—then it is self-defeating. Ultimately, his case, like identity politics generally, undermines the solidarity that collective action requires.

For conservatives, there is one obvious lesson from Rothstein's book: the harms that were visited upon African Americans were done by an activist state. Limited government is the best safeguard against these kinds of abuses of power. The less expansive is government action, the weaker are the claims it makes upon our collective empathy, and the less damage it can do to the dignity of individuals, which comes from formal equality and submission to the rule of law.



It is true that this will not immediately change the position of all African Americans as a group in society. Nor, however, would the remedies suggested by Rothstein. But just as the harms of segregation were compounded over generations, so too will be the gains from a well-ordered society. The final triumph over the wrongs of the past will only come, however, with the obliteration of the categories by which they were motivated. It is only when Americans come to truly share the one identity as Americans that they will be free as individuals from their collective past.

For Australians, this lesson applies to the current debate about including an Indigenous voice in the Constitution. Entrenching racial division in our founding document will forever preclude a truly united Australian identity, and this will ultimately see reconciliation derailed by perpetual resentment. When Tim Soutphommasane tells Asian Australians they cannot properly identify with the Anzac legend, or when we are told that white Australians' opinions about free speech are necessarily ignorant, our ability to empathise with one another, and live together as equals, is being denied.

Identity politics and the campaign against historical injustice ultimately abandons the hope that our national circle of empathy will ever include all our citizens. It walks away from justice. And this is a harm that can never be remedied.

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