Never a Neutral State: American Race Relations and Government Power

Jason Kuznicki

Economics tells us that racial discrimination is expensive. Yet social psychology suggests that humans nonetheless tend to mistrust those whom they identify as outsiders. As a result, governments can exacerbate this mistrust and thereby encourage costly discrimination by creating or maintaining official race-based definitions of outgroups and differential outcomes based on race.

This article reviews evidence from economic and legal history to argue that not only did U.S. governments incentivize and even mandate racial discrimination, but these acts tended to reinforce racial mistrust as time went by. Segregation became more strict, not less, from the end of Reconstruction until the mid-20th century, largely because of growing and self-perpetuating state action. Discrimination created its own constituency.

Some skeptics of the civil rights movement have viewed racial discrimination as an essentially private matter that did not warrant the extensive state intervention. This view is untenable. Although certain measures passed in the name of black civil rights still raise serious legal issues in light of strict constitutional construction, the civil rights movement also dismantled a wide variety of even more troubling measures. Most of these can be characterized as straightforward impediments to the freedoms of movement, trade, and association.

Although, if given a free market and a neutral state, economic incentives will tend to work against racial discrimination, American

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Jason Kuznicki is a Research Fellow at the Cato Institute.

history has never witnessed a neutral state. Instead, and until the mid-20th century, the market incentives that might have worked against discrimination were repeatedly frustrated. Recent historical scholarship, notably from left-leaning scholars, has done much to show the depth and surprising recentness of state support for discrimination.

As a result, even those not ideologically on the left can rethink the civil rights movement as a complex set of tradeoffs that moved the United States from one type of interventionism to another, much more benign one. On the whole, state intervention into the lives of ordinary citizens shrank in this area of life, rather than grew. Although libertarian and conservative intellectuals of that era viewed certain developments, notably the Civil Rights Act of 1964, with great alarm, this alarm was badly misplaced.

Discrimination and the State

Opposing racism isn't a difficult call. Economists tell us that discrimination is inefficient (Becker 1971). Worse, racism is a collectivist idea that doesn't sit well with other deeply seated American values. Recent American history has seen the rollback of discriminatory practices to a degree that might have been hard for previous generations to imagine.

Yet some questions remain: Wasn't racial discrimination basically a *private* affair? Did we really have to enact federal laws and regulations to end it? Many of these laws dictate how people run their businesses and associations, and these restrictions are problematic to say the least. Even if we do find discrimination wrong, isn't it a private wrong? Why wasn't private moral force enough?

Such questions, while serious, can be difficult to ask. Many on the American left have dismissed libertarianism as an unserious political movement or even as a form of crypto-racism precisely because it raises them. Admittedly, many of the characteristically libertarian concerns about property rights, employment at will, and the freedom of contract have often been echoed by individuals and groups of questionable character. Yet this is no reason to reject these concerns out of hand, and it is worth continuing to consider the problem of discrimination in ways that do not simply concede the necessity of coercion in combating it.

One answer is that even until relatively recently, the state itself mandated and incentivized discrimination. In recent years, a growing revisionist literature, often sympathetic to the political left, has exposed this tendency even in popular initiatives like the New Deal (Quadagno 1994, Brown 1999). This literature is worth examining as a part of the critical history of racism, to be sure, and this is the purpose for which its authors no doubt intend it. But it is also worth examining as a cautionary tale about the dangers of special interests, bureaucracy, and unchecked government power.

Apart from mandating and incentivizing discrimination, discriminatory laws also taught discrimination, and as we shall see, the effects of this process can be observed even today, after decades of effort, both public and private, to teach the opposite principle. Various reasons can be offered for this persistence, some of which are discussed below. One thing is clear, however: The federal government and many state and local governments sent a powerful message in both word and deed that discrimination was not simply a private taste or proclivity. Instead, discrimination was a matter worthy of local, state, and federal government support. Existing private prejudices were therefore reinforced or intensified over time, and new ones were created. Contrary to what many may believe, it certainly appears possible to legislate some types of morality—above all, apparently, certain antisocial ones. Evidence from social and evolutionary psychology, examined in the next section of this article, may help explain why this should be.

While it is true that government policies enforcing racism could not have arisen without some initial popular support, the existence of these policies in turn instilled and validated discriminatory attitudes that in some respects seem to have reached further and further with each generation. Discrimination appears therefore to be a classic case of a law creating its own constituency, as government-mandated discrimination in public life created an expectation of discrimination in private life, too.

One could spend much time reviewing what-if scenarios about how we might have eliminated a purely private discrimination through purely private means. Yet in the American context, such speculation is beside the point. U.S. governments have never been neutral. Major legal reforms would therefore have been necessary before private discriminators could have borne the full costs of their

actions, as Becker's models entail. In many cases, these actors were even prohibited from making race-neutral choices at all. And relatively few in any case wanted to practice racial equality, in part because the opposite stance saw itself validated in the laws themselves, and validated as well in the inequality of outcome that has been the result of much U.S. social policy since the New Deal.

The civil rights movement thus brought two contradictory developments. On the one hand, a wide and often underappreciated array of state-perpetuated and state-endorsed discrimination was obliterated. On the other hand, the property and contractual rights of some individuals—particularly southern whites—were also infringed upon, setting a dangerous precedent that remains with us today. But between then and now, there has been no truly neutral state.

This mixed rollback of state power—for indeed, that is what it was—allowed many individuals to associate with one another, economically and otherwise, in ways they had previously found impossible. Moreover, public sentiment has turned decisively against racism, and it is difficult to imagine this development coming about without some state action to encourage it. Excesses in the opposite direction are worrisome, but they are decidedly the lesser evil.

Social Psychology Findings

Social psychology abounds with studies of induced prejudice in response to authority. These studies imply that predispositions toward prejudice exist in all societies, and that some forms of state action may elicit them as well. Although one popular and often correct approach to social engineering is to note that the state cannot "legislate morality," it would be far more precise to say that attempts to legislate morality meet with unintended consequences. These consequences derive from an interplay of innate human tendencies, cultural values, state action, and individual action. Social psychology has lately begun to explain why this should be so.

One such finding is that prejudice and even cruelty are far easier to elicit than one might have imagined, even among psychologically "normal" individuals. Although experts formerly dismissed these claims, they have since become a part of even introductory texts on psychology, sociology, and political theory (Adorno 1950, Milgram 1963, Tajfel 1981).

For example, doing as little as merely assigning experimental subjects randomly to one group or another, and then assigning differential rewards to the two groups, is sufficient to evoke statistically significant in-group preference. The differing rewards in this "minimal intergroup situation" need not be the result of competition or any measure of merit. Randomly assigned differential outcomes have had the same effect, even when group members know the assignments to be random. Preferences even persist in experimental situations in which the members of a group never saw other members of their "own" group face to face. A shared common outcome, actual or anticipated, sufficed to produce the effect (Brewer 1979, Tajfel 1982).

Note that while the relationship between bias *toward* members of one's own perceived group and *against* the members of a rival group is by no means necessary, the one is commonly found in conjunction with the other (Taylor and Moriarty 1987). In laboratory settings—at the very least—it takes surprisingly little to establish a group identity, to create a bias in favor of that identity, and to create a bias against other identities.

To understand the role of state action in fomenting prejudice, it is worth considering some more specific results from the psychological literature on bias. Experimentally, a number of factors have been found to elicit a more intense in-group preference. These include visibly differentiated groups, such as those in which members wore different-colored lab coats, physically distanced groups, experimenter interventions suggesting the superiority of one group over another, and, most saliently, actual racial difference between the experimental subject's group and other groups in the same experiment (Brewer 1979, Taylor and Moriarty 1987).

Authority figures are able to elicit more than just stated preferences. They can also do a great deal to encourage acts of cruelty, and these acts become significantly more likely when their victims are already perceived as members of an out-group. Although group differentiation does not necessarily entail intergroup hostility or negative evaluations of out-groups, studies continue to suggest that for many people, they do (de Figueiredo and Elkins 2003).

The research that opened this line of inquiry was conducted in 1961 by Stanley Milgram. His experiments demonstrated the willingness of subjects to inflict progressively more intense electrical shocks

on others as part of an alleged experiment in memory augmentation. In reality, the recipient was a collaborator of Milgram's, who suffered no shock at all, but who acted as though he did, and who pleaded for the real test subject to end the experiment. Milgram's contemporaries were stunned at the consistent administration of remarkably high levels of current to the supposed victim, even by individuals whose psychological profiles indicated no tendencies toward violence or sadism. Even a simple verbal prodding from an authority figure often sufficed to keep them going (Milgram 1974).

Further confirmation, though not strictly rigorous, came from the infamous 1971 Stanford Prison Experiment conducted by Philip Zimbardo. In this experiment, paid student volunteers were randomly assigned to play the role of either "prisoner" or "guard" in a makeshift prison facility on the grounds of Stanford University. Surprisingly, the "guards" almost immediately exceeded the levels of force that had been established as appropriate for the experiment and frequently devised new ways to torment the prisoners, up to and including sexual humiliation. Their charges in turn displayed signs of severe psychological stress and in several cases had to be removed from the study early. The situation escalated at such an alarming rate that Zimbardo called off the entire experiment after a mere four days. Although subsequent attempts to replicate his work have not always met with such dramatic results, often they have (Zimbardo 2007).

Although highly controversial, experiments like these suggest that insularity and out-group mistrust are not an aberration, but rather the default state for most people. Presumably they are easier to elicit than their opposite. These findings, while speculative, are of tremendous interest to those who would study the effects of state action on bias in the real world. It suggests that even innocuous actions on the part of the state may produce disproportionate feelings of prejudice in the population. And the actions of federal, state, and local governments have only rarely been innocuous.

There may even be some more wide-ranging implications for the centralizing, bureaucratic state. Bureaucracies inevitably generate physical distance between the individuals under their control and the agents exercising that control. They follow standardized procedures articulated in abstract terms and thus tend to absolve individual actors of responsibility. They appeal to an understanding of the good

that is almost inevitably couched in collective rather than individual terms, and thus they tend strongly to treat individuals as a means to a greater end. Dehumanization is seldom an officially sanctioned stance, but it is never far away. One could easily argue that much of the inefficiency, waste, and petty cruelty encountered in bureaucratic situations owes its existence to just the factors we have been discussing above, to say nothing of the more organized and far larger acts of evil perpetrated by the modern state. And, of course, the addition of racial distinctions only does more to encourage these tendencies.

Defining Race

Group identifications are important, but race can be hard to define. Anthropologists, for example, long ago stopped thinking of racial archetypes as a useful analytical tool. Instead, they describe visible human physical differences as existing on a "cline," meaning that human appearance varies gradually and continuously, with no sharp boundaries separating one type from another (Lieberman, Stevenson, and Reynolds 1989). Thus, although differences exist, clear and categorical divisions do not. Genetics, which might be expected to define race more precisely, instead shows, counterintuitively, that our perceptions of racial types predict relatively little of a subject's genetic makeup; within each visually homogenous group, within each "race" as a layman would define it, there are genes that originated among many other "races" (Templeton 1998).

The reasons for this diversity are easy to infer. Throughout human history and prehistory, the supposedly distinct racial types have continually mixed. Historians and cultural anthropologists have found that racial definitions, which might be expected to keep the boundaries firm, instead have varied from one society to another and have shifted drastically over time. Even given a shared and unchanging definition of race, those who can "pass" as a racial type different from that of their ancestors have often done so (Kennedy 2001). And of course, individuals may identify with a religion, a nationality, or some other cause more intensely than they do with their racial type, leading them to form families in unpredictable ways; among world religions, Islam and Christianity have been notable for their strong though not always consistent commitment to the proposition that belief trumps race. Thus, while outward appearances may give the

impression of distinct lineal groupings, these appearances are deceiving and probably always have been. The social sciences do continue to examine "race," but today they generally view it as a set of cultural attitudes toward perceived physical differences, and not as a proxy for lineage, evolutionary biology, or other issues of physical anthropology (Harrison 1995, Hirschman 2004).

In a mobile and egalitarian commercial republic influenced by Christianity, practicing racism ought to be difficult. It becomes much easier, however, when there are legally established definitions of race and when outcomes and opportunities are clearly bound to racial identity. Laws to this effect work to fix definitions of race in the public mind, even if these definitions don't map well onto physiological reality. Law reifies race.

Racialized laws are likely to be enacted by lawmakers who were racists to begin with, but their continued existence also makes racism easier to practice in the future, whether in the public sector, the private sector, or even the confines of one's own mind. In economic terms, laws of racial definition lower the costs associated with racism. As historian Jennifer Roback has written, Jim Crow labor law "can best be understood as attempts to enforce a labor-market cartel among white employers that could not be enforced in any other way" (Roback 1984). In addition, these laws tended to give racism whatever moral imprimatur the state can offer, and, for many people, this is a weighty endorsement.

Consider the American experience with legal definitions of race. From the earliest English settlements to the present, governments have worked to establish and refine definitions of race, almost always for invidious purposes, and frequently with tighter and tighter standards as to who received racial privileges and who did not. This behavior is indeed similar to that observed in guilds, occupational licensure, and professional organizations, in which membership requirements tend to grow more stringent over time and new areas are brought under the restrictive umbrella (Gelhorn 1976, Young 1991, Dorsey 1983).

Legal definitions based on genealogy arrived very early. Although mixed-race individuals were born shortly after the first importation of African slaves, 17th century legislatures nonetheless criminalized sex between Africans and Europeans (Jordan 1968: 139–44). These punishments did little to stop interracial sex, however, as both demo-

graphics and ever-stricter laws would seem to demonstrate. A 1705 statute from Virginia declared that the "child, grand child or great grand child of a negro"—that is, anyone of one-eighth or more African descent—would also be classified as black. Colonial North Carolina went further, to one sixteenth (Jordan 1968: 168).

In general, the legal scrutiny applied to one's ancestors tended to increase rather than decrease over time. By the 1830s, U.S. courts were occasionally encountering the argument that, regardless of what the law said, a person with any degree of racial mixing would have to be considered black, and these arguments gradually spread through the 19th century legal system. Yet it may surprise today's readers that the first legislated statewide "one-drop" policy only arrived in 1910, following a series of court cases in the late 19th century that had adopted this rule either out of a perceived necessity or, sometimes, at the requests of *black* litigants. Prior to 1910, and as recently as the South Carolina Constitutional Convention of 1895, whites had generally rejected the one-drop rule for fear that their own mixed-race ancestries—and liaisons—would be called into question (Sweet 2005: 299–316).

The year 1910 saw the heyday of both Jim Crow and the eugenics movement. Many state legislators were eager to preserve white racial purity, then understood as a scientifically validated goal, and interested parties in the white population increasingly viewed "racial hygiene" as a legitimate state aim (Cynkar 1981). The creators and defenders of anti-miscegenation and one-drop laws believed that their efforts went hand in hand with forced sterilization and the eugenics movement more generally; all were seen as prudent measures to prevent degradation of white America's genetic stock. Virginia's Racial Integrity Act, which both established the one-drop rule and reiterated the state's longstanding ban on miscegenation, was signed into law on March 20, 1924, the same day as its sterilization act. Both were understood at the time to be part of a coherent agenda (Sherman 1988: 69).

There is little evidence, however, that this law initially enjoyed significant popular support. On the contrary, outside the legislature and the few interested parties that lobbied for it, the populace appears to have been well aware of (though certainly uncomfortable with) its racially mixed ancestry. As historian Richard B. Sherman writes, "The campaign for racial integrity in Virginia was not the product of

a great popular ground swell. Rather, it was primarily the work of [a] dedicated coterie of extremists who played effectively on the fears and prejudices of many whites" (Sherman 1988: 71–72). Sherman argues for the crucial importance of a small and not very well-attended group of "Anglo-Saxon Clubs of America" in drafting and lobbying for Virginia's one-drop statute. Although the phrase had not yet been made infamous, these clubs called for a "final solution" to "the Negro problem," terms that even stripped of their Nazi associations are still deeply disturbing (Sherman 1988: 74–75).

Virginia newspapers were among the proposed law's early supporters, perhaps because they recognized the shock value of a moral panic that combined sex, secrecy, and many readers' private anxieties. Predictably, another supporter was the director of the Virginia Bureau of Vital Statistics, Dr. Walter Ashby Plecker, who would see a significant increase in his own power and prestige as the bill became a law. His bureau was charged with classifying the race of all births in the state and with certifying the racial purity of every marriage between Virginia residents, an extraordinary new addition to government power (Sherman 1988: 75–77).

As noted above, Gary Becker has described race discrimination as a taste or a preference that is not cost-free, but rather imposes costs on the individuals who wish to indulge in it. Extending his logic slightly further, we may imagine a taste or a preference that one's neighbors also indulge in racialized behavior, and a set of costs associated with this preference. This taste, of course, is much more expensive, but it can be satisfied with the fewest costs to the possessor by enlisting the state to enforce it. Thanks to the persuasive threat of force, the neighbors are nearly certain to comply. The additional tax burden on any one person will be negligible, and it will be paid in part by those who are indifferent to, or ignorant of, the issue. It will also in part be paid by those who are already disenfranchised thanks to other racist laws and procedures.

Within the apparatus of the state, the lowest-cost provider of discrimination services would likely be a state bureau that stood to gain funding, power, or prestige in the process (Niskanen 2008: 189–205). That bureau would be a natural ally of the most racist elements of the state, as Plecker's Bureau of Vital Statistics indeed became. Virginia's one-drop law was thus a piece of classic special-interest legislation, in which a highly motivated group extracted rents from the state, aided

by an opportunistic press and a decidedly self-interested bureaucracy. Ordinary Virginians seem to have been either ignorant of or unconcerned at the time, again broadly consistent with public choice theory.[1]

The story did not end there, however. Although the South had previously rejected the one-drop rule, its introduction in the early 20th century seems to have worked a remarkable transformation. In only a few decades' time, supporters began referring to the one-drop rule as both a normative and a positive description of the entire history of the South—indeed, of all history in general. Theodore Bilbo's 1946 defense of segregation, *Take Your Choice: Separation or Mongrelization*, declared that strict racial segregation could be observed over "a period of close on to thirty thousand years" (Bilbo 1946: 3). The white race had never mixed with the black, Bilbo maintained, whether in the South or anywhere else:

> We deny that any appreciable amount of black blood has entered white veins. As disgraceful as the sins of some white men may have been, they have not in any way impaired the purity of Southern Caucasian blood. Southern white women have preserved the integrity of their race, and there is no one who can today point the finger of suspicion in any manner whatsoever at the blood which flows in the veins of the white sons and daughters of the South [Bilbo 1946: 49].

As we know today, and as Bilbo's own predecessors knew, these claims were completely false. They do, however, show the degree to which legislation can elicit biased perceptions against out-groups. Similarly, in the famous 1967 case *Loving v. Virginia*, the trial judge declared,

> Almighty God created the races white, black, yellow, Malay and red, and He placed them on separate continents. And but for the interference with His arrangement there would be no cause for such marriages. The fact that He separated the races shows that He did not intend for the races to mix [*Loving* 1967].

[1]It would take a great deal of case-by-case judgment to determine whether various individuals were rationally ignorant, as classical public choice theory has it, or whether they were rationally irrational, in Bryan Caplan's striking phrase (Caplan 2001; cf. McVeigh 2005).

This attitude stood in stark contrast to the attitudes of 18th and 19th century southern whites, who of course opposed racial mixing, but who reluctantly acknowledged that it had happened, and who often hoped that over the course of generations, children of mixed-race ancestry would be assimilated into one group or the other, as indeed they were. Whites of that era would have looked with horror on the prospect of thorough investigations into their own ancestry.

One-drop laws may have been enacted by a special-interest minority of whites, but they became self-reinforcing in part because the racial background of anyone who opposed the law would be called into question, and, in all likelihood, some deviation from strict racial purity might be found. By making the color line as unforgiving as possible, the law encouraged whites to redouble their opposition to intermarriage, and to support additional punishments for it and for anything potentially leading up to it.

Further, among all the legal definitions of race, the one-drop rule may actually be the most harmful when one considers some of the other incentives it sets up. Under most American understandings of race, those of mixed racial ancestry are held to belong to the lower status group—a situation known to sociologists as *hypodescent*. Combined with hypodescent, the one-drop rule stigmatized intermarriage yet also ensured that the stigmatized fraction of the population would grow over time. In the words of one early 20th century author, "Miscegenation [was never] a bridge upon which one might cross from the Negro race to the Caucasian, though it has been a thoroughfare from the Caucasian to the Negro" (Stephenson 1910: 18).

Now consider the opposite case, which never happened in law: If one drop of white blood had been enough to confer *white* status, no white person would ever have feared for his children's status. No genealogical discovery or malicious rumor would mean the loss of the legal or social privileges. Those privileges themselves would have expanded to more and more people over time. Although obviously a flawed system (Why not just abolish the privileges?), an inverse one-drop rule might have gradually eroded racist attitudes.

At least one scholar, a left-leaning one, has argued that the one-drop rule helped "forge a people" by creating the African-American identity as we now know it (Hickman 1997: 1116). Leaving aside the question of whether it is the government's job to forge an unchosen division among its citizens, we should note that while the one-drop

rule helped forge the African-American people, it also helped forge that people's fetters.

But given the ease with which experimental subjects can be made to mistrust outgroups, and the relative difficulty in overcoming such attitudes, we should not be surprised that the one-drop rule took hold. At times litigants used it to tear families apart, to dispute inheritances, and to declare children illegitimate, because all marriages between racial groups were void, even if the participants hadn't understood themselves to belong to different groups. Ironically, the one-drop rule could often end up ostracizing formerly "white" individuals while leaving the (low) status of self-evident blacks unchanged (Sweet 2005: 406–31). The desire to identify and marginalize racial out-groups had begun to eat its own.

Although racial sorting by hypodescent remains fixed in the popular mind, it no longer entails a system of legal disabilities. Yet even today we can still observe some artifacts of the legal and social disabilities that hypodescent entailed. For example, since 1968 the Gallup Organization has asked American blacks and whites whether they approve or disapprove of interracial marriage. Their relative attitudes have been exactly what one might predict from the incentives set up by hypodescent: Although the American public as a whole has overwhelmingly shifted from disapproval to approval of intermarriage, white Americans have always been less likely to approve. This disparity only makes sense. Because intermarried whites stood to see their children lose a great deal of status, and because intermarried blacks stood to lose nothing, hypodescent strongly reinforced white aversion to intermarriage, while blacks did not face the same disincentive. Even despite the dramatic reversal in overall opinion, this racial disparity has persisted in 11 separate polls from 1968 to 2007 (Carroll 2007).

From Definition to Disability

We have just seen how definitions of race tended to become narrower over time. Yet what, exactly, did being classified as black legally entail?

Before the Civil War

This article is hardly the place to review the entire history of slavery, although two aspects of antebellum history are worth

mentioning here because they lend support to the notion that many forms of racism are both engendered by the state and dependent upon it for its continued viability.

First, in slave states, the economic effects of hypodescent were such that while it discouraged intermarriage, it encouraged the growth of slavery, even despite the optimistic belief of many Founders that slavery would wither in the new republic.[2] Slave states uniformly declared that the children of black slave mothers—even by white masters—would likewise be slaves. Thus, although hypodescent was a legal disincentive for intermarriage, it was clearly a legal incentive for rape, and for the sale of the children produced by rape.

Second, the claim is often heard that the South did not leave the Union because it wished to preserve slavery, but rather because it disapproved of the growth of federal power. "States' rights, not slavery" is the refrain among many avowed libertarians.[3]

Yet this claim is belied by two facts: First, all of the states that declared their reasons for secession indicated that they had acted to preserve slavery.[4] Alexander Stephens, the vice president of the Confederacy, publicly admitted the same thing, as did its president, Jefferson Davis.[5] The only "state's right" seriously at issue was the right to enslave. While the North did not go to war to free the slaves, the South by its own declarations left the Union to preserve slavery, which it correctly noted had become a target of odium in the North (Sandefur 2006).

[2]Madison (1787) provides many examples of Founders who thought slavery was incompatible with the principles of American government and who believed the institution was on the decline. See the debate of August 22, 1787, particularly the remarks of Roger Sherman, George Mason, and Oliver Ellsworth.

[3]Williams (1998) makes a remarkable omission when he writes, "[The Confederate] Constitution was nearly identical to the U.S. Constitution except that it outlawed protectionist tariffs [and] business handouts and mandated a two-thirds majority vote for all spending measures." In my opinion these would be improvements on the current U.S. Constitution, but Williams never mentions the most salient difference between the two documents: The Confederate Constitution declared in so many words that no one could be deprived of their "property in negro slaves" (Art. 1, Sec. 9).

[4]Mississippi's was particularly strident and declared, "Our position is thoroughly identified with the institution of slavery—the greatest material interest of the world … a blow at slavery is a blow at commerce and civilization" (www.yale.edu/lawweb/avalon/csa/csapage.htm.)

[5]"Our new government is founded upon . . . the great truth that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition," Stephens declared (http://teachingamericanhistory.org/library/index.asp?documentprint=76; also see Davis in Richardson 2001).

More importantly for our own argument, the slave states before the Civil War had shown near-total contempt toward other states' public policies on slavery, and an eagerness to use federal power to shore up slavery, even when it required stepping on northern states' rights. During the controversies following the Mexican-American War—a war waged to open new territory to slavery—the South agitated for, and received, the largest single expansion of the federal police power before Prohibition: the Fugitive Slave Law of 1850. Alleged fugitive slaves living in the North received no jury trial but were summarily returned to their alleged masters. Federal marshals were obliged to act as slave catchers and were fined if they refused the work.

All of this was a gross infringement on the public policies of the northern states. Many of these states had either passed laws or had had judges simply declare, on the basis of Anglo-American common law, that slaves entering their jurisdiction were automatically emancipated, just as they had been in Britain for centuries. Local law enforcement and judges in the North faced a dilemma with which modern libertarians should clearly be sympathetic—either comply with federal law, or defy it in favor of individual conscience, individual liberty, and local autonomy. Many of them chose the latter option, and the so-called defenders of states' rights in the South did nothing but condemn them (Sebok 1991).

The pattern established here would endure until the civil rights revolution of the 1960s: Those who believed in the innate superiority of the white race usually found governmental power a friend, not an enemy, because it gave them the sharp racial distinctions that they could find neither in nature nor in a truly free market.

Reconstruction and Its Aftermath

Only the Civil War was able to end chattel slavery, but as everyone knows, it did not destroy racial prejudice, whether in social practice or in law. Following the Civil War, the Fourteenth Amendment was probably the most important of the federal government's attempts to extend equal citizenship and liberty to the newly freed slaves. As legal scholar Randy Barnett has written:

> The enactment of the Fourteenth Amendment was specifically intended to subject state legislation to federal scrutiny to determine whether it violated the privileges or immunities

> of citizenship or whether it deprived any person of life, liberty, or property without due process of law. In essence, the exercise of power by state governments was now subject to new constitutional constraints in addition to those already provided for it. . . . This alteration in the basic constitutional structure did not, however, go down well in the courts [Barnett 2004: 194].

The legal rights in question were, of course, those of the freedmen. Yet the Fourteenth Amendment was to remain essentially an unfulfilled promise for roughly a century, and even today, its full power has yet to be felt. In 1873, the U.S. Supreme Court, ruling in a group of decisions now known as the *Slaughter-House Cases*, declared that the Privileges or Immunities clause of the Fourteenth Amendment was not a restriction on the police powers of individual states, and that the federal courts could not review state laws on this basis. In doing so, the Court removed a substantial and carefully crafted barrier to racist legislation. History might have turned out very differently if the Court had ruled otherwise in these cases.

But because no one could challenge state police powers under the Privileges or Immunities clause, and because the Due Process clause was not considered at the time to apply to the enactment of laws, but only to their execution, individuals who felt their rights had been violated by state laws had few federal remedies. These early legal battles set a precedent in which state and local laws enjoyed almost complete freedom from federal judicial review concerning possible civil rights violations. Attitudes about race do not seem to have changed substantially among whites following the Civil War; to the extent that they did, they hardened, and, in the absence of any restraint, the conditions tended to create a cycle of increasing racial division, from law to social practice and back again. Race law tended to grow in strictness over time, and African-Americans' legal opportunities steadily eroded from Reconstruction until the dawn of the modern civil rights era.

Indeed, a good summary of race relations from the Civil War until the mid-20th century might run as follows: White children, isolated in all-white schools and raised amid the attitudes and values of what had only recently been a slave society, absorbed these attitudes and values as they grew into adults, and in the last quarter of the 19th century they restricted black schooling, labor, and entry into trades

and professions in ways that severely hampered their contemporaries, the first generation of blacks born into freedom. The second generation of whites was therefore even more isolated from blacks, and thus even less inclined to view them favorably. During the 1890s and 1900s, this generation enacted Jim Crow on a widespread scale for everyday social situations like streetcars and restrooms, where in fact it had never previously existed. The most severe and effective voting restrictions appeared at about this time as well, restrictions that never mentioned race explicitly, but that often allowed local officials such broad latitude in determining voting qualifications that blacks were almost completely disenfranchised. Following this, legislatures began to adopt the one-drop rule, which previous generations had considered but generally rejected as too severe. Finally, a generation of children grew up thinking that the entire edifice of strict social separation was normal, natural, and even divinely ordained—reflected in the laws but certainly not created by them. Even slaveowners, who at least lived and worked in close physical (though not social) proximity to their slaves, would never have thought this way.

None of this is to imply that slavery was preferable to Jim Crow, of course. Yet the first things to be lost in an examination of a reprehensible social system are often nuance and the understanding of gradual change. Jim Crow created much stricter policies of racial segregation than slavery ever did, and these were every bit as dependent upon the support of the law as slavery formerly had been. Segregation was neither natural nor divinely ordained. Instead it was taught and perpetuated, generation after generation, by the laws themselves.

As we shall see, writing racist provisions into the New Deal, the conduct of World War II, and much of modern social welfare legislation was simply a matter of course for individuals raised under Jim Crow, even the so-called liberals. Yet white southerners' perception of a natural, eternal racial separation could not have been further from the truth. Let us examine this development in a bit more detail, beginning with some of the earliest segregationist measures following the Civil War.

Segregated schools were in some ways an atypical case, yet we must begin with them, because segregation of the state-run educa-

tional system was by far the most important early type of forced segregation implemented in the wake of the Civil War.

The historical background is crucial to understanding this issue in particular. During the years 1800–1835, most southern states made it illegal to educate slaves (Anderson 1988). A few slaves could read and write, notably the abolitionist Frederick Douglass, but they typically had to keep their learning secret. Following the war, ex-slaves were eager to learn, correctly seeing reading and writing as important elements of their emancipation.

Indeed, ex-slaves found their own education so important that they often refused to entrust it to anyone else. Although the Freedmen's Bureau set up publicly funded schools for former slaves, and although northern missionaries organized private schools as well, ex-slaves founded and ran a substantial number of independent private schools, often using improvised teaching materials and relying on instructors who had only managed to teach themselves shortly before teaching their pupils. So intent were southern blacks upon self-education that some of these ventures began even before the end of the Civil War.

These schools were surprisingly successful, well-attended, and common. They typically operated without white direction, only occasionally received white funding, and developed within them a fiercely independent ethos of racial self-sufficiency. These schools were so successful that historian James D. Anderson has assessed them as more important to black education of the Reconstruction era than either northern charity or federal intervention (Anderson 1988: 4–32). "It was a whole race trying to go to school," said Booker T. Washington, who experienced the process firsthand and went on to become one of the most important public intellectuals of his age (Washington 1901: 14).

Under the military phase of Reconstruction, southern blacks in state governments helped institute the first systems of public education in the former Confederacy. These, however, turned out to be a Faustian bargain: Following the end of Reconstruction, white legislators took over. They ensured that these never-integrated black schools would be understaffed, underdeveloped, underfunded, and in all other ways inferior to whites-only public schools. Private, black-run primary and secondary schools never again enjoyed the success they had seen under the early years of Reconstruction.

While private black schools had emphasized the classical curriculum—also understood among whites as a key to upward mobility—white-run state governments had other plans. State-run schools for blacks typically aimed only to prepare them for lives as domestic servants or farm workers. White southern educators, even progressives, viewed black higher education as useless or subversive (Dennis 1998). As historian Michael Dennis has noted, "the progressives' theories on Black educational development posed no threat to the southern orthodoxy. Indeed, their emphasis on gradualism with regard to Black advancement and educational separation fit comfortably into the New South vision of economic expansion and neopaternalistic White supremacy" (Dennis 1998). Southern educational "reformers"—their positions secured through white political patronage—never seem to have considered asking blacks what sort of education they would prefer.

Outside of education, some of the first discriminatory measures passed following Reconstruction, and indeed during it, were in the area of labor, including emigrant agent laws and laws against enticement and vagrancy. Textually, these laws were race-neutral, but their effects were both anti-market and anti-black, the latter by design. They remained on the books, with similar enforcement methods, throughout much of the 20th century.

Emigrant agents were individuals who recruited laborers, usually poor blacks, for jobs in distant places where better wages prevailed. Emigrant agents arranged transportation, advanced funds, and even subsidized the travel of workers wishing to find better conditions elsewhere. They advertised their services in the nascent free black communities, and for a time they did a brisk business uniting workers with better jobs in the North and West.

They also helped indirectly to improve conditions in the South. As legal historian David E. Bernstein has written, "mass migration, and even the threat of such migration, was critical to improving the treatment of African Americans by white southerners. In response to large-scale migrations, many plantation owners and other employers raised wages, improved the living and working conditions of African Americans, and, with the cooperation of local and state government, granted African Americans greater educational opportunities and greater protection in their property and person" (Bernstein 2001: 11).

None of this sat well with the planter aristocracy, which was eager to keep the former slaves as confined as possible and to spend as little as possible on their well-being. Accordingly, they passed laws requiring all emigrant agents to register and pay prohibitively high licensing fees. At times, some jurisdictions outlawed emigrant agents entirely. Both types of measures dramatically impaired the mobility of southern blacks, reducing their opportunities in the labor market and helping to confine them to tenant labor and other low-paying occupations. Although they were facially neutral, the laws restricting emigrant agents had a grossly disproportionate negative effect on blacks, tending to keep them on the plantations where they had formerly worked as slaves.

Emigrant agent laws restricted blacks' opportunities indirectly, but a far more direct restriction came from debt peonage—a term likely to mislead, as many cases of peonage were only distantly related to debt, if at all. As historian William Cohen has written,

> In some cases contract legislation went still further and made it a criminal offense to break a labor contract even when no debt was involved. Broadly drawn vagrancy statutes enabled police to round up idle blacks in times of labor scarcity and also gave employers a coercive tool that might be used to keep workers on the job. Those jailed on charges of vagrancy or any other petty crime were then vulnerable to the operations of the criminal-surety system, which gave the offender an "opportunity" to sign a voluntary labor contract with his former employer or some other white who agreed to post bond. Convict-labor laws began where the surety system ended, and those who had no surety often ended up on chain gangs, which in effect were a state-sponsored part of the system of involuntary servitude [Cohen 1976: 33–34].

These measures, however race-neutral they may have been on the books, were seldom enforced in a neutral manner, and this set the precedent for much of what would come throughout the first half of the 20th century.

The Relatively New Jim Crow South

It may come as a surprise to many readers to learn that some of the most overt and coercive parts of Jim Crow weren't enacted

immediately at the end of Reconstruction, and were certainly not holdovers from slavery, but instead came during the 1890s and the early part of the 20th century. This is the thesis of C. Vann Woodward's landmark 1955 study *The Strange Career of Jim Crow,* and it's worth remembering the relatively late introduction of many of these measures. Yet the sheer existence of these laws, coupled with the psychological tendency toward in-group bias, seems again to have created an artificial history for them, one that normalized segregation, exactly as we have seen above in the case of antimiscegenation laws and the definition of race.

Middle-aged southerners of Woodward's time "grew up along with the system," he wrote. "Unable to remember a time when segregation was not the general rule and practice, they have naturally assumed that things have 'always been that way.' Or if not always, then 'since slavery times,' or 'since the War,' or 'since Reconstruction.' Some even think of the system as existing along with slavery. Few have any idea of the relative recency of Jim Crow laws" (Woodward 2002: xv-xvi). Although Woodward is at pains to emphasize the degree of racism, violence, and mutual mistrust between blacks and whites during Reconstruction and the decades following, still, he finds overwhelming evidence that the full development of legal and social Jim Crow came much later and was by no means inevitable.

Instead—and Woodward is *not* at terribly great pains to stress this—the development seems to have owed nearly everything to the acts of state governments in the South. And the origin of these laws was not in "slavery times," but in the Progressive Era.

Indeed, the most progressive elements of the white southern political class tended strongly to be the *leaders* in introducing these laws, which at the time they presented as enlightened and scientifically justified reforms. James K. Vardaman, governor of Mississippi (1913–19), supported prison reforms, modernizing public education, ending child labor, nationalizing the railroads—and literally repealing the Fourteenth and Fifteenth Amendments. Vardaman went on to become a U.S. senator and an early supporter of the income tax. Theodore Bilbo, mentioned earlier, was a close ally of Vardaman's and supported many of the same progressive—and segregationist—measures when he in turn became governor (Cresswell 2006: 190–227).

Private businesses and individuals on both sides of the color line frequently resisted proposals like these. Yet this resistance was often short-lived, ill-informed, and half-hearted. Over a range of different issues, a consistent picture emerges: Those supporting racist public policies were few but well-organized and well-connected. Those opposing them were just the opposite. Indifferent whites were later won over, and in the end, the relatively new policies came to seem traditional and even perfectly natural.

For example, blacks' voting rights endured for a surprisingly long time in the South, albeit plagued by mob violence, pervasive intimidation, and assassinations. Although American high schoolers commonly learn about the "Redeemers"—white southern Democrats who retook state governments from the Republicans and ended formal Reconstruction—it was not until the surprisingly late date of 1890 that Mississippi enacted a state constitution whose suffrage requirements were designed to exclude blacks.

Mississippi's constitution of 1890 enabled local election officials, by then invariably racist whites, to determine, without review, the qualifications of each would-be voter. Literacy tests, as provided for in that constitution, may be facially neutral, but they were seldom administered neutrally, and commonly these tests were waived in favor of the simple presumption that white voters automatically qualified (sometimes on the basis of "good character"). Following the introduction of literacy tests, often the mere act of requesting one was forestalled by the threat of violence, a threat that local governments did little or nothing to stop (Cresswell 2006: 110–29).

Historian Stephen Edward Cresswell writes that the Mississippi constitutional convention delegates "swept the horizon of expediency to find a way around the Negro amendments to the Federal Constitution." Their efforts survived U.S. constitutional scrutiny in the 1898 case *Williams vs. Mississippi:* "While the federal justices recognized the purpose of Mississippi's new constitution, they declined to interfere. Having received a constitutional green light, other southern states followed Mississippi's lead and enacted new disenfranchising constitutions" (Cresswell 2006: 124). Before *Williams,* only two southern states had constitutions of this type. Five years later, all of them did (Flamming 2005: 39).

Another instructive example is economic historian Jennifer Roback's work on southern streetcar segregation. She writes that

"segregation laws were binding constraints and not simply the codification of customary practice . . . streetcar companies were not the initiators of segregation and sometimes actively resisted it" (Roback 1986: 893; Folmsbee 1949). Even more often, these companies ignored or passively resisted segregation laws, because segregated cars meant higher operating costs, unhappy passengers, and empty seats. At the turn of the 20th century, as these laws developed all across the South, blacks organized boycotts, and even some whites refused to follow the color line.

Yet as Roback notes, before the advent of legally enforced Jim Crow, some streetcar companies *did* segregate their streetcars—into smoking and nonsmoking sections. One frequent objection to the legally forced introduction of Jim Crow was that it crowded together smokers and nonsmokers, going against both those groups' preferences (Roback 1986: 896). This is hardly the response one would expect if white southerners of that era believed that the segregation of everyday life was natural, ordained by God, or part of the immutable social order. It powerfully suggests that such attitudes had to be acquired, that belief in an unchanging—yet constantly threatened—racial order was helped along by the state, and that much of this acquired ethos was learned during the late 19th and early 20th centuries, precisely when harsh new laws called it into being.

For these streetcar regulations, as with Virginia's extraordinarily strict anti-miscegenation and social mixing laws, it appears that a coalition of highly motivated racists in the press and the government foisted the costs of their preferred discriminatory policies onto an unwilling but not deeply invested private sector. Of the Mobile, Alabama, streetcar segregation law of 1902, Roback writes, "it is not clear from the record who favored the ordinance other than the newspaper editor" (Roback 1986: 914).

The Federalization of Jim Crow

So far we have discussed mostly state and local policies instituting, perpetuating, or spreading racial division. Yet the growth of the federal government in the Progressive and New Deal eras meant that Washington no longer simply tolerated Jim Crow. As readers will generally be aware, the New Deal in particular represented a point of departure for the federal government in that it intervened for the first time in many areas of civil society that it had formerly left to the

states or the people. These interventions tended strongly to redistribute wealth to lower- and middle-class whites, but just as strongly, they tended to exclude from this redistribution or even harm lower- and middle-class blacks. More than at any time since the Civil War, federal legislation was crafted with the intent of preserving racial division, and recent scholarship has begun to revisit this era with an eye toward the many racial implications of Progressive and New Deal policy.

One area in which the federal government actively approved of discrimination—rather than permitting it passively or tacitly—was in the area of racially restrictive covenants, a practice in place long before Franklin Roosevelt took office. The landmark 1917 case *Buchanan v. Warley* had struck down a Louisville, Kentucky, ordinance explicitly requiring residential segregation, on the grounds that buying and selling private property were rights protected by the Fourteenth Amendment. It was silent, however, on other methods of ensuring that then-extant patterns of segregation would be preserved by other methods, and in the wake of the *Buchanan* decision and the growing power of racialized thinking, particularly outside the South, restrictive covenants became one of the key methods of preserving segregation (Jones-Correa 2000–01).[6]

In the context of racial segregation, a restrictive covenant was a clause in a property deed, typically added when buying or selling a home, that stipulated that no future sale could be to a person of color. Although employed as early as 1904, their use exploded in the early 1920s (Jones-Correa 2000–01: 548–550). Restrictive covenants had the effect of rapidly creating all-white neighborhoods and sharply increasing segregation even in previously well-integrated cities, as the example of post-*Buchanan* Los Angeles shows (Flamming 2005: 153–55). The U.S. Supreme Court declared racially restrictive covenants enforceable in the 1926 case *Corrigan v. Buckley*.

Yet it cannot be said that a restrictive covenant is a *purely* private act. Although the freedom of contract has long and correctly been thought central to economic liberty, this freedom is self-evidently

[6]Jones-Correa analyzes tensions between blacks and whites in the rapidly diversifying northern cities, demographic changes that appear to have fueled not only restrictive covenants but also race riots, the resurgence of the Ku Klux Klan, and a variety of other measures that moved the North toward segregation at the time, including racial steering and redlining, often with local, state, or federal endorsement.

neither absolute nor strictly private; a contract is, after all, a formal demand for state action in certain circumstances. Contracts to commit murder, or to engage in fraud, have never been valid, and this is obviously in keeping with a view of justice centered on individual rights: Although, as the legal dictum has it, "agreements must be enforced," this has never been an absolute injunction. Not only would we find at the heart of these contracts an action inimical to the liberties of others, but we would also find it hypocritical that the state could be called to enforce a contract of this type while still justifying its own existence on the basis that it vindicates the rights of its citizens.

As these extreme examples show, limits on the power of government are also limits on what the government can be asked to do by private individuals, and thus even in contracts, some limits to state authority may apply. A government—such as the U.S. federal and state governments—that is forbidden from applying the laws unequally based on race might also be forbidden from enforcing racially restrictive covenants. This was the reasoning followed in *Shelley v. Kraemer* (1948), which ended the use of restrictive covenants for racial segregation:

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing [*Shelley* 1948: 21].

Shelley was immediately recognized as a problematic decision, in that it may imply some fairly radical redrawings of the boundaries separating state and private action; as a result the Supreme

Court was and continues to be reluctant to rely on its reasoning elsewhere.[7]

Yet in all, relatively little blame lies with the judiciary in the New Deal and postwar expansions of Jim Crow. Instead, nearly all of the racially skewed federal policies of this era were introduced by southern members of Congress. These members were reluctant to approve of welfare legislation that might lift blacks out of poverty, encourage them to leave the South in even greater numbers, or strengthen their political power. Owing to the one-party nature of southern politics, southern members of Congress tended to occupy senior committee positions. And although they did not necessarily object to social welfare legislation, they were determined not to let it interfere with the status quo in their home states.

As Douglas Massey, author of *Categorically Unequal: The American Stratification System*, has put it, "Southern senators and representatives were willing, even eager, to support the populist economic goals of the New Deal—but only so long as those goals did not threaten the racial status quo, a view generally shared by representatives of blue-collar constituencies in the North. As a result, every piece of New Deal legislation was carefully crafted to exclude blacks from coverage or, failing that, to delegate to the states the authority to exclude" (Massey 2007: 60).

One common tactic used to limit African Americans' access to New Deal programs was to administer them at the state or local level, where overtly racist state officials could admit or deny individuals access to federal aid as they saw fit. Although these benefits were still federally funded, there was very little federal accountability.

This hands-off approach might seem to have the added benefit of making the federalization of various social relief efforts more palatable to those who mistrust centralized government. But it also guaranteed that local norms would in effect be subsidized by federal money. Thus, although the Constitution forbade explicitly racist federal laws, southern members of Congress nonetheless found ways to

[7]But see Henkin (1962: 496): "[Kraemer and the white homeowners] are asserting rights acquired by contract, not traditional incidents of their rights in their property. Their association is loose and imperfect. It has no intimate ties or purpose; anyone is welcome to buy and live there except Negroes and "Mongolians." … Shelley, for his part, asserts his right to buy and occupy a home where he can." If a choice must be made, and if this is the proper way to frame it, then that choice is clear enough.

favor whites over blacks in housing, education, welfare, and labor regulations.

One of the most egregious examples of the federalization of Jim Crow came in the form of the Federal Housing Administration. The FHA was created in 1934 to extend loans to relatively risky homebuyers otherwise unable to obtain them. One way it sought to preserve these homebuyers' investments was, perhaps unsurprisingly, the racially restrictive covenant. The FHA explicitly recommended restrictive covenants and even insisted on them, with the announced goal of protecting the property values of FHA mortgages (Massey 2007: 60–61).

The FHA also appears to have pioneered the practice of "redlining"—that is, of establishing areas into which blacks and whites are sorted when they enter the housing market, with the intent of producing segregated neighborhoods. Indeed, the red lines referenced in the term were first drawn on FHA maps. They demarcated heavily black neighborhoods, which could not receive FHA loans at all (Roediger 2005: 226–27). Even the incomes of the would-be homeowners were irrelevant (Massey 2007: 60). Historian David Roediger describes the FHA as "the open incarnation of the New Deal alliance between white supremacist southern Democrats and northern segregationist forces, in this case realtors, bankers, and white urban and suburban home owners," whose "largesse" was "racially targeted" (Roediger 2005: 228).

Demographers continue to dispute the extent and even the existence of redlining among private real estate agents, with at least two recent studies concluding that race has not been a significant factor in the private market for homes (Holmes and Horvitz 1994, Klein and Grace 2001). The clearest form of redlining remains the eponymous redlining of the FHA. Although these practices clearly cannot explain the entire gap between black and white wealth accumulation, no one disputes that in the decades following the New Deal, home equity became the largest source of wealth for the American middle class. However, black homeownership has lagged behind, even controlling for income. Given that homeownership has been one of the key avenues of wealth appreciation for the middle class, any intervention discouraging it will likely have had disproportionate effects on wealth (Hilber and Liu 2008, Charles and Hurst 2002). The New Deal's housing policy "imparted powerful lessons and expectations to

new immigrants and their descendants regarding the extent to which reformers tolerated and forwarded white privilege. It also encouraged—and in some ways required—them literally to invest in whiteness" (Roediger 2005: 224). The same could easily be said of nonimmigrant whites, of course.

Social Security was one of the most ambitious programs of the New Deal, yet it too was tailored to exclude the large majority of blacks. Although Roosevelt's Committee on Economic Security recommended including all industries and sectors of the economy in the new program, the final legislation excluded farm laborers and domestics—two categories of labor in which blacks were far overrepresented—from the old age insurance portion of the program. As a result, 65 percent of African Americans were ineligible, a situation that was to endure through the 1950s as well. Aid to Dependent Children, another key feature of Social Security, was administered by the states, again at the insistence of southern Democrats (Katznelson 2005: 45). Thus, "for the first quarter century of its existence, Social Security was characterized by a form of policy apartheid, something neither Roosevelt nor his study commission intended" (Katznelson 2005: 43).

Particularly shabby was the treatment black veterans received at the hands of state administrators of the Selective Service Readjustment Act, better known as the GI Bill. Representative John Rankin (D-Miss.) chaired the Committee on World War Legislation, which drafted the bill, seeing to it that Veterans Administration facilities in the South, including hospitals, would be segregated by race. Rankin also zealously insisted that "no Department or Agency, or Offices of the United States . . . shall exercise any supervision or control whatsoever over any state educational agency," the better to exclude black veterans from schools. Yet federal money certainly would flow to state educational agencies, to be administered locally, according to Jim Crow rules. On this point he was quite explicit: "a definite line should be drawn in the schooling on the matter of race segregation" (Katznelson 2005, 127). Recent analysis suggests that Rankin succeeded, and that, particularly in the South, the education gap between whites and blacks actually widened at least in part as a result of this federal subsidy for Jim Crow (Turner and Bound 2003).

Given increased mobility among both blacks and whites, as well as the federal support for discrimination, it's not surprising that just as

the civil rights movement was about to enter its most prominent and successful phase, southern-style Jim Crow was also showing signs of spilling out of its borders. The growing reach of discriminatory laws can be seen, for instance, in how white southerners who moved to Los Angeles during the first half of the 20th century sought to recreate there the Jim Crow laws they had known and benefited from in the South. They achieved considerable success in doing so, beginning with the frequent nonenforcement of preexisting California laws prohibiting discrimination against blacks, and progressing from there to restrictive covenants and segregated public facilities such as parks and beaches. As has recently been shown, the racial history of early 20th-century Los Angeles reveals constant lobbying by special interests to expand state subsidies for prejudice; on the front lines of both supporters and dissenters were migrants from the South (Flamming 2005).

Thus, in addition to providing direct subsidies that enabled disproportionately many white Americans to buy a home, go to college, educate their children, and enjoy a comfortable retirement, many New Deal programs helped reinforce economic inequality by denying blacks these same opportunities. Racially unequal welfare policies amounted, in the final analysis, to a transfer of wealth from one race to another. When each race faces equal taxation policies but one reaps far more substantial state benefits, this is clearly the net effect. Ira Katznelson, author of *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America,* has characterized the New Deal in stark, uncompromising terms as follows:

> Imagine two countries, one the richest in the world, the other among its most destitute. Then suppose that a global program of foreign aid transferred well over $100 billion, but to the rich nation, not the poor. This is exactly what happened in the United States as a result of the cumulative impact of the most important domestic policies of the 1930s and the 1940s [Katznelson 2005: 142].

The two countries, of course, were the blacks and whites of the United States. The language of separate countries geographically superimposed on one another closely parallels that of Gary Becker in *The Economics of Discrimination* (1971: 19). Becker likened dis-

crimination to international trade restrictions—and argued, in effect, for free trade between the races as an economically efficient policy.

Katznelson suggests that the New Deal's welfare programs, and some subsequent ones, whose effects were to intensify economic inequality between blacks and whites, can be likened to a sort of perverse foreign aid between these two nations, in which the richer one benefited at the expense of the poorer. But let us speak precisely here: This is not foreign aid. It is predation. Apart from whatever problems a racially neutral welfare program may pose, a racially inequitable one poses even greater difficulties.

Later welfare programs, particularly those of the Great Society, were often administered in a more race-neutral way, typically by removing them from state government control. Yet these later programs, including food aid and subsidized rental housing, did little to encourage capital accumulation, and even scholars who broadly support welfare rights have therefore criticized them for failing to end the racial wealth inequalities that were deepened in the New Deal. As political scientist Theda Skocpol has written,

> Originally an effort to correct for the New Deal's omissions and shortcomings in public social provision, the Great Society ended up . . . deepening American political divisions along racial lines. It is hard to avoid the conclusion that the Great Society's attempt to complete by rhetorically overblown patchwork the partial system of social protections inherited from the New Deal inadvertently opened the door to powerful critiques of the aims and practices of public social provision in the United States. It especially opened the door to attacks against those policies implicated in the troubled realm of welfare for the unemployed or marginally employed [Skocpol 1995: 222].

One of the ironies of all of this is that the Great Society was conceived of, and continues to be defended as, a completion of the New Deal, and a means of correcting the deficiencies of the earlier program. Yet certain forms of welfare are clearly more helpful in accumulating capital and ultimately in escaping the need for welfare in the first place. A generation of whites, and not blacks, received these relatively benign types of welfare—and, to make amends, a later generation of poor, now disproportionately black, received welfare in forms that made it far less likely for them to be able to escape.

Conclusion

Until recently, both liberals and conservatives have been eager to minimize the extent to which government interventions contributed to racism and racial inequality. Conservatives have been eager to emphasize the private nature of discrimination. Whether they find discrimination to be rational or otherwise, they are quick to embrace the claim that one cannot legislate changes in morality, and that the state, today presumed to be more or less racially neutral, should remain that way, after any remaining affirmative action programs are eliminated. They often do not appear to believe that state action was a significant factor in encouraging past racism.

Conservatives also are likely to emphasize evidence for individual merit as the source of income and wealth inequality, and not to be overly troubled by racially disparate economic outcomes. The tendency among conservatives, then, is to minimize the role of the state in race relations, both in describing the recent past and in the normative future.

Liberals, meanwhile, have tended to take a heroic view of the actions of the state in recent decades, stressing state efforts as crucial to the dismantling of Jim Crow, and only lately coming to criticize social welfare programs for their role in perpetuating racial inequality. They have generally viewed recent state action, and prescriptions for the future, as benign or at least as well-intentioned, a stance from which they have only very recently begun to diverge.

Another picture can be drawn, however, one that describes state action as categorically problematic for race relations. There have been errors of commission and of omission alike, owing to historical precedent, the dynamics of public choice, and even, perhaps, to the psychology of bias. It may prove useful to point out these errors.

It is not enough, however, *only* to point them out. Nor is it enough to note that the market process, left to its own devices, will disincentivize racial discrimination. One question still unanswered is why this process seemed to roar to life in the mid-20th century after lying dormant for so long. It may be that rising incomes and education levels among blacks, and much greater mobility among the population as a whole, made the incentives to fair treatment more attractive than they had previously been. Indeed, as Becker has shown (1971: 28–31), discriminating against a capital-poor minority has relatively slight costs for the majority, even while it costs the minority dearly.

Greater minority education, mobility, and capital tend to raise the price of discrimination, and not just as a matter of economic modeling. As economist Steven Horwitz has written,

> Part of our willingness to trust strangers is that we know that there are supra-individual institutions in place that provide an incentive for anonymous others to treat us well and to punish those who do not. . . . Property rights make it possible to capture the benefits of engaging in reciprocity and enable those who do not to be penalized. The result is that reciprocity increases and trust is spread [Horwitz 2008: 91].

Learning to trust, and above all being able to trust, is advantageous in a free market in ways that may not always be captured by economic modeling. It becomes particularly important in complex business arrangements and among strangers, where this process of trust brings not only more choice among economic inputs, but also new information, the particular focus of Horwitz's work. Moreover, discrimination, which may act chiefly to signal one's membership in a privileged and therefore trusted group, is of little use when institutions, rather than loyalty networks, form the basis of interpersonal trust. This seems particularly true in modern cities and in light of modern information technology, but much work could still be done in this area.

Advocates of limited government would perhaps do best to see the civil rights movement as a complex set of tradeoffs that moved the United States from one type of interventionism to another, undoubtedly more benign one. Barry Goldwater was correct to note, for example, that the Civil Rights Act of 1964 interfered with how private firms conducted business, and that this interference had no constitutional basis. Yet, strictly speaking, neither did the many southern state laws and extralegal state practices that mandated racism. These too were unconstitutional, and they were even then in the process of being struck down. Although two wrongs do not make a right, it is difficult to see how the one could have been eliminated without bringing something like the other. Popular social change—and the Civil Rights Act was popular—only rarely respects constitutional niceties.

Perhaps we can consider them now, but we should also consider the rest of the picture. Formerly, pro-racist infringements on constitutionally protected liberties entailed restrictions on commerce, both intra- and interstate, infringements on voting rights, perversion of the system of trial by jury, prohibitions on interracial marriage, and, in effect, a caste system that stood entirely at odds with the intent of the Bill of Rights and the Civil War amendments. Penalties for violating this system frequently involved all-but-state-sanctioned mob violence, including murder.

Today, anti-racist infringements on constitutionally protected liberties entail relatively mild restrictions on intra- and interstate commerce, with relatively mild penalties and due process of law for alleged transgressors—features totally absent under Jim Crow. Goldwater considerably overstated his case when he claimed that the Civil Rights act of 1964 "bids fair to result in the development of an 'informer' psychology in great areas of our national life—neighbors spying on neighbors, workers spying on workers, businessmen spying on businessmen." His fears had already been realized, and, properly understood, they were in the process of being dismantled.

Although it is unclear that state action can incentivize fair treatment quite as effectively as it incentivizes discrimination, all other things being equal, it is clear which form of intervention is preferable. A free society is ill served by tribalist collectivism of any type. It would be a mistake to accept either the pre–civil rights era United States or subsequent developments uncritically. Having a viewpoint, even an ideological one, does not require us to stipulate a golden age.

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