The Color of Law: A Forgotten History of How Our Government Segregated America

(Richard Rothstein)

August 15, 2017

Some years ago, I lived for a time in Oak Park, Illinois. Oak Park has for decades been filled with rich white liberals, who live just across the street from a City of Chicago neighborhood, Austin, that is filled with poor black people. Yet, for some reason the citizens of Oak Park simply can't fathom, people from Austin almost never move to Oak Park. Who can say why? Well, Richard Rothstein can. His book, *The Color of Law*, shows all the ways in which the racist government of Oak Park, and innumerable other government functionaries across the nation, have aggressively worked for decades to keep black people in inferior, segregated housing. Rothstein's service is to precisely set out why this happened, how it was done, and what exactly the effects today are.

Rothstein doesn't actually mention Oak Park, but it is the perfect example of many of the racist behaviors he documents. To this day, the "Village" (ah, how quaint) funds (behind a screen of third parties, whose pictures are not shown on their website) the boringly named "Oak Park Regional Housing Center." The OPRHC advertises all over Chicago that it will help those moving to Oak Park find rental apartments. Since Oak Park has very few rentals (due to deliberate zoning to prevent them), this is a seemingly valuable service. Thus, when I needed to move to Oak Park, I took advantage of it, setting up an appointment, as required, with an "advisor."

When I arrived, my "advisor" gave me a sheet that said, in deliberately obscurantist legalese, "We will give you listings on the basis of your race." This blatantly illegal practice (not made legal by disclosure, either) took me aback. Why, I thought, would they do that? It did not take long for me to figure out—they wanted, and still today want, to prevent black people from clustering in their Village (shades of the M. Night Shyamalan movie) and attracting more black people who might thereby start to view Oak Park as welcoming to African Americans. So they scatter black people among white people, and they try to locate white people among black people already living in Oak Park, both to prevent clustering that might attract more black people. I suspect that

they probably also try to directly discourage African Americans in other ways, though I can't speak personally to that. Turned off by their overt racism, I ultimately found an apartment in Oak Park by myself, in those early internet days, by going to the offices of the *Chicago Reader* the night before the paper was distributed, and being the first to call one of the few apartments offered for rent that week. Unsurprisingly, I had to leave a voice mail, and I was called back, having met the Village's effective main criterion of a good renter—being white.

I encourage you, though, after you read Rothstein's book, to go to the OPRHC's current website, or to the "History" article linked from their site, to see the contortions that racists go through to justify their racism, especially when their own self-image is as completely non-racist, and to see how precisely the OPRHC lines up with the practices Rothstein documents. For example, in the OPRHC's FAQ, they ask "Question: Do you have listings online? Can I get them over the phone or email?" Answer: "We don't, and here's why: Because our services are customized to each individual client, we must meet with you in person to review your financial requirements with you and discuss your space and location needs and any other preferences you might have." Ha ha. Yeah, that might be it. Sure. If Oak Park really wanted to help people find rentals, they'd operate a purely on-line service. And they'd also change their zoning, which includes many fun rules, such as forbidding "For Rent" signs and on-street overnight parking, the better to discourage black people from Austin from walking around town, or owning houses or apartments without expensive off-street parking. But they don't do any of those things, because the reality is they don't want "those people" from Austin coming into their town.

Enough about Oak Park, although as I say, it is in many ways the perfect exemplar of the practices documented by this book. *The Color of Law*, while not flawless, is very impressive on many levels. It offers voluminous scholarship; it offers detailed history. But what most impressed me was that at each step of the way Rothstein directly and without flinching or evasion addresses all possible counter-arguments. When the reader thinks "but what about. . . . ?," the next paragraph or next chapter is nearly certain to address just that question. And in case he missed anything, Rothstein has an entire ending section on "Frequently Asked Questions" to directly answer questions and objections raised

by others during his research. Throughout the book, Rothstein makes great efforts to be intellectually honest, which makes his book very different than most modern political debates, where advocates pretend that their desired solutions are cost-free, and their opponents are idiots or driven by malice. Rothstein freely admits where he expects there to be costs, and gives specific reasons why and by whom those costs should be borne. If he thinks there is malice (and given the topic of his book, it could not be otherwise), he does not spend his time focusing on it, rather spending his time on facts. This honesty is refreshing and adds considerable power to the book.

A major theme running through *The Color of Law* is that the distinction between de jure and de facto segregation is both functionally fictitious and obfuscatory. Non-black people (me, for example) tend to think of housing discrimination as something in the past, engineered mostly by individuals in their private capacities, though with effects in the current day. It's more convenient to think that way, after all. Just as importantly, we tend to think that if, in some cases, the government did engage in segregation (de jure), it doesn't any more, so there's little to talk about. Plus, anyway, we conclude that by now the effects of private and government actions are impossible to separate. Rothstein rejects all this, or rather, claims it obscures more than it clarifies. First, there was, until relatively recently, vastly more de jure segregation than most people are aware. Second, even if de jure segregation is now gone, what we think of as de facto segregation was primarily driven by earlier de jure segregation, and therefore the government, not private choice, is almost exclusively responsible for present-day patterns of segregation, as well as the consequent multiple negative effects on African Americans in the present day of that segregation. Third, because it was our government, we are all responsible for finding a solution.

Although most of the book is taken up with the dry bones of statistics and with carefully phrased parsing of specific instances of de jure segregation and their effects, Rothstein frames his book with the story of Frank Stevenson, born in 1924 in Louisiana. As a young man he moved to San Francisco, working in war industries and settling in Richmond, just north of Oakland. Many African Americans came to California to work, because the war opened up (some) opportunities for good jobs for black men—but it did not open up opportunities for

good homes. Rothstein documents the myriad ways in which men like Stevenson and their families were forced into less desirable housing, usually far from their jobs. These included official refusal by the Federal Housing Administration and the Veterans Administration to insure mortgages for black applicants seeking homes in white areas, or for white applicants seeking homes in black areas. They also included putatively private practices such as blockbusting (real estate agents trying to stir up white panic about declining house values if black people moved in or near) and redlining (bank refusal to lend for housing in any area where many black people lived). All of northern California engaged in these practices—which is largely why Stanford and Palo Alto have almost no black people today, because black people were kept out and now they can't afford to enter. And Stevenson's descendants are, if not poor, barely middle class—unlike the vast majority of descendants of white wartime workers.

Rothstein then spends much of the rest of the book delineating the breadth and impact across the country of each of the obstacles encountered by Frank Stevenson and other African Americans in California. He discusses at great length government efforts to ghettoize (his word) black people, both where they lived and most especially as they moved north. These efforts began primarily in the Progressive Era (segregation was actually less aggressive earlier) and were led by Progressives. They were militantly supported and expanded by Franklin Roosevelt and his team of Democrats, both on the national level and in most large municipalities (but primarily driven at the federal level). There were so many such efforts, with interlocking effect, and Rothstein itemizes them all, that the reader's eyes begin to glaze over. They included discriminatory mortgage insurance (or the lack thereof); innumerable explicit racial restrictions in development and housing sales; location of services and schools; the racism of the Tennessee Valley Authority; the segregation of federally-driven high-rise housing projects; and much more. Rothstein also documents the intermittent attempts by courts to forbid various segregation practices, usually promptly evaded by government functionaries who made slippery statements about how they were really complying with the law (a practice that seems to characterize most functionaries of the administrative state even today,

on any issue where the courts overrule the superior judgment and insight of bureaucrats).

The book extensively covers zoning—something mostly neutral on its face, but widely used by Oak Park, and thousands of other localities, to keep black people out. Occasionally such zoning was explicitly racial, but early on that was forbidden by the courts, so various clever alternatives were used, primarily focused on preventing the creation of housing attractive to lower income people (with other actions taken against higher income black people who didn't get the message). And just in case the reader starts to think he means just places like Alabama, Rothstein points out that zoning and other local ordinances were used to drive black people almost wholly out of—Montana.

Another chapter elaborates further on FHA policies designed to prevent black people from obtaining desirable housing (including, most poignantly, in Levittown). The next chapter tells how ostensibly private discrimination, such as in housing covenants, relied not just on direct government enforcement (which was ended relatively early) but on governments refusing to enforce laws against those who intimidated or used violence against black families daring to move to white areas. Other chapters cover tax policy; numerous additional local efforts to keep black people out, such as by hugely raising utility connection fees for "black developments" and paying black people to go away by offering them above-market prices for their homes. None of this is strictly news, but its breadth and permanence, as well as its brazen conduct, is news to most people, including me.

Rothstein also repeatedly points out the knock-on effects of housing segregation. Renting, or owning a house in a less desirable neighborhood, prevents the building of equity over decades. Subsequent generations therefore get less money handed down to them. Living far from jobs makes it harder to get, and to keep, a good job. Related to this were government efforts to suppress black wages, such as by Roosevelt's National Recovery Administration, which was designed to set much lower wages for industries with a heavy African American presence, and the Civilian Conservation Corps, with its segregated camps and assignment to blacks of menial, unskilled jobs, thus hampering skills development. This continued after the Depression and World War II, when blacks were largely excluded from the good jobs in many industries

that boomed and allowed millions of white people to enter the middle class. And, even aside from overt segregation, when you make less money, you have less choice in housing, and are more likely to end up in cheaper, crowded, already segregated housing.

Of course, it does not take much historical knowledge to know that racism against black people was widespread government policy, both North and South, for a long time. (The exceptions were areas where public policy was heavily influenced by Christian social principles, which drove anti-racism just like it drove abolitionism.) Gun control, for example, was originally introduced, in the South post-Reconstruction, as a naked effort to strip black people of their constitutional right to keep and bear arms, so that they could be more effectively oppressed. But historical knowledge is in short supply nowadays, so Rothstein fills in the picture for readers, and then adds plenty of detail.

The author notes in several places that the Progressive movement, from Woodrow Wilson ("an uncompromising believer in segregation and black inferiority") on down, was incorrigibly racist, most aggressively against African Americans. He does not note, but could have with profit, that this was closely related to the racism of the Progressive-run eugenics movement, which sought to "purify the race," and was led by, among others, Margaret Sanger, the founder of Planned Parenthood. She founded it with a primary goal of limiting the black population through the eugenics methods of the day, including birth control, forced sterilization, and abortion. As she said, in writing, talking of hiring black ministers to propagandize recalcitrant black people opposing her methods, "We don't want the word to go out that we want to exterminate the Negro population." And even today, Supreme Court justice Ruth Bader Ginsburg let her mask, or hood, drop a few years back, noting with approval that *Roe v. Wade* invented a constitutional right to abortion in part because of "concern about population growth and particularly growth in populations that we don't want to have too many of." That is, to be clear, Ginsburg thinks it good to encourage the killing of black people so there won't be so many of them. If that's what a sitting Supreme Court justice, the heir of Woodrow Wilson's Progressives, today feels comfortable saying in public, it's no wonder that de jure housing segregation lasted so long.

The inevitable conclusion from Rothstein's powerful demonstration of overwhelming government discrimination against black people is that the African American experience is unique. He draws that conclusion, without hesitation. Unfortunately for today's Left, though, this is the wrong conclusion, because today's American Left relies nearly wholly on identity politics, and its underlying Marxist theories of oppression and emancipation, to unite its coalitions and to stir up rage to action. If one group is unique, then this program collapses of its own contradictions. Thus, Rothstein has been criticized in some quarters for overtly refusing to use the term "people of color," instead explicitly insisting on "black" or "African American." "When we wish to pretend that the nation did not single out African Americans in a system of segregation specifically aimed at them, we diffuse them as just another 'people of color.' " He similarly refuses to use the vague term "diversity," in effect recognizing it as a cult word designed to obfuscate through its meaninglessness—rather, he insists on using the precise goal term "racial integration." This speaks well of his passion for exactitude, but undercuts the bogus narrative of generalized, non-specific but all-powerful "white privilege," and thus makes him guilty of wrongthink. If Rothstein worked at Google, he'd be fired.

Rothstein ends with a list of possible "fixes," ranging from giving effectively free houses to black people, to eliminating the mortgage interest deduction, to various fairly complex schemes to incentivize the building of low-income housing in desirable suburbs. He openly admits that these fixes have considerable costs, ranging from direct monetary costs to the increase in local crime that will result from importing young black men—noting, with rare honesty, that "integration cannot wait until every African American youth becomes a model citizen." But he also freely admits none of these are constitutional under current principles or are politically palatable—both to white people, and, what he does not say, to non-black "people of color." Thus, his primary goal is to educate—to show readers that the common narrative of "it was a long time ago, and it wasn't really the government, and anyway don't black people choose to live by themselves" is wrong, and to hope such education bears fruit in public policy, especially in the courts. And Rothstein sticks to that goal. Unlike Ta-Nehisi Coates, he does not get bogged down in blaming white people for every bad thing that has

ever happened to a black person. This gives more power to his analysis, not least by preventing those in his audience uncomfortable with his analysis and conclusions from wriggling away or changing the topic.

There are many unanswerable questions, which Rothstein does not get sidetracked into addressing. What would patterns of housing, and economic progress, look like in a world without the government actions Rothstein narrates? How much did government segregation contribute to the destruction of the black family from the 1960s onward, with consequent further negative impacts on black economic progress? How can cultural pathologies in some African American communities be repaired? All these are worthwhile questions, but not the focus of the book, which is a wise choice by the author, I think.

Yes, there are some false notes. Most of these consist in mushy application of legal principles. No, the Fifth Amendment does not "prohibit the federal government from treating citizens unfairly." That may be a layman's version of the Fifth Amendment (or rather the Fifth Amendment viewed through the Fourteenth), but that is not what the Fifth Amendment says, and to import vague concepts like "fairness" decreases clarity. Similarly, Rothstein makes much of the Thirteenth Amendment, arguing that the long history of government housing discrimination "was not only unlawful but was the imposition of a badge of slavery that the Constitution mandates us to remove." The Thirteenth Amendment says nothing about "badges of slavery." Rothstein also insists on referring to all discriminatory actions as unconstitutional as of the time they were taken, stating "I reject the widespread view that an action is not unconstitutional until the Supreme Court says so. In fact, all of us . . . bear a collective responsibility to enforce our Constitution and to rectify past violations whose effects endure." I am all for private interpretation, and I agree with Rothstein that what is unconstitutional should not be defined solely by the Supreme Court, but also by legislators and simple individuals. *Dred Scott* should not be viewed as having made slavery constitutional in its time, any more than *Roe v. Wade* should be viewed as having made abortion constitutional in our time. In practice, though, Rothstein's moral outrage on constitutionality does not really add to his overall argument.

On another legal matter, Rothstein repeatedly complains that mortgage brokers and banks "targeted lower-middle-class African American

communities for subprime lending during the pre-2008 housing bubble, leaving many more African American families subject to default and foreclosure than economically similar white families." This may be true—but some, or perhaps all, of that targeting was required or encouraged by law, by the so-called Community Reinvestment Act, which Rothstein does mention, but only in an endnote, and by pressure by financial regulators to issue more loans to "underserved communities." I'm quite familiar with both, and their effect was (and is) to require race-based lending to bad credit risks. Naturally, when you lend to bad credit risks, they default more, and they are disproportionately adversely affected by downturns in the economy as a whole. Criticism of modern-day bank policies as designed to perpetuate segregation is the weakest part of Rothstein's book (although it is also a very ancillary part of the book)—it is, perhaps, ironic that the CRA results in black borrowers being set back further in a downturn, but that does not show racism. There is simply zero evidence for discriminatory lending—as shown by the default rates for black borrowers being generally actually higher, suggesting that the underwriting standards for them are looser, not tighter.

Rothstein also uncritically praises the Obama administration's "Affirmatively Furthering Fair Housing" regulations, a radical expansion of the Fair Housing Act by bureaucratic fiat. He notes, correctly, that much of what AFFH demands is designed to address the effects of many of the government policies on which his book focuses. He does not note, however, that AFFH dilutes that focus by requiring exact quotas for all races in housing for suburbs of any given city, not just African Americans. Moreover, he ignores the much more sinister overall goal of AFFH, which is to tap the monies of successful Republican suburbs by federal force, in order to redirect them to prop up cities that are failing due to decades of Democratic leadership and policies, so they can take that money and pay off their political cronies and supporters, without any political responsibility to those who are actually providing the money. (This is not dissimilar to the way in which Democrats have for decades used government employee unions to reinforce their power while handing the bill to future generations, one of the many reasons government unions should again be made illegal.)

But these mild problems don't detract substantially from the power of this book. Yes, it's a bit of a slog, and like any book about the evil that men do, the reader doesn't necessarily thrill to the read. If you stick it out, though, you'll be rewarded with fresh insights into critical public policies, and that is well worth the time and effort.