

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Equality/Race/The Road to *Brown*

The Debate over Strategies for Achieving Racial Equality (1935) (expanded)¹

The Journal of Negro Education in 1935 ran a special edition on “The Courts and the Separate Negro School.” Many prominent African-American intellectuals contributed essays analyzing and critiquing efforts to eradicate Jim Crow education through litigation. The most famous and controversial article was written by W.E.B. Du Bois. Du Bois was the leading African-American scholar of the first third of the twentieth century and a founding member of the NAACP. Vigorously opposed to the litigation campaign outlined by Nathan Margold and being implemented by Charles Houston, Du Bois resigned from the NAACP in the 1930s.

The Du Bois essay and the others excerpted more briefly below highlight significant disagreements within the African-American community over both the merits of litigation in general and the merits of litigating as a means for desegregating schools. What different were positions adopted by various participants in the debates and what are their most important arguments? Do various participants underestimate or overestimate judicial capacity? Suppose the NAACP had adopted Du Bois’s arguments. What would have been the probable consequences for the constitutional status of race relationships in the United States?

W.E. Burghardt Du Bois, “Does the Negro Need Separate Schools?”

...
The question which I am discussing is: Are these separate schools and institutions needed? And the answer, to my mind, is perfectly clear. They are needed just so far as they are necessary for the proper education of the Negro race. The proper education of any people includes sympathetic touch between teacher and pupil; knowledge on the part of the teacher, not simply of the individual taught, but of his surroundings and background, and the history of his class and group; such contact between pupils, and between teacher and pupil, on the basis of perfect social equality, as will increase the sympathy and knowledge; facilities for education in equipment and housing, and the promotion of such extra-curricular activity as will tend to induce the child into life.

If this is true, and if we recognize the present attitude of white America toward black America, then the Negro not only needs the vast majority of these schools, but it is a grave question if, in the near future, he will not need more such schools, both to take care of his natural increase, and to defend him against the growing animosity of the whites. It is of course fashionable and popular to try to deny this; to try to deceive ourselves into thinking that race prejudice in the United States across the Color Line is gradually softening and that slowly but surely we are coming to the time when racial animosities and class lines will be so obliterated that separate schools will be anachronisms.

...
Much as I would like this, and hard as I have striven and shall strive to help realize it, I am no fool; and I know that race prejudice in the United States today is such that most Negroes cannot receive proper education in white institutions. If the public schools of Atlanta, Nashville, New Orleans and Jacksonville were thrown open to all races tomorrow, the education that colored children would get in

¹ Excerpts taken from “The Courts and the Negro Separate School,” *Journal of Negro Education* 4 (1935): 289–456. We gratefully acknowledge Howard University for granting permission to reprint these excerpts.

them would be worse than pitiable. It would not be education. And in the same way, there are many public school systems in the North where Negroes are admitted and tolerated, but they are not educated; they are crucified. There are certain Northern universities where Negro students, no matter what their ability, desert, or accomplishment, cannot get fair recognition, either in classroom or on the campus, in dining halls and student activities, or in common human courtesies. . . .

Under such circumstances, there is no room for argument as to whether the Negro needs separate schools or not. The plain fact faces us, that either he will have separate schools or he will not be educated.

. . . To endure bad schools and wrong education because the schools are "mixed" is a costly if not fatal mistake. I have long been convinced, for instance, that the Negroes in the public schools of Harlem are not getting an education that is in any sense comparable in efficiency, discipline, and human development with that which Negroes are getting in the separate public schools of Washington, D.C. And yet on its school situation, black Harlem is dumb and complacent, if not actually laudatory.

Recognizing that for the vast majority of colored students in elementary, secondary, and collegiate education, there must today be separate educational institutions because of an attitude on the part of the white people which is not materially to change in our time, our customary attitude toward these separate schools must be absolutely and definitively changed. As it is today, American Negroes almost universally disparage their own schools. They look down upon them; they often treat the Negro teachers in them with contempt; they refuse to work for their adequate support; and they refuse to join public movements to increase their efficiency.

. . . If Negroes could conceive that Negroes could establish schools quite as good as or even superior to white schools; if Negro colleges were of equal grade in accomplishment and in scientific work with white colleges; then separation would be a passing incident and not a permanent evil; but as long as American Negroes believe that their race is constitutionally and permanently inferior to white people, they necessarily disbelieve in every possible Negro Institution.

. . . There are times when one must stand up for principle at the cost of discomfort, harm, and death. But in the case of the education of the young, you must consider not simply yourself but the children and the relation of children to life. It is difficult to think of anything more important for the development of a people than proper training for their children; and yet I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made a mock of it, neglected or bullied it, and literally rendered its life a living hell. . . . Sometimes, to be sure, the child triumphs and teaches the school community a lesson; but even in such cases, the cost may be high, and the child's whole life turned into an effort to win cheap applause at the expense of healthy individuality. In other cases, the result of the experiment may be complete ruin of character, gift, and ability and ingrained hatred of schools and men. For the kind of battle thus indicated, most children are under no circumstances suited. It is the refinement of cruelty to require it of them. Therefore, in evaluating the advantage and disadvantage of accepting race hatred as a brutal but real fact, or of using a little child as a battering ram upon which its nastiness can be thrust, we must give greater value and greater emphasis to the rights of the child's own soul. We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into halls where they are ridiculed and hated.

. . . If the American Negro really believed in himself; if he believed that Negro teachers can educate children according to the best standards of modern training; if he believed that Negro colleges transmit and add to science, as well as or better than other colleges, then he would bend his energies, not to escaping inescapable association with his own group, but to seeing that his group had every opportunity for its best and highest development.

. . . Does the Negro need separate schools? God knows he does. But what he needs more than separate schools is a firm and unshakable belief that twelve million American Negroes have the inborn capacity to accomplish just as much as any nation of twelve million anywhere in the world ever accomplished, and that this is not because they are Negroes but because they are human.

So far, I have noted chiefly negative arguments for separate Negro institutions of learning based on the fact that in the majority of cases Negroes are not welcomed in public schools and universities nor treated as fellow human beings. But beyond this, there are certain positive reasons due to the fact that American Negroes have, because of their history, group experiences and memories, a distinct entity, whose spirit and reactions demand a certain type of education for its development.

...
... "Negroes must know the history of the Negro race in America, and this they will seldom get in white institutions. . . . Negroes who celebrate the birthdays of Washington and Lincoln and the worthy, but colorless and relatively unimportant "founders" of various Negro colleges, ought not to forget the 5th of March—that the first national holiday of this country, which commemorates the martyrdom of Crispus Attucks. They ought to celebrate Negro Health Week and Negro History Week. They ought to study intelligently and from their own point of view, the slave trade, slavery, emancipation, Reconstruction, and present economic development.

...
I know that this article with forthwith be interpreted by certain illiterate "nitwits" as a plea for segregated Negro schools and colleges. It is not. It is simply calling a spade a spade. It is saying in plain English, that a separate Negro school, where children are treated like human beings, trained by teachers of their own race, who know what it means to be black in the year of salvation 1935, is infinitely better than making our boys and girls doormats to be spit and trampled upon and lied to by ignorant social climbers, whose sole claim to superiority is ability to kick "niggers" when they are down. I say, too, that certain studies and discipline necessary to Negroes can seldom be found in white schools.

It means this, and nothing more.

To sum up this: theoretically, the Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

E. Franklin Frazier, "The Status of the Negro in the American Social Order"

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Where such a basic pattern of relations between whites and blacks exists . . . democratic justice in the courts is impossible in spite of the abstract legal formulations.

...
... The increasing conflict between the workers and the employers is forcing the Negro to make common cause with white workers. . . . [S]uch movements indicate that the Negro's struggle to change his status in the South will be bound up in the future with the struggle between white and black workers and sharecroppers and the white landlords and capitalists.

...
... While the Negro in the Northern urban environment does not enjoy all the rights of citizenship, he undoubtedly enjoys more freedom in these cities than in any other part of the country. This freedom is due to some extent to the fact that he has political power.

...
... The Negro is gradually learning that the status of a group is dependent upon social and economic power, and that "good will" on the part of sentimental whites will not help him. In the urban environment he is showing signs of understanding the struggle for power between the proletariat and the owning classes, and is beginning to cooperate with white workers in this struggle which offers the only hope of his complete emancipation.

Ralph J. Bunche, "A Critical Analysis of the Tactics and Programs of Minority Groups"

...

Negro leadership . . . has traditionally put its stress on the element of race; it has attributed the plight of the Negro to a peculiar racial condition. . . . They have not realized that so long as this basic conflict in the economic interests of white and black groups persists, and it is a perfectly natural phenomenon in a modern industrial society, neither prayer, nor logic, nor emotional or legal appeal can make much headway against the stereotyped racial attitudes and beliefs of the masses of the dominant population. The significance of this to the programs of the corrective and reform organizations working on behalf of the group should be obvious. The most that such organization can hope to do is devote themselves to the correction of the more flagrant specific cases of abuse, which because of their extreme nature may exceed even a prejudiced popular approval; and to a campaign of public enlightenment concerning the merits of the group they represent and the necessity for the establishment of a general community of interest among all groups in the population.

The confidence of the proponents of the political method of alleviation is based on the protection which they feel is offered all groups in the society by that sacred document the Constitution. . . . The Constitution is . . . detached from the political and economic realities of American life and becomes a sort of protective angel hovering above us and keeping a constant vigil over the rights of all America's children, black and white, rich and poor, employer and employee and, like impartial justice, blinded to their differences. This view ignores the quite significant fact that the Constitution is a very flexible instrument and that, in the nature of things, it cannot be anything more than the controlling elements in the American society wish it to be. And, what these worthy institutions wish it to be can never be more than what American public wishes it to be. . . .

...

. . . It is only inadvertently that the courts, like the legislatures, fail to reflect the dominant mass opinion. It must be futile, then, to expect these agencies of government to afford the Negro protection for rights which are denied to him by the popular will. . . . In the first place, American experience affords too many proofs that laws and decisions contrary to the will of the majority cannot be enforced. In the second place, the Supreme Court can effect no revolutionary changes in the economic order, and yet the status of the Negro, as that of other groups in the society, is fundamentally fixed by the functioning and demands of that order.

...

. . . The only hope for the improvement in the condition of the masses of any American minority group is the hope that can be held out for the betterment of the masses of the dominant group. Their basic interests are identical and so must be their programs and tactics.

Newton Edwards, "A Critique: The Courts and the Negro Separate School"

...

There are considerations involved in separate schools for Negroes other than those of material and physical equality. These conditions involve the outcomes of the policy of separation, and the consequent effect upon the minds of the segregated Negro children, who are separated from the white children as one would take from a school those with measles, or chicken-pox, or diphtheria. . . .

...

Howard Hale Long, "Some Psychogenic Hazards of Segregated Education of Negroes"

...

The total setting of the segregated school literally forces a sense of limitation upon the child. He is reminded of it whether in home, school, theatre, or on the streets. . .

Segregation with its obtrusive implications of dependence conjures up in the mind of the minority child an ideal status for the dominant group.

. . . In short, we simply may not expect a citizenry to grow up with common social and political ideas in an atmosphere of enforced separateness.

Alain Locke, "The Dilemma of Segregation"

. . . Negroes . . . should and must resort to the courts to secure any considerable or wholesale improvement of the situation. This becomes more imperative when you realize that separation and a parity of standards and facilities are naturally antagonistic and rarely if ever co-exist. . .

My reasoning here is not theoretical or Utopian. The reform of educational segregation by resort to law will never be wholesale or without its temporary set-backs. Specific communities must . . . face the difficulties of practical enforcement even after favorable decisions, and count upon retributive community sentiment and behavior in some instances. Favorable decisions or pending appeals should be used by public-spirited and sanely balanced citizens' committees as bargaining points for progressive adjustment toward the equalitarian goal.

. . . The only other effective alternative of legal pressure would . . . be political pressure, which in the nature of the case in the South is even more restricted than legal recourse. For, in the first instance, the legal system has through the machinery of appeal more reliable access to a wider circle of public opinion beyond the local community and a firmer tradition of impartiality. The political channels of effective pressure are purely local or primarily so in the American political system, and what little potentiality of appeal they have from the counter-pressure of biased local tradition and sentiment is itself legal. . .

. . . [F]ew if any communities can afford the additional expense of entirely equal accommodations, and it would require as much and the same kind of effort at the removal of the social bias of the community and the reform of its conscience to secure general admission of the principle of complete equity as to secure the abolition of the dual system. Up to a certain point, communities will pay a price for prejudice, but not such an exorbitant price as complete economic equality requires.

. . . [T]he advantages of mixed schools in the long run are greater than certain admitted temporary advantages of separate schools. The contact of Negro teachers with groups of handicapped and socially maladjusted Negro students is undoubtedly more helpful than indifferent pedagogic attention from white teachers. . . On the other hand, the student is better conditioned to the eventual stress which he must undergo in the adult community and the white or non-Negro student will have the additional educative exposure under more advantageous circumstances than the casual associations of out of school life.

William H. Kilpatrick, "Resort to Courts by Negroes to Improve Schools A Conditional Alternative"

. . . As to the question of appeal to the courts to abolish inequality of educational opportunities, the general answer is yes, that is what courts are for. But there are certain considerations which should be taken into account in determining any particular appeal.

1. The courts, possibly without being quite aware of it, are always amenable to the influence of surrounding public opinion. The notion sometimes held that law is an exact science which grinds out decisions that are independent of time, place, and conditions, is very far from correct. Generally, and especially with regard to new questions, there is a wide range of possibility before the court as to what

decision to make. Any particular court is very likely to seek ways of carrying out what it conceives to be the most fundamental public policy. . . .

2. The public support necessary to carry out a court decision must be taken into account. Hostile legislatures find many ingenious ways of thwarting unwelcome court decisions; and the cause that the decision is meant to aid may receive a significant back-set. Where there has been built up a public opinion sufficient to give a respectable support both within and without the area of court jurisdiction to a decision favorable to Negroes then take the case to court. The supporting public opinion inside the jurisdiction need not constitute a majority opinion, but it should include along with good legal support such a backing among good citizens in general as would not allow demagogic politicians to profit by attacking the decision or proposing circumventing laws. . . .

Chas. H. Thompson, "Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School"

. . .

In discussing these questions several basic limitations are observed:

1. Where separate schools are mandatory or permissive by constitutional or statutory enactment and provide substantially equal educational opportunity, they have been adjudged by the higher courts of the country to abridge none of the constitutional rights of the parties concerned. Thus, the main issue involved here is the relative advantage of court action as a means of attaining equitable treatment within the limits of the *status quo*.

2. It is recognized that the ultimate solution of the separate school, its abolition, is contingent upon the ultimate solution of the so-called race problem in America. Moreover, it is just as clear that the separate school will not be completely up-rooted in a few, or in many, decades. But, as a step toward its eventual abolition, it is possible to stop the extension of the practice of the separate school into those 26 states which either legally forbid it or give it no legal sanction. Thus, the real issue here is whether there are enough reasons potent enough to make unwise the use of the courts as a means of preventing the extension of the separate school.

3. . . .

Alternatives

In such a predicament Negroes might take recourse to any one or a combination of several alternatives. They might *migrate, revolt, attempt to regain the ballot, appeal to the sense of fairness of the local whites, or resort to the courts.*

. . . *Migration* is possible but practically inconceivable. . . . *Revolution* as an immediate alternative is suicidal. . . . *Attempt to regain the ballot* is excellent and necessary, but it will involve, in the main, resort to the courts. . . .

While it is difficult to appraise with any degree of accuracy the effects of "appeals to the sense of fairness" of the whites, nevertheless, the facts disclose unquestionably that, whatever virtue such "appeals" have had, they have fallen far short of *minimizing*, not to say anything of eliminating, the discrimination in the provision of school facilities for whites and Negroes. . . .

. . . Thus, it appears to the writer that it is no longer a question of whether Negroes *should* resort to the courts as a means of removing present abuses. They *must* resort to the courts. They have no other reasonable, legitimate alternative.

Advantages and Disadvantages of Court Action

. . .

. . . Granting that attempts to circumvent court decisions are valid evidence of strong resistance by public opinion, it does not follow that resort to the courts is either futile or disadvantageous. It is obvious that we can not determine what decisions will be circumvented until *after* the courts have made a decision, and the courts will not make a decision until a case is brought before them. Accordingly, resort to the courts becomes a necessary part of the procedure in determining what can and what can not be enforced.

[S]ince 1865, Negroes have brought before the higher state and federal courts some 113 cases dealing with the separate school alone, not to say anything of the numerous additional cases instituted on other issues. Most of these cases have been decided since Reconstruction, and many of them in favor of the Negro. . . . Certainly, in the school cases, aside from some temporary and infrequent ill feeling, no untoward consequences have resulted, and Negroes have had the advantage of a number of favorable decisions. . . . Moreover, the assumption that Negroes should eschew any and all tactics that would challenge in any effective manner the unjust customs and practices of various local communities for fear of precipitating a "conflict situation" seems to ignore the basic principle that public opinion never results in any other way. . . .

[I]t may or may not be significant that in those states where Negroes have brought the most court cases, they also have the best schools. Whether Negroes in these states have the best schools because they have brought the most court cases, or whether they have brought the most court cases because they have the best schools is, of course, debatable. Yet, I can think of few other historical reasons why North Carolina should have better Negro schools than does Virginia, Maryland, or Tennessee, except that North Carolina Negroes have brought more than ten times as many court cases relating to their schools as Negroes in any one of these other states. . . .

. . . The history of limitation in this country reveals only rare instances where the decisions of our higher courts are flouted to the extent of a direct refusal to act in accord with them. To be sure, there have been many attempts to circumvent court decisions by devising more subtle legal means of attaining the same ends secured by the procedure outlawed by the courts. And the answer is briefly this: Circumvention is not a universal practice; and even where it is attempted, it is not always successful; and even where it is successful, the very subtlety necessitated by circumvention, either makes administration of the practice so difficult as to defeat itself in the long run, or furnishes another opening for attack.

. . . [E]ven unfavorable decisions are more advantageous than disadvantageous. In the City of Baltimore, Negro high-school teachers were being paid considerably less than white high-school teachers, with similar training and experience. After much importuning without success, they took the matter to court. The lower court ruled against them. They filed an appeal to the higher court. But before the case reached the higher court, the local authorities saw the "reasonableness" of their case and provided equal salaries.

The Argument for Separate Schools

The allegation that Negro children are discriminated against in the mixed school is substantially correct, — *some* Negro children are discriminated against in mixed schools. But, the conclusion that such a fact justifies the separate school, even with equal facilities, it seems to me, is fallacious. . . . it is obviously illogical to assume that, because *some*, or even a large number of, Negro pupils are discriminated against, *all* Negro pupils should be assembled and taught in separate schools. If this logic is followed, then all the Jews and Gentiles, Greeks and barbarians, blondes and brunettes, the ugly and the beautiful, should have separate schools established for them, because *some* of their groups are discriminated against. . . .

. . . The assertion, that Negro teachers are more sympathetic toward Negro pupils than white teachers, appears to be one of the "questionable-if-not-false" aspects of this generalization. . . .

. . . [T]he answer to the question of discrimination against Negro teachers need not and should not be a separate school, where Negroes would have a monopoly, but rather should be a persistent and consistent fight to compete for teacherships on equal terms with the whites.

. . .

It has not been demonstrated conclusively, or otherwise, that the scholastic achievement of Negro pupils is any better in the separate school than in the mixed school, or that Negro pupils in the separate school develop any more wholesome personalities than in the mixed school. . . .

. . .

Argument Against Separate Schools

In the first instance, I think most of us would agree that to *segregate* is to *stigmatize*, however much we may try to rationalize it. We segregate the criminal, the insane, pupils with low I.Q.'s, Negroes, and other undesirables. To argue that Negroes are no more stigmatized than white people who are also segregated is, and should be recognized, as sheer sophistry. For we all know that segregation is practically always initiated on the basis that Negroes are inferior and undesirable. Thus, when Negroes allow themselves to be cajoled into accepting the status defined by the separate school, they do something to their personalities which is infinitely worse than any of the discomforts *some* of them *may* experience in a mixed school.

In the second instance, the separate school is generally uneconomical, and frequently financially burdensome. Except in very large cities where the Negro population is fairly dense, separate schools mean costly duplication of facilities and an unreasonable increase in school expenditures. Consequently, where sufficient funds are not available to support decent schools for both whites and Negroes, and even in many cases where they are sufficient, it is the Negro school that suffers, and there is very little that is done about it. Those who argue that the separate school with equal facilities is superior to the mixed school with prejudice should know that the separate school, or separate anything, with equal facilities is a fiction. Separation in any form with equal facilities does not exist anywhere—not even in Washington, D.C. where Negroes have more nearly substantially equal facilities than in any other separated system.

In the third instance, and finally, not only is the separate school uneconomical and undemocratic but it results in the *mis*-education of both races. Separation of the two racial groups, at an early age, when they should be learning to know and respect each other, develops anti-racial and provincial attitudes in both, and necessitates, in adulthood, re-education against tremendous odds. The net results of such an educational policy are that the Negro develops an almost ineradicable inferiority complex and evolves a set of Jim Crow standards and values; the white child develops an unwarranted sense of superiority—if not an actual contempt for or indifference towards the Negro. And both races develop a misunderstanding of each other that necessitates all of the expensive and ineffective race-relations machinery that we have in this country at the present time.

. . .

W.T.B. Williams, "Court Action by Negroes to Improve Their Schools is a Doubtful Remedy"

TOO FEW LIBERAL COMMUNITIES TO WARRANT GENERAL COURT ACTION

. . .

The courts are composed largely of the same sorts of people as elect them and they share the popular feelings toward Negroes. . . . A sympathetic white schoolman of the upper South says: "The Negro may have recourse to the courts to secure his rights but in many cases, I fear, even a favorable verdict would be barren because of the many ways that can be found to circumvent the law." . . . [A]n effective friend of Negroes in one of the more progressive Southern states [declares]: "Other effects of such action . . . would be to alienate in many instances the best support which Negroes have among

white people . . . besides this, there are so many ways in which contrary-minded school and other officials might retaliate." . . .

. . .

HELPFUL PUBLIC OPINION MORE EFFECTIVE THAN COURT ACTION

[G]eneral resort to the courts now might tend to set back the natural, healthy movements already under way for improving the Negroes' educational conditions. These movements spring from enlightened public sentiment regarding Negroes, without which I doubt that any real, permanent progress can be made. . . . A capable, keen-minded young white man engaged in Negro education is doubtless right in his analysis when he says: "If I have analyzed correctly the elements in the field in which I work, progress in the field is possible though the moulding of sentiment and public opinion more than through the drive of law." I should add, too, the well-considered opinion of a similar worker in Negro education in another state: "It has always been my belief that the development of the Negro school system to be permanent and lasting should grow slowly and should be made on firm foundation backed by public sentiment on the part of both races. . . ."

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