

Michigan Law Review

Volume 79 | Issue 4

1981

The Supreme Court: A Citadel for White Supremacy

Sidney Willhelm

State University of New York at Buffalo

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Law and Race Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Sidney Willhelm, *The Supreme Court: A Citadel for White Supremacy*, 79 MICH. L. REV. 847 (1981).

Available at: <https://repository.law.umich.edu/mlr/vol79/iss4/31>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE SUPREME COURT: A CITADEL FOR WHITE SUPREMACY

*Sidney Willhelm**

RACE, RACISM AND AMERICAN LAW, by *Derrick A. Bell, Jr.*, Boston: Little, Brown. 1980. (2d ed.) Pp. xxvii, 685. \$22.

White Americans applaud themselves for accepting Blacks as their equals, apparently believing that only the last vestiges of racism mar what would otherwise be a land of Equality. "After 345 years," Eli Ginzburg and Alfred S. Eichner proclaimed in 1964, "America is well on the road toward establishing the first biracial democracy in history — an accomplishment that will be the equal of its earlier contribution to mankind, a democracy [of] white men."¹ Only six years later, Alexander M. Bickel proudly announced the arrival of "the Egalitarian Society."² "No one," the Marxist historian Eugene D. Genovese insists in reflecting upon the Black experience of the sixties, "who lived through the era of segregation, which extended well into the 1940s, can fail to recognize the giant strides toward equality."³

With the advent of Equality between Blacks and Whites, one might expect social and economic equality to follow. After all, the bases for white privilege — slavery and segregation — have been abolished. Now that Blacks and Whites are treated alike, the disparity in their standards of living should vanish. Yet quite the contrary has taken place: the gap between Blacks and Whites has increased. Between 1959 and 1973, the median Black family income increased from \$3,047 to \$7,269, while White income increased from \$5,893 to \$12,595. Despite the increase in the ratio of Black to White income from 52 to 58 percent, the income gap itself expanded from \$2,846 to \$5,326, an increase of 187 percent.⁴ The 1970s saw Blacks fall even farther behind. Although the income ratio reached, according to one

* Professor of Sociology, State University of New York, Buffalo. B.A. 1957, M.A. 1957, Ph.D. 1961, University of Texas, Austin. — Ed.

1. E. GINZBERG & A. EICHNER, *THE TROUBLESOME PRESENCE* 21 (1964).

2. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13 (1970).

3. Genovese, *Reflections on the 1960s: Preface to the Italian Edition of In Red & Black*, 8 *SOCIALIST REV.* 61-62 (1978).

4. S. LEVITAN, W. JOHNSTON, & R. TAGGART, *MINORITIES IN THE UNITED STATES* 12 (1975).

optimistic account, 64 percent in 1970,⁵ the ratio dropped back to 57 percent in 1977,⁶ the same level it had reached a quarter of a century earlier in 1952. Adjusting for inflation, we find that White median family income increased four percent between 1970-1977, while income for Black households remained constant.⁷

Unemployment statistics further dramatize the widening gap between Blacks and Whites. In 1948, the official unemployment ratio for nonwhites stood at 5.9 percent versus 3.2 percent for Whites, for a Black-to-White unemployment ratio of 1.6; in 1954 unemployment reached 9.9 percent for nonwhites and 5.0 percent for Whites, for an unemployment ratio of 1.9; the ratio rose to 2.2 in 1975-1977 and to 2.4 by mid-1978, "the widest gap between the two groups since the federal government began recording employment statistics by race."⁸

Unsurprisingly, Black poverty relative to White poverty has also worsened: official figures reveal 32.2 percent of Blacks below the poverty line in 1969 and 31.5 percent — a drop of merely .8 percent — in 1974; during the same period Whites dipped from 9.5 to 8.9 percent.⁹ Put another way, the ratio of Black-to-White poverty climbed from 3.05 in 1959 to 3.53 in 1974¹⁰ and then to 4.03 in 1977.¹¹ In 1966, poor Blacks and near-poor Blacks (those with incomes below 125 percent of the poverty line) constituted 58 percent of all poor and near-poor people, even though Blacks were only 11 percent of the population; this ratio expanded to 59.9 in 1972.¹² Between 1976 and 1977 the number of poverty-stricken Black families increased 20,000 (from 1,617,000 to 1,637,000).¹³ In 1973, 21 percent of all Black families received welfare, up from eight percent in 1961; by contrast, a mere three percent of White families were on welfare.¹⁴ All these figures¹⁵ point to increasing racial inequality; in the

5. See B. WATTENBERG, *THE REAL AMERICA* 125 (1975).

6. See Johnson, *Blacks' Job Plight Laid to Recessions*, N.Y. Times, July 25, 1979, § 1, at 10, col. 2.

7. See U.S. BUREAU OF THE CENSUS, *CURRENT POPULATIONS REPORTS: SPECIAL STUDIES: SERIES P-23; No. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1970-1978*, at 31, 181, 191 (1979).

8. See *id.* at 69 & 188.

9. See *id.* at 49.

10. See *id.*

11. See *id.* at 201.

12. S. LEVITAN, W. JOHNSTON & R. TAGGART, *supra* note 4, at 39.

13. See U.S. BUREAU OF THE CENSUS, *supra* note 7, at 201 & 203.

14. S. LEVITAN, W. JOHNSTON & R. TAGGART, *supra* note 4, at 39.

15. For a more detailed survey of the socioeconomic conditions of Blacks relative to Whites, see Willhelm, *Black/White Equality: The Socioeconomic Conditions of Blacks in America*, 78 J. BLACK STUD. (publication forthcoming).

words of the Kerner Report, we are headed toward "two societies, one black, one white — separate and unequal."¹⁶

A new book by Professor Derrick Bell, *Race, Racism, and American Law*, helps explain the persistence of inequality in the Egalitarian Society. In a thorough survey stretching from slavery to the present, Bell analyzes the historical impact of America's legal system on race relations. Bell does so by exploring what the legal system has done *to*, rather than *for*, Blacks. Rejecting the current mythology that social and economic equality will follow from constitutional equality, Bell argues that law, even now, reflects White interest at Black expense. His historical analysis confirms that laws intended for Black people end up benefiting Whites. "Little that has happened in the twentieth century," Bell maintains, "does more than reinforce the conclusions drawn out of the experience of the nineteenth" since "there was little indication in this history to justify placing much faith in the law . . ." (p. 39).

Drawing primarily upon Supreme Court cases, Bell inspects virtually all aspects of Black-White relations: marriage, public facilities, privileges of citizenship (voting, jury duty), protest activities (sit-ins, boycotts, demonstrations, flag-burning), education, housing, and fair employment. Although Bell carefully selects the leading cases in each of these areas, he fails to include any cases in two other areas of great concern to Blacks. One is welfare rights, which are crucial because at least one-fourth of all Blacks receive some form of welfare; the other is the criminal justice system, because Blacks make up half of the 533,000 people in jail and are increasingly the victims of police brutality. Bell argues that in each area, the Court has simply perpetuated White dominance in a new guise. In the past, *de facto* inequality was maintained through segregation, the legal doctrine of inequality. Bell demonstrates convincingly that Court rulings mandating equal treatment and an end to segregation have simply preserved the social and economic inequalities founded in a racist past. In short, constitutional decisions that speak the language of Equality have yielded little justice for Blacks.¹⁷

16. NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMITTEE ON CIVIL DISORDERS 1 (1968) (The Kerner Report).

17. Edwin Dorn, in a brilliant analysis of racial oppression, argues that under the banner of Equality, White America

has accepted substantive inequality. As a substitute for equality of result we have placed quality of process — equal protection and equal opportunity. If Americans can convince themselves that the procedure is fair, they believe that the outcome, however unequal, is also fair — that it is related to personal qualities, or at any rate is necessary for increased productivity and economic growth.

E. DORN, RULES AND RACIAL EQUALITY 111 (1979). The White view of Equality makes cer-

While Bell understands that the Egalitarian Society has failed to liberate Blacks, he does not satisfactorily explain why the courts adopted the ideology of Equality in lieu of segregation. Bell contends that the decision in *Brown v. Board of Education*¹⁸ responded to White needs, which is true, but he has misapprehended the nature of those needs. Bell insists that Whites feared that the perpetuation of segregation would hinder the United States' efforts to win the allegiance of nonwhite peoples among the newly-established African nations during the Cold War. However, Bell fails to support this argument convincingly. All he cites are the same undocumented assertions made in the *Brown* briefs — the arguments made by the NAACP lawyers and the federal government — and in news accounts published by *Time*. Such assertions are unpersuasive in light of the proven readiness of the United States government to disregard world opinion, as illustrated by the Vietnam War. Nor can Bell maintain that the courts responded to Black expectations raised by the promises of the Allies in World War II to make the world safe for democracy; Woodrow Wilson took America into the First World War with the same slogans, yet racism resurged after the conflict. The heightened demand for labor, and not an ideological commitment to democracy, prompted the wartime concessions to Blacks. Finally, the third argument Bell sets forth to explain the shift from segregation collapses under the weight of the facts. Bell writes that segregation inhibited the industrialization of the South, yet he himself documents that racial segregation prevailed in the North throughout industrialization.

Why, then, did White America adopt the ideology of Equality, if not as a concession to Blacks? Because changes in the economy made the ideology of Equality an appropriate tool to preserve White privilege, just as earlier changes had led to the demise of slavery and the rise of segregation. The transformation was not conscious any more than was the transformation to slavery or segregation; both slavery and segregation became institutionalized gradually over a period of decades.¹⁹ Only with the passage of time — and it is now a quarter of a century since *Brown* — can we see that constitutional Equality is merely another form of White domination. And it is Bell himself who so decisively shows the Court's principle of equal treat-

tain "that equality [will] not manifest itself in the equalization of the material and social existence of all citizens and then equal access to self-determination." Lichtman, *The Facade of Equality in Liberal Democratic Theory*, 12 *INQUIRY* 172 (1979).

18. 347 U.S. 483 (1954).

19. See C. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966).

ment to be ineffective in promoting true equality. Although the Court struck down racial segregation of schools in *Brown*, the nation, particularly in the North, is increasingly separated by race; residential segregation has not lessened even though discriminatory practices have been declared unconstitutional; the gap between Black and White income has widened after twenty-five years of rulings outlawing discriminatory practices; despite "equal opportunity," Black unemployment relative to White unemployment is at an all-time high; and affirmative action programs — which promise real gains for Blacks — are struck down in the name of Equality. Thus, social and economic inequality worsens even as the Court affirms constitutional Equality as the appropriate measure for race relations and Whites pride themselves for judging others "regardless of race."

The question, then, is what are the economic conditions that brought about the rise of Equality — myth though it may be — and the demise of segregation? The answer is that Whites no longer need or depend upon Black labor. Both slavery and segregation rested upon the need to exploit Black labor. Whites no longer need to discriminate on the basis of race to maintain their positions of privilege because they now produce wealth through the exploitation of technology. Not needing Blacks, Whites feel free to offer them "equal opportunity." Increasingly blacks are being disgorged from the labor force as surplusage in the modern, computerized economy. The percentage of Black males out of the labor market altogether — those not working or seeking jobs — doubled from the mid-sixties to the present, leaping from 20 to 40 percent.²⁰ Those figures cannot be explained as the result of a failure to educate Blacks for skilled, technological jobs, because unemployment for Blacks relative to Whites increases with level of education. Among persons aged sixteen through twenty-four in 1979, 16.4 percent of White high school dropouts were unemployed while the figure for Blacks stood at 31.6 percent, for a Black-to-White ratio of 1.9; 8.5 percent of White high school graduates were unemployed in contrast to 21.3 percent for Blacks, for a ratio of 2.5; and unemployment among White college graduates amounted to 4 percent while Black college graduates had an unemployment rate of 17.1, for a ratio of 4.3.²¹ In other words, the popular view that racism is fading in the marketplace²² is simply

20. See Malabre, *Recession Hits Blacks Harder Than Whites*, Wall St. J., Aug. 21, 1980, at 1, col. 1, 14, col. 2.

21. See Stevens, *Joblessness Worsens Among Black Youths*, Wall St. J., Sept. 8, 1980, at 1, col. 1.

22. See, e.g., W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978); Gersham, *A Matter of Class*, N.Y. Times, Oct. 2, 1980, § 6 (Magazine), at 29.

wrong. Segregation is even more pronounced in the boardrooms and executive suites of large American enterprises. Only two Blacks were found among the 4,000 people holding the top 5,000 elite positions examined by Thomas Dye²³ in the private and public sectors; a mere 75 to 100 Blacks mix with the 14,000 directors²⁴ of the nation's one thousand largest businesses. Yet no overt philosophy of racism calls for the exclusion of Blacks from corporate America; wealth, especially that tied to family affiliations, assures the presence only of Whites.

Although Bell convincingly shows that constitutional decisions have not produced socioeconomic improvements for Blacks and that racism remains embedded in the fabric of American Society, he does not go far enough. His failure is in not recognizing that the Constitution itself is a racist document. The very idea of Equality, of treating Blacks and Whites alike, is racist because it fails to take account of over three hundred years of racist oppression. Equal opportunity is a myth because it ignores the tremendous advantages that Whites retain. For example, 42 U.S.C. § 1982 grants to all citizens the "same right . . . as is enjoyed by White citizens thereof to inherit, purchase, base, sell, hold, and convey real and personal property"; the right granted is empty because Whites retain control over most property in America. Thus, the myth of Equality serves as a racist doctrine to justify the continued economic subjugation of Blacks,²⁵ who remain powerless to define Equality to meet Black needs or to force abandonment of the myth altogether in favor of racial justice.²⁶ As James Woodruff asks, "How can the slave cease being a slave when his freedom is defined by the very person who made him a slave?"²⁷

The fate of Blacks has remained in the hands of Whites for the past 350 years. Only the doctrine that sanctions Black subordination has changed. In the plantation economy, the Protestant ethic that legitimated the worldly accumulation of wealth also sanctioned slavery; in the robber baron era, social Darwinism sanctioned the right of the rich to their wealth and also justified the segregation of Blacks.

23. T. DYE, WHO'S RUNNING AMERICA? 4-8 (1975).

24. T. BLAIR, RETREAT TO THE GHETTO 177 (1977).

25. For a more extensive discussion of this point see Willhelm, *Equality: America's Racist Ideology*, in RADICAL SOCIOLOGY 246 (D. Colfax & J. Roach eds. 1971) and in THE DEATH OF WHITE SOCIOLOGY (J. Ladner ed. 1973).

26. See generally S. WILLHELM, WHO NEEDS THE NEGRO? chs. 7 & 8 (1971).

27. J. WOODRUFF, RACE WAR IN AMERICA 70 (1972). Accord, Reck, *The Metaphysics of Equality*, in THE CONCEPT OF EQUALITY 134 (W. Blackstone ed. 1969) ("Men must also be equal in the making of the law").

Today, neither religion nor social Darwinism can legitimate Black-White relations; rather, the continued degradation of Blacks must be sanctioned on the constitutional ground of Equality.²⁸ Thus, appeals to constitutional principles can no more yield relief from White oppression than did earlier appeals to the Christian conscience.²⁹

The acceptance of the ideology of Equality presents not opportunities for racial justice, but instead raises, for the first time in American history, the question of Black survival. The myth of Equality creates, in the words of William H. Chafe, "civility within a context of oppression [that] simply provides a veneer for more oppression."³⁰ With the widening socioeconomic gap between Blacks and Whites, the increasing segregation in residence and daily life,³¹ and the redundancy of Black labor in the modern economy, the continued existence of Black life in America is in doubt. White greed restrained White hatred in the past: under slavery, the destruction of Blacks was the destruction of valuable property, and under segregation, it was the loss of essential labor. Today, the growing isolation of Blacks reveals that Blacks are being discarded; the ghetto slum is a junk heap where Blacks are tossed because they have lost their economic value to Whites. Blacks are becoming, in the words of a recent report released by the Carnegie Council on Policy Studies in Higher Education, "a permanent underclass, self-perpetuating culture of poverty, a substantial 'lumpen proleariat.'"³² The appalling living conditions, the economic debilitation, and the persistence of White racism make the Black ghetto the equivalent of the Indian reservation. Hence, White greed will no longer restrain the White response as the inevitable Black insurrections are followed by armed White repression. As the ghetto upheavals of the sixties and into the eighties make so apparent, Black discontent is inevitable; having

28. This aspect of constitutional racism is more fully explored in Willhelm, *supra* note 15.

29. See, e.g., Walker, *Walker's Appeal*, in *ONE CONTINUAL CRY* (H. Aptheker ed. 1965) (describing David Walker's futile appeals to Christian conscience in 1829).

30. W. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM* 355 (1980).

31. The Moynihan Report stated in 1965 that "the present generation of Negro youths growing up in the urban ghettos has probably less personal contact with the white world than any generation in the history of the Negro American." U.S. DEPT. OF LABOR, *THE NEGRO FAMILY* 44 (1965). A 1970 study found that only 29 percent of all Blacks have contacts with White neighbors, Pettigrew, *Attitudes on Race and Housing: a Social-Psychological View*, in *SEGREGATION IN RESIDENTIAL AREAS* 50 (A. Hawley and V. Rock eds. 1973), while a 1973 investigation established "that in general there was an increase in the spatial concentration of Blacks and all non-whites," Glanz & Delaney, *Changes in Nonwhite Residential Patterns in Large Metropolitan Areas, 1960 and 1970*, *NEW ENGLAND ECON. REV.*, March-April 1973, at 6.

32. Quoted in *N.Y. Times*, Nov. 28, 1979, § 1, at 16, col. 1.

nothing to lose, Blacks will rise in riot and revolt. The White response is predictable. At first, the police power of the state will be used for containment, to keep Blacks in the ghetto. Later, it will be used to eliminate those Blacks who resist White military rule over the ghetto. Blacks who believe that economic class is the dividing line in America, and that they have made it over to the right side of that line, fail to realize that military retaliation against Black insurgency will not make class distinctions. Rather, all Blacks, regardless of their class, will be the enemy. Blacks delude themselves if they think economic success will save them from being Black.

Bell, writing in the *Black Scholar*, is one of the few who concedes his naïveté “in believing that all racial barriers would tumble when segregation laws were held unconstitutional”³³ and who understands that “equal opportunity” preserves racial barriers in the form of unfair economic competition. In short, the courts have substituted “Equal but separate” for “separate but equal.” Bell’s *Race, Racism, and American Law* confirms that the Court is engaged in a game of musical chairs; ironically, Chief Justice Taney’s opinion in *Dred Scott v. Sandford*³⁴ reminds us that constitutional provisions “were not intended to confer on them [Blacks] or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen [Whites]”³⁵ because Blacks “had no rights which the white man was bound to respect.”³⁶ Today, Blacks still have no rights that Whites must respect; the only constitutional “rights” that Whites recognize are meaningless for Blacks. Bell’s survey of the law reveals a White strategy to retain White rule over Blacks. As one of the few who truly understands the Black reality in America, he deserves a wider audience than that achieved by those propagandizing the myth that race no longer matters in America.

Bell’s analysis substantiates the Constitutional basis of racism, a form of White oppression that history may very well confirm to be far more inimical to Black survival than either slavery or segregation. That Black agony still prevails after 350 years — even within this Egalitarian Society — can not be more eloquently expressed than in the words of lament contained in the testament of a highly decorated Black Chicago detective written prior to his death of a

33. Bell, *Learning From the Brown Experience*, 11 THE BLACK SCHOLAR 9 (September-October 1979).

34. 60 U.S. (19 How.) 393 (1857).

35. 60 U.S. (19 How.) at 411.

36. 60 U.S. (19 How.) at 407.

heart attack in 1974: "Mine is a wasted life, full of degradation, muted feelings and not belonging. This is one hell of a world for a black man."³⁷

37. Quoted in Clayton, *Blacks' Big 1974 Gains*, Nashville Evening Bull., Jan. 1, 1975, at 13.