

RETHINKING THE INTEREST-CONVERGENCE THESIS

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INTRODUCTION

When the United States Supreme Court validated the limited use of race as an admissions criterion in *Grutter v. Bollinger* eight years ago,¹ many veterans of the civil rights struggle greeted the decision with elation. Elaine R. Jones, then-President of the NAACP Legal Defense and Educational Fund, Inc., called the decision upholding the University of Michigan's law school admissions program "a slam-dunk victory affirming the principles we have been fighting for."² Professor Jack Greenberg, one of

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¹ 539 U.S. 306 (2003).

² Lynette Clemetson, *NAACP Legal Defense Fund Chief Retires*, N.Y. TIMES, Jan. 16, 2004, at A10. In announcing her departure from an organization for which she had worked for thirty-two years, Jones cited the positive result in *Grutter* as enabling her to retire with a clear conscience: "After that I knew I

Jones's predecessors at the Legal Defense Fund and part of the litigation team who won *Brown v. Board of Education*,³ also viewed *Grutter* as an affirmation of the organization's efforts to achieve black advancement.⁴ Professor Greenberg expressed particular admiration for *Grutter*'s conception of affirmative action not as a policy that benefits primarily blacks but instead as a policy that benefits all of American society—including the armed services and the business communities.⁵ Referring to Justice O'Connor's opinion for the Court in *Grutter*, Professor Greenberg commented that she kept "[h]er eye . . . on the condition of society and what affirmative action can do to help fix it, not what caused the condition."⁶ This holistic perspective was, in Professor Greenberg's estimation, deeply commendable.⁷ "In this I think she is not only right," Professor Greenberg wrote, "but it is what has been the driving force of affirmative action all the time: affirmative action to make ours a better country."⁸

Grutter was not, of course, praised in all circles. In addition to criticism launched at the opinion from the right for its refusal to prohibit racial classifications,⁹ legal scholars on the left also criticized *Grutter* for precisely the feature that Professor Greenberg lauded: its justification of affirmative action as a compelling government interest on the ground that such programs enhance leading American institutions rather than on the ground that such programs benefit racial minorities.

Most prominently, Professor Derrick Bell viewed *Grutter* as a "definitive example" of his "interest-convergence" thesis.¹⁰ According to this the-

could go." *Id.* (internal quotation mark omitted). Professor Lani Guinier invoked precisely the same basketball metaphor as Jones did to describe the complete nature of the *Grutter* victory. See Lani Guinier, *The Constitution Is Both Colorblind and Color-Conscious*, CHRON. HIGHER EDUC., July 4, 2003, at B11 ("The Supreme Court's decision was a slam-dunk victory for affirmative action.").

³ 347 U.S. 483, 484 (1954).

⁴ See Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610 (2003). For an argument viewing *Grutter* as a reaffirmation of *Brown*, see Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 946 (2004): "Through the ideal of diversity, *Grutter* reaffirmed *Brown*'s commitment to racial equality."

⁵ Greenberg, *supra* note 4, at 1618–19 (noting that *Grutter* conceptualized "affirmative action for what it does for society as a whole"). As is well known, Justice O'Connor's opinion for the Court in *Grutter* validated the University of Michigan Law School's affirmative action policy, in part, by citing amicus briefs from retired military officers and Fortune 500 companies. *Grutter*, 539 U.S. at 330–31.

⁶ Greenberg, *supra* note 4, at 1621.

⁷ See *id.*

⁸ *Id.* For a similar analysis that preceded *Grutter*, see Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 522–25 (2002).

⁹ See, e.g., Lino A. Graglia, *Grutter and Gratz: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 TUL. L. REV. 2037, 2048 (2004).

¹⁰ Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) [hereinafter Bell, *Diversity's Distractions*]; see also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 149 (2004) [hereinafter BELL, *SILENT*

sis, blacks receive favorable judicial decisions to the extent that their interests coincide with the interests of whites.¹¹ The Court's decision in *Brown*, by these lights, was not motivated by a desire to redress black suffering under racial segregation; instead, the United States eliminated Jim Crow in order to improve its international image during the Cold War.¹² Writing nearly five decades after *Brown* was decided, Professor Bell detected similar motivations animating the Court's decision in *Grutter*: "When [Justice O'Connor] perceived in the Michigan Law School's admissions program an affirmative action plan that minimizes the importance of race while offering maximum protection to whites and those aspects of society with which she identifies, she supported it."¹³ Professor Bell contended that *Grutter* "should provide [him] with some measure of a prophet's pride" because he has long asserted "that no matter how much harm blacks were suffering because of racial hostility and discrimination, we could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern."¹⁴ Just as *Brown* did not immediately lead to desegregated schools in much of the country,¹⁵ Professor Bell predicted that *Grutter* would prove to be a fleeting victory for

COVENANTS] (referring to *Grutter* as a "prime example" of the interest-convergence thesis). Professor Bell referred to "interest convergence" as a "dilemma" in his 1980 *Harvard Law Review* article. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*]. Throughout this Article, however, I generally use the terms "thesis" and "theory" interchangeably. I do so for two different reasons. First, Professor Bell uses these terms in his subsequent scholarship. Second, the terms are—to my ears, at least—less loaded than the term "dilemma."

¹¹ Bell, *Interest-Convergence Dilemma*, *supra* note 10.

¹² See *id.* After Professor Bell observed the Cold War implications of *Brown*, Professor Mary Dudziak discovered extensive documentation that was designed to underscore how anti-Communist concerns played an important role in motivating the U.S. government to advocate racial desegregation. See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 66 (1988) ("I conclude by suggesting that this article demonstrates Derrick Bell's interest-convergence thesis: The consensus against racial segregation in the 1950s resulted from a convergence of interests on the part of whites and persons of color."). There is no question that anti-Communist sentiment exerted some influence in motivating the Solicitor General's office, among other offices within the U.S. government, to oppose racial segregation. See *id.* at 62–63. As Professor Curtis Bradley has noted, however, it is also possible that the role of anti-Communism in motivating the government to end desegregation has been overstated. See Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475, 1476 (2001) ("[T]o say that Cold War foreign affairs played a role in U.S. civil rights reform does not tell us much about its relative influence as compared with other influences, a difficult if not impossible empirical question. Even in light of the substantial evidence that Professor Dudziak presents suggesting that U.S. government officials linked race relations to Cold War politics, one still might conclude that the influence of the Cold War concerns on civil rights reform was relatively minor when compared with other, domestic influences.").

¹³ BELL, SILENT COVENANTS, *supra* note 10, at 151 ("Diversity in the classroom, the work floor, and the military, not the need to address past and continuing racial barriers, gained her vote.").

¹⁴ Bell, *Diversity's Distractions*, *supra* note 10, at 1624.

¹⁵ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–63 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008).

racial minorities: “Once again, blacks and Hispanics are the fortuitous beneficiaries of a ruling that can and probably will change when other priorities assert themselves.”¹⁶

Professor Bell was far from alone in viewing *Grutter* as evidence of the interest-convergence theory at work. Indeed, a strikingly large number of scholars independently identified the Court’s decision as a vivid illustration of racial interests converging.¹⁷ *Grutter* thus provides a clear view of the central position that the interest-convergence theory occupies in constitutional law scholarship in general and race relations law in particular. Even though Professor Bell introduced the theory more than thirty years ago, many scholars who explore how race interacts with the law continue to regard it as “enormously influential.”¹⁸ Aided by the historical scholarship

¹⁶ BELL, SILENT COVENANTS, *supra* note 10, at 151.

¹⁷ See Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 827 (2004) (“[W]e have come full circle to the ‘interest-convergence’ idea articulated by Derrick Bell a generation ago.”); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1484 (2005) (“The predominant line of reasoning running through the Michigan opinion remained that affirmative action furthers the interests of whites as a group, even if such programs sometimes deny individual whites access to certain selective institutions of higher education. In other words, the interests of the majority converged with the interests of the minority, and it is this convergence that justified programs that otherwise would be deemed unlawful.”); Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 678 (2004) (“Perhaps [*Grutter*] is just another example of what Derrick Bell has called ‘interest-convergence’—that civil rights progress occurs only in moments when it benefits white elites, whether for economic profit or national security. Just as *Brown v. Board of Education*’s historic prohibition of segregation came in a context of the United States military promoting diversity on behalf of national security, here again in the wake of terrorist attacks—a new national crisis—the Court appears to be paying attention to the views of retired military leaders and powerful business forces that claim affirmative action protects their interests.” (footnote omitted)); Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Boardrooms and What to Do About It*, 61 WASH. & LEE L. REV. 1583, 1612–13 (2004) (“This alignment of interests was achieved in the *Grutter* opinion fifty years [after *Brown*], where it succeeded in securing qualified support for affirmative action from a fundamentally conservative Court.”); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 213 (2004) (“Derrick Bell writes that material gains come to communities of color only when those gains serve white interests. *Grutter* demonstrates Bell’s point.” (footnote omitted)).

¹⁸ Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN’S L. REV. 253, 271 n.67 (2005). See also Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2284 (2001) [hereinafter Delgado, *Two Ways*] (describing *Interest-Convergence Dilemma* as a “classic article”); Dudziak, *supra* note 12, at 64 (deeming *Interest-Convergence Dilemma* “important and suggestive”); Neil Gotanda, *Towards Repeal of Asian Exclusion, in ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY* 309, 313 (Hyung-Chan Kim ed., 1996) (labeling the theory an “influential suggestion”); Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 94 (2004) (describing *Interest-Convergence Dilemma* as an “influential article”); David A. Singleton, *Interest Convergence and the Education of African-American Boys in Cincinnati: Motivating Suburban Whites to Embrace Interdistrict Education Reform*, 34 N. KY. L. REV. 663, 671 (2007) (deeming the work an “influential article”); Alexander Tsesis, *Justice at War and Brown v. Board of Education*, 47 HOW. L.J. 361, 367 (2004) (labeling the work an “influential article”); Book Note, *Brown’s Potential, Still Unrealized*, 115 HARV.

that has supported Professor Bell's assertion regarding the primacy of the Cold War in achieving desegregation,¹⁹ the interest-convergence thesis has become a part of the standard account of the Court's motivations for *Brown*.²⁰ Scholars particularly concerned with the plight of blacks, furthermore, continue to find vitality in the interest-convergence thesis.²¹ In addition, scholars have applied the interest-convergence theory to explain legal developments among nonblack racial groups, including Latinos²² and Asian-Americans.²³

L. REV. 2034, 2036 n.22 (2002) (reviewing WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001) (contending that the theory offers "compelling analyses of the Court's motivations for outlawing segregation"))).

The *Interest-Convergence Dilemma* played a significant role in establishing Professor Bell as the most prominent black law professor of his era. See Richard Delgado, *Derrick Bell's Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 284 (2000) (listing the *Interest-Convergence Dilemma* first among the "treasure trove of ideas [that] Derrick Bell has showered on an entire generation of his readers!"). For testaments to Professor Bell's prominence, see Richard Delgado, *Enormous Anomaly?: Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1550 (1991) (reviewing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter BELL, AND WE ARE NOT SAVED]) ("Derrick Bell is perhaps the country's leading African-American legal scholar."); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1786 (1989) ("Derrick Bell is the most widely-known black legal academic in the country . . ."). Not every commentator was convinced that Professor Bell's scholarship warranted its preeminence. See, e.g., Lino A. Graglia, Book Review, 5 CONST. COMMENT. 436, 437 (1988) (reviewing BELL, AND WE ARE NOT SAVED) ("[T]here can be no sin for which reading Professor Derrick Bell is not, for me, adequate punishment.").

¹⁹ See Dudziak, *supra* note 12, at 66.

²⁰ See Ruth Bader Ginsburg, *Brown v. Board of Education in International Context*, 36 COLUM. HUM. RTS. L. REV. 493, 493 (2005) ("Although the *Brown* decision did not refer to the international stage, there is little doubt that the climate of the era explains, in significant part, why apartheid in America began to unravel after World War II."); Justice Richard J. Goldstone & Brian Ray, *The International Legacy of Brown v. Board of Education*, 35 MCGEORGE L. REV. 105, 108 (2004) ("Derrick Bell's 'interest convergence' theory highlights the domestic significance of the prevailing international situation for the *Brown* decision." (footnote omitted)).

²¹ See Cashin, *supra* note 18, at 254 (contending that the interest-convergence thesis offers "a key insight into human nature and American race relations"); Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1510 (2005); John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 LAW & INEQ. 355, 412–13 (2007); Christine H. Rossell, *The Convergence of Black and White Attitudes on School Desegregation Issues During the Four Decade Evolution of the Plans*, 36 WM. & MARY L. REV. 613 (1995). For applications of the interest-convergence theory to the quest for reparations for the enslavement of blacks in the United States, see Kevin Hopkins, *Forgive U.S. Our Debts?: Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531 (2001), and Van B. Luong, Note, *Political Interest Convergence: African American Reparations and the Image of American Democracy*, 25 U. HAW. L. REV. 253, 263 (2002).

²² See Richard Delgado, *Rodrigo's Roundelay*, *Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 63 (2006) (applying interest-convergence to explain the Court's decision prohibiting the exclusion of Mexican-Americans from juries and contending that interest-convergence is a helpful method for understanding "all of Latino history"); María Pabón López, *Reflections on Educating Latino and Latina Undocumented Children: Beyond Plyler v. Doe*, 35 SETON HALL L. REV. 1373, 1377 (2005) ("Plyler v. Doe may join *Brown v. Board of Education* as a decision embodying the interest convergence covenants in which educational opportunities for minority students

The influence of the interest-convergence theory has extended well beyond the borders of race relations law²⁴ as legal academics have imported the interest-convergence thesis into a wide array of doctrinal areas. Constitutional law scholarship, apart from the theory's implications for *Brown*, has imported the interest-convergence thesis to explain judicial interpretation of the First Amendment's religion clauses and the subordination of non-Christian religions.²⁵ Criminal law scholarship has imported the interest-convergence thesis to explain why courts sometimes permit "cultural defenses" to prevail.²⁶ Employment discrimination law scholarship has imported the interest-convergence thesis to explain when employees will receive legal relief in challenging employment policies.²⁷ Indian law

exist only when the students' interests and the nation's interests converge. Analyzing *Plyler* under an interest convergence model demonstrates that the nation's interest is the maintenance of an underclass of undocumented, low-wage earners who fuel the nation's economy by performing work that is undesirable to many United States natives." (footnotes omitted)).

²³ See, e.g., Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 908–09 (1993) (contending that the interest-convergence thesis explains why Congress's favorable response to the quest for reparations on behalf of Japanese-Americans for internment coincided with the Reagan Administration's pro-Japan trade policies).

²⁴ Admittedly, the precise boundaries of "race relations law" are decidedly unclear—perhaps even less clear than the boundaries separating other doctrinal areas.

²⁵ Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 871–72 (1996) ("Derrick Bell's interest-convergence thesis helps explain why the separation of church and state often provides only minimal benefits to outgroup religions, such as Judaism: To a great extent, outgroup religions benefit only when their interests happen to converge or correspond with the interests of Christians. The benefits to outgroups, in other words, are merely *incidental*, while the *primary* benefits of separation of church and state flow, in fact, to Christianity, the hegemonically dominant religion in America.").

²⁶ See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 939 (2007) ("Cultural convergence is the idea that a 'cultural defense' is more likely to succeed when the cultural norms underlying an immigrant or minority defendant's cultural defense claim converge with the cultural norms of American society. Like interest convergence theory, cultural convergence theory can be used to explain the underlying forces behind a particular decision or series of decisions. . . . Cultural convergence, however, focuses on the presence or absence of overlapping cultural norms as opposed to converging interests." (footnotes omitted)).

²⁷ See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1764 (2003) (book review) ("With respect to workplace discrimination, the interest convergence story holds that the state will require employers to hire nonwhites only when doing so converges with the institutional interests of the employer. This occurs when diversity hiring provides the employer with institutional legitimacy without compromising the efficiency gains attendant to homogeneous workplace cultures."); see also Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence*, 48 HOW. L.J. 937, 940 (2005) (exploring how alternative dispute resolution "can be used as a mechanism to focus on racial justice in the workplace while also acting as a tool to accomplish employer incentives as interest-convergence"); Ramirez, *supra* note 17 ("[C]onvergence theory holds the promise of real and durable reform in the specific context of board selection processes and, by extension, in a host of other areas that may be key to racial progress."); Joseph C. Feldman, Note, *Standing and Delivering on Title VII's Promises: White Employees' Ability to Sue Employers for Discrimination Against Nonwhites*, 25 N.Y.U. REV. L. & SOC. CHANGE 569, 600 (1999) ("For many whites, before they endorse policies that benefit nonwhites and

scholarship has imported the interest-convergence thesis to explain why state courts give effect to tribal courts' criminal convictions but not to tribal courts' civil judgments.²⁸

Alongside these examples of the theory's application to assorted doctrinal areas, many scholars have looked to it as providing a strategic method for producing social and political change. Among the extremely broad range of issues that scholars believe the interest-convergence theory can remedy or illuminate are the following: educational reform,²⁹ pension reform,³⁰ animal rights,³¹ domestic violence,³² concentrated poverty,³³ and even the war on terror.³⁴ The interest-convergence theory's strategic implications have also been adopted by the popular press,³⁵ and the theory has been cited approvingly in federal judicial decisions.³⁶

make the possibility of Title VII suits a real deterrent to employers who would discriminate, they must believe that their own self-interests are furthered.”)

²⁸ See Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 286–87 (2004) (contending that while “certain states are willing to credit tribal court convictions because it serves the public safety interests of the non-Indian majority . . . the recognition of tribal civil judgments serves no such interest and, thus, under Professor Bell’s theory, the non-Indian majority is less willing to respect such judgments” (footnote omitted)). For additional examples of the interest-convergence theory’s application to other doctrinal fields, see, e.g., Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 283–84 (1996) (applying the insights of interest convergence to immigration law). These examples of interest-convergence importation present merely an illustrative rather than an exhaustive list.

²⁹ See, e.g., Bryan L. Adamson, *The H’aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform*, 43 CAL. W. L. REV. 173 (2006); Singleton, *supra* note 18.

³⁰ See, e.g., Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1505 (2004) (“[B]ecause employer sponsored pension plans exclude a majority of Whites and people of color, according to Professor Derrick Bell’s interest-convergence thesis, this may be a unique opportunity to effectuate pension reform.” (footnote omitted)).

³¹ See, e.g., Joseph Lubinski, Note, *Screw the Whales, Save Me!: The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC’Y 377, 411–12 (2003).

³² See, e.g., Adele M. Morrison, *Changing the Domestic Violence (Dis)Course: Moving from White Victim to Multi-cultural Survivor*, 39 U.C. DAVIS L. REV. 1061, 1114–18 (2006).

³³ See, e.g., Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell’s Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW. J.L. & SOC. POL’Y 30 (2007), <http://www.law.northwestern.edu/journals/njisp/v2/n1/2>.

³⁴ See, e.g., Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1329 (2003) (“[I]n the short run, the United States will lack unfettered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own historic government-sponsored terrorizing of a significant segment of its populace.”); Stephanie M. Weinstein, Note, *A Needed Image Makeover: Interest Convergence and the United States’ War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403, 428 (2006).

³⁵ See, e.g., Kenji Yoshino, *Marriage Partners*, N.Y. TIMES, June 1, 2008, § MM, at 26. Professor Kenji Yoshino asserted that advocates of same-sex marriage should incorporate the strategic insights of Professor Bell’s interest-convergence thesis into the campaign to achieve marital equality. Contemplating recent and upcoming popular votes regarding the permissibility of same-sex marriage, Professor Yoshino suggested that if unmarried heterosexual couples thought that prohibiting same-sex marriage

Given the theory's prominence within the legal academy and beyond, it is surprising that virtually no sustained scholarly attention has been dedicated to examining the interest-convergence thesis, the assumptions that undergird the thesis, and the consequences that flow from accepting the thesis. Although the interest-convergence thesis is cited with great regularity, the articles that refer to the idea almost invariably invoke the idea as a kind of received wisdom. The few scholarly works that criticize the thesis, moreover, tend to do so in a fleeting manner.³⁷ This Article initiates a critical discussion of the interest-convergence thesis—a discussion that is long overdue.

This Article proceeds in three principal parts. In order to contextualize my critique, Part I provides a brief overview of the interest-convergence theory. Rather than merely summarizing the article that coined the term, however, this overview identifies the theory's precursors within Professor Bell's work. The overview then closely examines the article that unveiled the "interest-convergence" terminology and explores how that notion has subsequently been offered to explain contemporary racial developments. This Part and the ensuing critique draw upon many of Professor Bell's writings throughout his career in order to gain a full appreciation of the interest-convergence theory. This eclectic approach is not only appropriate but necessary because Professor Bell has repeatedly returned to the theory, both explicitly and implicitly, in his scholarly efforts to address contemporary racial dynamics. In the parlance of Isaiah Berlin, Professor Bell more closely resembles a hedgehog than a fox,³⁸ and confining this examination of the interest-convergence theory to only its earliest manifestations would artificially constrain the inquiry.

With a foundational understanding of the interest-convergence theory in place, Part II identifies and examines four analytical flaws that diminish the theory's persuasiveness. First, the theory's overly broad conceptualization of "black interests" and "white interests" obscures the intensely contested disputes regarding what those terms actually mean. Second, the interest-convergence theory incorrectly suggests that the racial status of

would imperil their own lives (e.g., through lost health care coverage), measures designed to limit marriage would more likely be defeated at the ballot box. Professor Yoshino wrote: "If more straights could come to see marriage as a universal right that belongs to all human beings, that would, indeed, be a convergence of interest." *Id.*

³⁶ See, e.g., *Andrews v. City of Monroe*, 513 F. Supp. 375, 380 n.11 (W.D. La. 1980).

³⁷ See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 291–92 (2002); Cashin, *supra* note 18, at 276–77; Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 525–26 (1997); Onwuachi-Willig, *supra* note 21, at 1510–11; Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 483 (1997).

³⁸ See ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 1–3 (Phoenix 2009) (1953) (dividing influential writers into two broad categories: hedgehogs, whose work is dedicated to advancing one large proposition, and foxes, whose work resists distillation to a single notion or theme).

blacks and whites over the course of United States history is notable more for continuity than for change. Third, the interest-convergence theory accords insufficient agency to two groups of actors—black citizens and white judges—who have played, and continue to play, significant roles in shaping racial realities. Fourth, the interest-convergence theory cannot be refuted—and, thus, cannot be examined for its validity—because it accommodates racially egalitarian judicial decisions either by contending that they are necessary concessions in order to maintain white racism or by ignoring them altogether.

The interest-convergence theory's analytical flaws, in turn, lead to harmful consequences, which are explored in Part III. The insistence that fortuitous moments of converging racial interests account for favorable judicial and policy decisions may regrettably lead the theory's adherents to limit their strategies for achieving genuine racial equality. In addition, the theory's irrefutability strengthens the racially conspiratorial viewpoint that is disturbingly prevalent within the black community.

At the outset, it merits emphasizing that I believe the interest-convergence theory warrants examination not only because it is influential, but also because it contains at least some persuasive force. To be sure, much of the following analysis levels serious criticism and expresses deep misgivings about the theory's analytical underpinnings and the consequences that flow from the theory. But the interest-convergence thesis cannot simply be deemed beyond analysis. While the theory is too often categorical where it should be nuanced and too often focused on continuity where it should acknowledge change, the theory nevertheless serves as a valuable corrective to the narrative of unambiguous triumph that plagues a disconcertingly large portion of scholarship regarding racial considerations in constitutional law. The interest-convergence thesis, moreover, demonstrated an admirably early understanding among legal scholars of the way in which domestic events cannot be viewed in utter isolation from the surrounding international context.³⁹ Whatever the theory's shortcomings, it is crucial not to overlook its considerable contributions to legal discourse.

I. EXAMINING THE INTEREST-CONVERGENCE THESIS

Before critiquing the interest-convergence theory, it is necessary to understand the conditions that, according to the theory, lend themselves to achieving racial reform. This Part endeavors to provide that overview by identifying the earliest articulation of that theory, examining the article that coined the "interest-convergence" label, and explaining the theory's continued application to the modern racial context.

³⁹ Cf. Dudziak, *supra* note 12, at 66–67 (discussing the role international relations played in setting civil rights agendas).

A. *Before the Interest-Convergence Thesis*

Although many scholars believe that Professor Bell initially explored the notion that black advancement occurs only where black interests coincide with the interests of white elites in his 1980 *Harvard Law Review* article,⁴⁰ that belief is only partially accurate. In fact, while Professor Bell did not dub the phenomenon “interest convergence” until 1980, he first articulated the underlying theory some four years earlier.⁴¹ In *Racial Remediation*, Professor Bell contended that white self-interest predominantly accounts for any relief from racial oppression that blacks have experienced throughout American history: “Measurable improvement in the status of some blacks[] and predictions of further progress have not substantially altered the maxim: white self-interest will prevail over black rights. This unstated, but firmly followed principle has characterized racial policy decisions in this society for three centuries.”⁴² There is no question, Professor Bell maintained, that moral concerns regarding the subordinate status of blacks have not alone motivated white people to address racial inequality: “[E]ven a rather cursory look at American legal history suggests that in the past, the most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks”⁴³

Racial Remediation offered a thumbnail sketch of black history in America, highlighting instances that would, on the surface, appear to have been designed to benefit blacks, but upon closer examination could be understood as motivated by a desire to advance white interests. Expressing skepticism that slavery was abolished in the North because of a sudden arousal of conscience following the Revolutionary War, Professor Bell contended that “the major motivation for abolition of slavery in the North was the economic advantages emancipation promised white businessmen who could not efficiently use slaves, and laborers who did not wish to compete with slaves for jobs.”⁴⁴ Professor Bell then proceeded to offer similar revisionist accounts of the Emancipation Proclamation⁴⁵ and the Reconstruction Amendments.⁴⁶

⁴⁰ See, e.g., Cashin, *supra* note 18, at 271 n.67 (“Bell first articulated his enormously influential interest-convergence theory in a *Harvard Law Review* article published in 1980.” (italics added)).

⁴¹ Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5 (1976) [hereinafter Bell, *Racial Remediation*].

⁴² *Id.* at 6.

⁴³ *Id.*

⁴⁴ *Id.* at 7. Professor Bell also postulates that abolition had the benefit for whites of, inter alia, eliminating ubiquitous fears of slave revolt. See *id.*

⁴⁵ See *id.* at 7–8 (“President Lincoln was no friend of slavery, but his primary objective was to save the Union.”).

⁴⁶ See *id.* at 9–11.

Turning his attention to *Brown v. Board of Education*,⁴⁷ Professor Bell enumerated two broad conclusions:

- (1) the Supreme Court's decisions in the school desegregation cases are the most important legal milestone ever achieved by advocates of racial equality; and (2) it is highly unlikely that the white self-interest factors which so clearly motivated earlier, less significant civil rights breakthroughs were absent when the *Brown* decisions were formulated.⁴⁸

Although Professor Bell would eventually withdraw the rosy assessment of *Brown*'s significance embodied in the first conclusion,⁴⁹ his tentatively expressed second conclusion would ossify into certainty in the years to come.⁵⁰ In explaining *Brown*'s white self-interest component, Professor Bell observed that the Court decided the case in the context of the Cold War.⁵¹ Declaring racial segregation unconstitutional in public schools had the effect of denying Communists a powerful rhetorical weapon as they could no longer claim that the United States formally subjugated black citizens, according to Professor Bell.⁵² The Court's remedial decision in *Brown II*,⁵³ which failed to require prompt desegregation of the nation's public schools, demonstrated both the nation's desire to cultivate the appearance of racial equality and its lack of commitment to the genuine article.⁵⁴ This pattern of advance followed quickly by retrenchment is typical of racial progress, Professor Bell posited, because white interests seldom overlap with black interests for extended periods of time.⁵⁵

⁴⁷ Professor Bell expressed some initial hesitation, which he later overcame, about assessing a legal development that had occurred so recently. *See id.* at 11 (“[I]t would be presumptuous to attempt almost contemporaneous conclusions about the *Brown* years.”). This caveat indicates how dramatically the scholarly world has changed since the mid-1970s. To think that a Supreme Court case may not yet be ripe for scholarly analysis some twenty-two years after it was decided is a jarring conception to the current era.

⁴⁸ *See id.* at 11–12.

⁴⁹ *See* Derrick A. Bell, Jr., *The Unintended Lessons in Brown v. Board of Education*, 49 N.Y.L. SCH. L. REV. 1053, 1054 (2005) [hereinafter Bell, *Unintended Lessons*] (claiming that people who believe that *Brown* was a valuable judicial victory subscribe to a hopelessly outmoded worldview).

⁵⁰ *See id.* at 1056 (characterizing *Brown* as “the definitive example that the interest of blacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interests of whites”).

⁵¹ Bell, *Racial Remediation*, *supra* note 41, at 12.

⁵² *Id.* Bell also noted that “[t]he foreign policy advantages of a pro-civil rights result in *Brown* were specifically argued to the Court in the federal government’s amicus curiae briefs.” *Id.*

⁵³ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

⁵⁴ *See* Bell, *Racial Remediation*, *supra* note 41, at 13 (“Spurred by the need to confront a political or economic danger to the nation as a whole, serious racial injustice is acknowledged and enjoined, but necessary remedies are not implemented once the economic or political irritant is removed.”).

⁵⁵ *Id.* at 21 (“If, as I have suggested, rights for blacks require for survival a climate permeated with white self-interest, those rights can be expected to wither in the far more hostile atmosphere that exists when the interests and priorities of whites change.”).

Professor Bell proceeded to identify four contemporaneous doctrinal developments that he suggested revealed how white interests trump black suffering in legal adjudication.⁵⁶ Two of those doctrinal developments—peremptory strikes in jury trials and available remedies for electoral districting—merit discussion here.⁵⁷ With respect to the regime then governing the use of peremptory strikes under *Swain v. Alabama*,⁵⁸ Professor Bell complained about “jury discrimination decisions that protect black defendants against trials by juries from which blacks have been systematically excluded, but refuse to condemn more sophisticated and no less effective means of barring blacks from juries, particularly in those cases where racial issues are important.”⁵⁹ Advancing a similar critique with respect to electoral districting, Professor Bell allowed that the Court’s decision in *Gomillion v. Lightfoot*,⁶⁰ which invalidated a districting plan in Tuskegee, Alabama, that sought to exclude virtually all black voters from the district, presented a helpful development for black electoral equality.⁶¹ Professor Bell, however, found fault with the Court’s failure to prohibit more subtly discriminatory districting schemes that result in vote dilution.⁶² While Professor Bell has packaged this thesis in somewhat different manners in his numerous recountings over the years, the core theory has remained fundamentally unaltered since he first articulated it thirty-five years ago.

B. *The Interest-Convergence Thesis*

Where *Racial Remediation* primarily used a historical lens to examine the subordination of black rights, Professor Bell’s *Brown v. Board of Education and the Interest-Convergence Dilemma* provided a distinctly more future-oriented account of the possibility for attaining black advancement. As its title suggests, *Interest-Convergence* used *Brown* and its accompany-

⁵⁶ *Id.* at 14–16.

⁵⁷ I emphasize these two doctrinal areas because I will return to them in my theoretical critique. See *infra* text accompanying notes 195–210. The other two areas that Professor Bell contended were indicative of his theory regarding black advancement were (1) due process requirements regarding expulsions in public schools, and (2) the cooptation of *NAACP v. Button*, 371 U.S. 415 (1963), which held that the application of a Virginia law to the NAACP’s activities violated the freedom to associate protected by the First and Fourteenth Amendments of the United States Constitution. Bell, *Racial Remediation*, *supra* note 41, at 14–16.

⁵⁸ 380 U.S. 202 (1965).

⁵⁹ Bell, *Racial Remediation*, *supra* note 41, at 15–16 (footnote omitted).

⁶⁰ 364 U.S. 339 (1960).

⁶¹ Bell, *Racial Remediation*, *supra* note 41, at 15–16.

⁶² See *id.* at 16 (“[W]hen blacks seek to show that election districts are drawn or policies such as at-large voting are followed that dilute seriously their political potential, they must prove that the lines or policies were intended to have a racially discriminatory effect. This is not difficult in blatant situations like the Tuskegee case, but it becomes almost impossible in many urban districts where there is no recent history of systematic exclusion and election officials are able to offer nonracial justifications for boundaries and procedures that have a discriminatory effect.” (footnotes omitted)).

ing history as a point of departure. Nonetheless, *Interest-Convergence* principally contemplates what will be, rather than what has been.

Professor Bell positions *Interest-Convergence* as a response to Professor Herbert Wechsler's famous (and infamous) article, *Toward Neutral Principles of Constitutional Law*.⁶³ In *Neutral Principles*, Professor Wechsler pledged allegiance to *Brown's* outcome on a personal level,⁶⁴ but he also expressed grave skepticism about the decision's constitutional legitimacy.⁶⁵ In Professor Wechsler's view, *Brown* could not be justified as invalidating a denial of equality to black citizens because such a theory requires an inquiry into the motives of the legislature.⁶⁶ Rather than viewing the problem posed by state-enforced school segregation as one of discrimination against blacks, Professor Wechsler contended that the problem should be viewed as a denial of the freedom to associate—a theory that has the virtue of applying to members of all racial groups.⁶⁷ But this reconceptualization of the right denied by segregation did not resolve the matter. “[I]f the freedom of association is denied by segregation,” Professor Wechsler suggested, “integration forces an association upon those for whom it is unpleasant or repugnant.”⁶⁸

Although Professor Bell emphasized his disagreement with Professor Wechsler's analysis of *Brown* as a normative matter,⁶⁹ he offered a defense

⁶³ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 519 (citing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)). Professor Wechsler's article caused quite a stir among legal academics. For particularly forceful responses to *Neutral Principles's* questioning of *Brown's* constitutional legitimacy, see Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); and Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

⁶⁴ Wechsler, *supra* note 63, at 28–29.

⁶⁵ *Id.* at 29. *Neutral Principles* is, of course, concerned with a good deal more than *Brown's* constitutional legitimacy, but the *Brown* portion of the piece is its most controversial—and, not coincidentally, its most memorable.

⁶⁶ See *id.* at 33.

⁶⁷ See *id.* at 34 (“Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.”). Professor Wechsler's concern with the associational implications of *Brown* finds an avatar in Zora Neale Hurston, who asked: “How much satisfaction can I get from a court order for somebody to associate with me who does not wish me near them?” Zora Neale Hurston, *Court Order Can't Make Races Mix*, ORLANDO SENTINEL, Aug. 11, 1955, reprinted in ZORA NEALE HURSTON, FOLKLORE, MEMOIRS, AND OTHER WRITINGS 956–58 (1995).

⁶⁸ Wechsler, *supra* note 63, at 34 (“Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion. To write it is for me the challenge of the school-segregation cases.”).

⁶⁹ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 522 (“To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.”). Professor Bell cast his lot with Professor Black, who “correctly viewed racial equality as the neutral principle which underlay the *Brown* opinion.” *Id.*; see Black, *supra* note 63.

of *Neutral Principles* as a descriptive matter.⁷⁰ *Neutral Principles* appropriately emphasized *Brown*'s associational dimensions, according to Professor Bell, as governmental institutions prioritize the effect that race-related decisions have on whites over the effect that such decisions have on blacks.⁷¹ With this framework established, Professor Bell set forth the interest-convergence theory, which he cast as merely the positive expression of the essential point in *Neutral Principles*:

Translated from judicial activity in racial cases both before and after *Brown*, this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated *only* when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.⁷²

In brief, white interests, rather than black suffering, dictate the contours of the Equal Protection Clause.⁷³

Professor Bell suggested that international concerns principally motivated the Court's decision in *Brown*—not the Court's sudden awakening of a long-dormant morality with respect to the subjugation of blacks.⁷⁴ Citing the Supreme Court's desegregation and busing decisions from the 1970s, Professor Bell contended that the temporary overlap of black and white interests evident in *Brown* had started to recede: "[R]ecent decisions, most notably by the Supreme Court, indicate that the convergence of black and white interests that led to *Brown* in 1954 and influenced the character of its enforcement has begun to fade."⁷⁵ Professor Bell suggested that these altered conditions may result in "the realization of Professor Wechsler's legi-

⁷⁰ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 523. Professor Bell's method of offering two cheers for *Neutral Principles* bears striking similarity to his treatment of Professor Alexander Bickel's prediction that *Brown* "may be headed for—dread word—irrelevance." ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 151 (1970). Bell wrote: "When, in 1970, [Bickel] questioned the long-term viability of the *Brown* decision in a highly praised book, civil rights lawyers and liberal scholars were annoyed. Few of us at that time had any doubts that we would eventually prevail in eradicating segregation 'root and branch' from the public schools. Now, more than three decades later, Professor Bickel's prediction, heavily criticized at the time, has become an unhappy but all too accurate reality." BELL, *SILENT COVENANTS*, *supra* note 10, at 94 (italics added).

⁷¹ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 523 ("[I]t is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites. Hence, Wechsler's [*Neutral Principles*] . . . suggests a deeper truth about the subordination of law to interest-group politics with a racial configuration.").

⁷² *Id.* (emphasis added).

⁷³ See *id.*

⁷⁴ See *id.* at 524–26. Given that blacks had long sought judicial relief from racial segregation in educational facilities, Professor Bell asked: "What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?" *Id.* at 524 & n.31 (citing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)).

⁷⁵ *Id.* at 526.

timate fear that, if there is not a change of course, the purported entitlement of whites not to associate with blacks in public schools may yet eclipse the hope and the promise of *Brown*.⁷⁶

Turning to the road ahead, Professor Bell maintained that honoring *Brown*'s promise was possible only to the extent that black interests failed to diverge from white interests.⁷⁷ Professor Bell hastened to add, however, that black educational advancement did not necessarily require racial integration.⁷⁸ Instead of pursuing racial integration at all costs, he suggested that educational strategies should not dismiss the educational benefits that can accompany racially isolated schools.⁷⁹ Professor Bell closed by broadening his point, suggesting that racial progress more generally was predicated on harnessing the potential of the interest-convergence theory.⁸⁰

C. Contemporary Views of the Interest-Convergence Thesis

Professor Bell's support of the interest-convergence thesis has scarcely diminished in the years since he first articulated it. Indeed, he has asserted that the theory retains every bit of its vitality in the modern world. In his book *Silent Covenants*, which bemoans the lack of progress achieved by the fiftieth anniversary of *Brown*, Professor Bell explicitly rejected the notion that the interest-convergence theory had lost its explanatory power: "It is easy and perhaps tempting to rationalize the history of self-interest motivation in determining the direction of racial policymaking as an interesting if troubling background, but hardly relevant in today's more enlightened world. There is, though, little indication that the favoring of white interests over black has changed."⁸¹

Professor Bell cites the continued elevation of white interests above black interests as evidence that conditions for today's African-Americans are not fundamentally distinct from the conditions of their enslaved ancestors.⁸² As recently as 2004, Professor Bell suggested that the structural barriers to black progress are unlikely to end anytime soon because "of entrenched beliefs about the relative importance of white and black humani-

⁷⁶ *Id.* at 528.

⁷⁷ *Id.*

⁷⁸ *Id.* at 532.

⁷⁹ *Id.*

⁸⁰ *Id.* at 533 ("If [*Brown*] . . . is to remain viable, those who rely on it must exhibit the dynamic awareness of all the legal and political considerations that influenced those who wrote it. Professor Wechsler warned us early on that there was more to *Brown* than met the eye. . . . Criticism, as we in the movement for minority rights have every reason to learn, is a synonym for neither cowardice nor capitulation. It may instead bring awareness, always the first step toward overcoming still another barrier in the struggle for racial equality.").

⁸¹ BELL, *SILENT COVENANTS*, *supra* note 10, at 58.

⁸² See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW 211* (5th ed. 2004) [hereinafter BELL, *RACE, RACISM*].

ty.”⁸³ With these entrenched beliefs in mind, Professor Bell instructed readers to “[r]ecall the gradual emancipation plans, under which still-unborn slaves would have to work most of their productive lives before they could experience freedom” and contended that “[t]he difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than of kind.”⁸⁴ In a similar testament to what he perceives as the continuity of racial relations in the United States, Professor Bell has contended that the absence of legally sanctioned segregation has not resulted in a substantive decline in racial barriers⁸⁵: “Despite our successful effort to strip the law’s endorsement from the hated ‘Jim Crow’ signs,” Professor Bell has written, “contemporary color barriers are less visible but neither less real nor less oppressive.”⁸⁶

The lack of change in racial conditions that Professor Bell sees when he surveys United States history, perhaps not surprisingly, compels him to suggest that blacks will never attain full racial equality. “Racial equality is, in fact, not a realistic goal,” Professor Bell has explained.⁸⁷ “By constantly aiming for a status that is unobtainable in a perilously racist America, black Americans face frustration and despair.”⁸⁸ Racial equality for blacks will remain a permanently elusive goal because the racist structure will absorb and adapt to any challenges: “Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”⁸⁹

II. ANALYTICAL FLAWS OF THE INTEREST-CONVERGENCE THESIS

Despite its continued vitality and widespread acceptance, the interest-convergence theory’s explanatory power suffers from four principal analytical flaws. First, the interest-convergence theory’s usage of the terms “black interests” and “white interests” ignores the deep intraracial disagreements regarding what constitutes progress and, more broadly, offers an

⁸³ *Id.*

⁸⁴ *Id.* The quoted passage continues: “Then, as now, blacks can progress in the society only when that progress is perceived by the white majority as a clear benefit to whites, or at least not a serious risk.” *Id.* For earlier declarations that conditions for blacks in the modern era bore a striking similarity to conditions for slaves, see Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 16 (1979) [hereinafter Bell, Bakke].

⁸⁵ Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 374 (1992) [hereinafter Bell, *Racial Realism*].

⁸⁶ *Id.*

⁸⁷ *Id.* at 363; see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM*, at ix (1993) [hereinafter BELL, *FACES*] (“[R]acism is an integral, permanent, and indestructible component of this society.”).

⁸⁸ Bell, *Racial Realism*, *supra* note 85, at 363.

⁸⁹ *Id.* at 373 (emphasis omitted).

excessively narrow understanding of the term “interest.” Second, the theory suggests that the severely limited instances of black progress demonstrate that the racial status of whites and blacks has remained largely unchanged since the demise of slavery. In reality, this contention ignores considerable racial advancement and minimizes the circumstances that black people confronted when their lives were overwhelmingly controlled by the unvarnished racial prejudice of yesteryear. Third, the theory accords a near total absence of agency to both black citizens and white citizens, including white judges. Rather than merely waiting for moments of racial fortuity to strike, blacks have played an important role in leading the nation’s quest for racial equality, and they have been aided (and stymied) in that quest by white judges along the way. Fourth, the theory either ignores racially egalitarian decisions altogether or suggests that the judiciary issues decisions that appear to be racially egalitarian when doing so is necessary to avoid the destabilizing effects that would accompany validating a racially discriminatory law. These two techniques work in concert to render the interest-convergence thesis incapable of refutation, meaning that the theory’s validity cannot be assessed.

A. Interrogating the Composition of Racial Interests

A central component of the interest-convergence thesis stresses the manner in which “black interests” are subordinated to “white interests.”⁹⁰ Given that these two terms lie at the theory’s core, it is striking that Professor Bell never endeavors to define what, precisely, these terms mean. Although the terms may initially appear so obvious as to require no definition, the oversight is significant because grappling with those terms reveals some of the theory’s analytical limitations. Even if one accepts the notion that interests can be divvied up by race, the interest-convergence theory offers an overly simplistic view of both the ability to identify and to express what constitutes “black interests” and “white interests.”⁹¹ The thesis accords insufficient attention to the intraracial cleavages that divide the interests of black people and white people. Thus, although Professor Bell uses the terms “black interests” and “white interests,”⁹² the interest-convergence thesis too often views those entities as singular (“black interest” and “white interest”) rather than plural.

This view arguably contained at least some analytical coherence as applied to race relations in the United States prior to the end of Jim Crow. It would be difficult to contend that the Court’s decision in, say, *Dred Scott*⁹³

⁹⁰ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 523–26.

⁹¹ See *id.* at 526.

⁹² See *id.*

⁹³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

or *Plessy*⁹⁴ did anything other than hurt the interest that black people collectively had in achieving racial equality. Over the course of the last half century, however, the racial situation in America has become increasingly complex, and the interest-convergence thesis fails to appreciate that complexity. Given the numerous areas in the modern world where there is genuine disagreement regarding which policy decisions advance the interests of black citizens, the interest-convergence theory's elision of that complexity misguidedly puts forth an undifferentiated and unqualified conception of what constitutes "black interests." Contrary to the notion advanced by the interest-convergence ideology, however, there is no singular black agenda.⁹⁵

In the democratic arena, for example, nearly everyone can agree that ending expressly racial restrictions on access to the ballot box advanced the interest of blacks in racial equality. But the creation of majority-minority districts, pursuant to judicial interpretations of the Voting Rights Act of 1965, has spawned a fierce debate about whether such districts advance black interests.⁹⁶ After all, while black politicians appear to be more likely to be elected from majority-minority districts, the electoral districts that surround the majority-minority districts are more white and more likely to elect Republicans.⁹⁷ While such a result may well be in the interest of black politicians, reasonable minds can, and have, disagreed whether that result advances the interests of black voters, the overwhelming majority of whom tend to vote for Democrats.⁹⁸ On a micro level, moreover, if the particular black person in question happens to be a Republican, increasing the number of Republican elected officials might well advance that individual's conception of racial interests.

Similarly, serious disagreements about what precisely advances the interests of black citizens also appear in the realms of integration in grade schools, affirmative action in higher education, and the administration of criminal justice. With respect to the virtue of pursuing racial integration in

⁹⁴ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *abrogated by* *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*).

⁹⁵ MARY PATTILLO, *BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY 2* (2007) (dismissing the concept of a "unitary black political agenda"); *see id.* at 12 ("The fact of racial homogeneity does not preclude the importance of difference, divisions, and distinctions.").

⁹⁶ *See* CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* (2006); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1080 (1991).

⁹⁷ *See* Pamela Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1733 (1993) ("Republicans have advanced a pure aggregation model of voting rights, assuming that the creation of majority-black districts will deprive white Democrats of a critical element of their base of support and thereby allow Republicans to win elections in predominantly white districts. This convergence of their aggregative interests with those of minority voters led them to provide technical assistance to minority groups seeking to draw plans that would increase the number of minority seats." (footnote omitted)).

⁹⁸ Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CALIF. L. REV. 1589, 1615 (2004).

grade schools, many commentators have suggested that this method remains a viable strategy for alleviating racial hierarchy.⁹⁹ Many other commentators, however, contend that, in light of the public school demographics in urban areas, meaningful racial integration may no longer be a realistic goal.¹⁰⁰ Even apart from the practical difficulties of achieving racial integration, Professor Bell himself has long offered incisive and provocative arguments against the wisdom of a headlong pursuit of racial integration.¹⁰¹ In the context of higher education and affirmative action, Professor Richard Sander has advanced an empirical argument contending that affirmative action in law school admissions serves to hinder black advancement in the legal profession.¹⁰² That claim, however, has generated many rebuttals suggesting that black interests are in fact served by race-conscious admissions practices.¹⁰³ With respect to the administration of criminal justice, many commentators suggest that black interests would be served by abandoning the aggressive policing of black communities that has been partially responsible for a highly disproportionate number of black people being ensnared by the legal system.¹⁰⁴ At least one commentator has argued, however, that such analyses elevate the interests of black criminals over the interests of black victims.¹⁰⁵

⁹⁹ See, e.g., Gary Orfield, *Why Segregation Is Inherently Unequal: The Abandonment of Brown and the Continuing Failure of Plessy*, 49 N.Y.L. SCH. L. REV. 1041, 1051–52 (2004).

¹⁰⁰ See, e.g., Kevin Brown, *Reflections on Justice Kennedy's Opinion in Parents Involved: Why Fifty Years of Experience Shows Kennedy Is Right*, 59 S.C. L. REV. 735, 739–40 (2008) (suggesting that even ardent advocates of school integration must recognize that demographic realities make achieving integration difficult).

¹⁰¹ See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 512 (1976) (claiming that NAACP lawyers elevated their interest in achieving racial integration above their clients' interest in obtaining a strong education independent of concerns regarding racial composition). For a thoughtful, historically based rejoinder to Professor Bell's *Serving Two Masters*, see Tomiko Brown-Nagin, *Race as Identity Caricature: A Local Legal History Lesson in the Salience of Intra-racial Conflict*, 151 U. PA. L. REV. 1913 (2003). More recently, Professor Bell authored a mock judicial opinion contending that the Supreme Court should have affirmed *Plessy* and actually enforced the equal portion of the "separate but equal" doctrine. Derrick A. Bell, *Bell, J., Dissenting, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185, 186 (Jack M. Balkin ed., 2001) ("I regret that the Court fails to see in these cases the opportunity to lay bare the simplistic hypocrisy of the 'separate but equal' standard, not by overturning *Plessy*, but by ordering its strict enforcement.").

¹⁰² See Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

¹⁰³ See, e.g., Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 YALE L.J. 2011 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

¹⁰⁴ See Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere"*, 94 CALIF. L. REV. 617, 625, 670 (2006) (criticizing the "over-policing" of minority neighborhoods and advocating a form of policing that rejects the aggressive enforcement of low-level, nonviolent crimes).

¹⁰⁵ See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997) ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement

Even under the old system of outright black subordination, however, it is at least plausible that determining precisely what decisions and policies advanced “black interests” presents an oversimplified view of racial reality. During Jim Crow’s reign, some black entrepreneurs owned businesses that thrived at least in part because white businesspeople did not welcome business from black customers. It is quite conceivable, then, that at least some members of the black elite did not welcome the destabilizing effects of segregation coming to a close.¹⁰⁶ J.L. Chestnut, a black lawyer in Selma, Alabama, pressed this very point:

[T]he ties [that the black elite] had to the white ruling hierarchy—the ties that established them as leaders—made them the least likely group of all to become involved [in the civil rights struggle]. They had the most—the best jobs, the largest homes—and therefore the most to lose.¹⁰⁷

Thus, while the end of racial segregation on a broad level surely advanced “black interests,” some black individuals who were thriving under the existing system must have viewed its demise as a bittersweet development: one that was in a general sense good for the race, but that was also at least potentially bad for their pocketbooks.

Just as the interest-convergence thesis presents an exceedingly simple approach to what constitutes “black interests,” so too does the thesis present an overly facile approach to what constitutes “white interests.” Professor Bell’s appreciation of the distinction between “middle and upper class whites,”¹⁰⁸ on the one hand, and “poorer whites,”¹⁰⁹ on the other hand, offers a measure of analytical nuance to the standard, broad-brushed interest-convergence analysis. But even this layer of complexity may simultaneously mask the conflicts and divisions that exist between and within these groups. The interest-convergence theory’s clumping of middle-class whites with upper-class whites¹¹⁰ may, for example, improperly lead to the conclusion that those two groups hold largely indistinguishable views on racial

of the laws.”). For a dispute over the wisdom of black jurors nullifying convictions of black criminal defendants accused of committing nonviolent crimes, compare Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995), which extols the virtues of jury nullification, with KENNEDY, *supra*, at 12–28, 295–310, which condemns jury nullification because such methods violate “the politics of respectability.”

¹⁰⁶ See E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* 111 (Simon & Schuster 1997) (1957) (“When the Negroes started a campaign for their admission to the ‘white’ cinema and the ‘white’ restaurant, the Negro political leader discouraged them and urged them to be loyal to Negro business enterprises.”).

¹⁰⁷ J.L. CHESTNUT & JULIA CASS, *BLACK IN SELMA* 172 (1990).

¹⁰⁸ Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 523.

¹⁰⁹ *Id.* at 525–26.

¹¹⁰ *Id.* at 523, 525–26.

matters. Even within the white upper class, moreover, white citizens have long voiced competing and conflicting views on the racial front.¹¹¹

Setting aside the racial component of the interest-convergence theory, it is worth observing that even the term “interest” can be understood to contain a good deal more complexity than Professor Bell generally allows. The interest-convergence theory tends to view the idea of “interest” as a singular and seemingly entirely self-interested concept. To be sure, people often—usually, perhaps—make decisions based upon a narrow idea of what will be good for them. But human beings—complex creatures that they are—sometimes have multiple motivations for reaching their decisions. In addition to raw material self-interest, there may be more idealized interests involving concepts like honor, altruism, justice, and morality.¹¹²

To state this somewhat abstract point more concretely, contemplate competing notions of how to understand the Court’s decision in *Brown v. Board of Education*. Professor Bell, along with many other scholars of constitutional law, emphasizes that the Court invalidated Jim Crow in elementary public school education during the 1950s because the system became an embarrassment to the United States during the Cold War.¹¹³ That explanation may well account for some of the Court’s motivation behind *Brown*—although the historical evidence on that front is a good deal more complicated than many scholars generally allow.¹¹⁴

¹¹¹ See Eugene L. Horowitz, “Race” Attitudes, in *CHARACTERISTICS OF THE AMERICAN NEGRO* 139, 203–05 (Otto Klineberg ed., 1944) (reporting divergent attitudes among northern college students regarding racial equality).

¹¹² Cf. KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* (2010) (noting that appeals to honor have motivated individuals and societies to alter their conduct); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 7 (1991) (challenging the notion in public choice theory that voters, legislators, and interest groups invariably and exclusively act out of “pure greed”).

¹¹³ See *supra* text accompanying note 12.

¹¹⁴ This Article engages principally with the theoretical underpinnings of interest convergence rather than its historical claims. But two brief historical points merit mentioning here. First, during the 1950s, anti-Communist sentiment pervaded American society. Although many desegregation advocates attempted to claim the mantle of anti-Communism, it is important to note that segregationists often claimed that advocates of integration were in fact Communists. See JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975*, at 40 (2006) (“Soon after the *Brown* decision, Senator Eastland charged that the Supreme Court was under communist control. The Court has become ‘indoctrinated and brainwashed by left-wing pressure groups,’ Eastland contended. The Supreme Court justices must be communists, many white southerners agreed. Jewell Lamm of Middlesex, North Carolina, wrote to her congressman, ‘Personally I think all nine of the old political hacks ought to be exiled to Russia.’”). Second, if Chief Justice Warren’s opinion for the Court in *Brown* was exclusively or even principally motivated by anti-Communism, why did he neglect to mention it? Chief Justice Warren’s opinion was, of course, written to be reprinted in newspapers around the nation and was designed to maximize acceptance among white Southerners. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 699 (rev. & expanded ed. 2004) (1975) (noting that Chief Justice Warren wanted the opinion to be “short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory”). It seems reasonable to believe that even an oblique statement regarding America’s place

But this explanation for the outcome in *Brown* may also be regarded as incomplete. For better or worse, widespread international disapproval has not historically been a sufficient condition to result in an alteration of American practices.¹¹⁵ It also seems distinctly possible that the Court found Jim Crow to be an international embarrassment because the practice clashed with its more abstract interests in justice and equality. Segregation may have embarrassed some whites (including those on the Court) during the 1950s, that is, because they came to regard the system as unjust. Attempting to assign relative value to discrete motivations, especially when dealing with a multimember body, is necessarily a speculative enterprise. The interest-convergence thesis, however, often expresses certainty where it should admit doubt, confidently identifying a lone interest where several motivations may be at work.¹¹⁶

In its crudest form, the interest-convergence theory can be understood as sharing some affinities with early articulations of law and economics. In the world of law and economics, people are regarded as rational utility maximizers;¹¹⁷ in the world of interest convergence, people attempt to maximize the utility of racial advantage. It also seems worth noting that the logic of this skeptical worldview does not necessarily limit itself to whites. Indeed, the interest-convergence ideology's steadfast denial of a genuine white interest in promoting equality and justice for its own sake may be understood as applying to blacks, too. Under this way of thinking, the reason that black people have sought racial equality is not because they believe that racial equality is inherently a just cause but because they believe that achieving racial equality will redound to their benefit. Thus, under the interest-

in the world or the Cold War may have been a powerful rhetorical point in achieving the Chief Justice's aims. Although it may be objected that a Cold War reference would be improper in a Supreme Court opinion, there are at least two responses: (1) the brief filed by the United States government made the argument, Brief for the United States as Amicus Curiae at 6–8, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 8), 1952 WL 82045, at *6–8, and (2) *Brown* is not exactly known for its adherence to traditional legal authorities, see *Brown*, 347 U.S. at 494–95 n.11 (citing psychological studies on the effects of segregation).

¹¹⁵ For example, despite widespread prohibition of the death penalty in Europe, the United States continues to uphold the death penalty. See, e.g., *Baze v. Rees*, 553 U.S. 35 (2008) (upholding imposition of capital punishment in the form of lethal injection). Similarly, the Court has upheld the right to gun ownership in the face of European prohibitions on handgun ownership. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that the Second Amendment protects an individual right to possess firearms in the home for self-defense).

¹¹⁶ Professor Bell's early articulation of the interest-convergence theory allowed some space for multiple motivations. See Bell, *Racial Remediation*, *supra* note 41, at 12 (suggesting that among the factors explaining *Brown* was "a humane as well as politically aware Supreme Court"). But such allowances have generally receded from Professor Bell's analysis.

¹¹⁷ See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 1 (1981) ("Although the traditional subject of economics is indeed the behavior of individuals and organizations in markets, a moment's reflection on the economist's basic analytical tool for studying markets will suggest the possibility of using economics more broadly. That tool is the assumption that people are rational maximizers of their satisfactions.")

convergence theory, claims of injustice—even when articulated by racial minorities—can be dismissed as unprincipled and pretextual, merely a high-minded manner of complaining that their own ox has been gored. After all, why should members of oppressed groups be the only individuals who are capable of making claims to justice and equality that do not reek of self-interest? The interest-convergence ideology so understood can be interpreted as undermining the legitimacy of claims by blacks to racial equality.¹¹⁸

B. Consistency and Inconsistency of Racial Status

The interest-convergence theory holds that, because black people receive relief from racial oppression only when it suits the interests of the white establishment, the status of blacks and the status of whites remained relatively constant throughout the latter half of the twentieth century—and perhaps even throughout the nation's entire history. According to Professor Bell, as discussed above,¹¹⁹ the interest-convergence theory at work throughout United States history links contemporary racial developments to the unvarnished racism of seemingly bygone eras. This misperception—that the status of blacks and whites has been characterized by continuity rather than change during the last several decades—erroneously minimizes one of the leading transformations of American society during that time. One need not believe that racism has been completely vanquished or that there is no longer any advantage associated with whiteness to acknowledge that the status of both racial groups has experienced profound transformations since World War II.

1. *Status of Blacks.*—Professor Bell has long asserted that the interest-convergence theory reveals how contemporary blacks have a good deal in common with their enslaved ancestors: “The difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than of kind.”¹²⁰ Under this view, the fall of Jim Crow was largely a formality, as conditions for African-Americans in the modern era retain an eerie similarity to the days of yore. Even though signs indicating separate water fountains for blacks and whites have long since disappeared, Professor Bell asserts that “contemporary color barriers are less visible but neither less real nor less oppressive.”¹²¹

While it may seem that to state this point is to refute it, arguments asserting an absence of genuine racial change for contemporary black citizens are surprisingly widespread. Indeed, in the face of the overwhelming evidence of the tremendous strides that the United States has made with re-

¹¹⁸ By extension, this analysis applies with equal force to claims of social justice made by members of other oppressed groups on their own behalf.

¹¹⁹ See *supra* Part I.

¹²⁰ Bell, Bakke, *supra* note 84, at 16; see also BELL, RACE, RACISM, *supra* note 82, at 211.

¹²¹ Bell, *Racial Realism*, *supra* note 85, at 374.

spect to race relations since World War II,¹²² the notion that conditions have improved for blacks only on the margins enjoys prominent support both in the legal academy¹²³ and in the larger culture.¹²⁴ Accordingly, it is necessary to observe that the racial existence of blacks in modern America would be unrecognizable, and perhaps even unfathomable, to their enslaved forefathers. Contending that the existence of blacks today can be analogized to people who were literally (not metaphorically) denied their freedom or to people who had their liberty thoroughly circumscribed by Jim Crow minimizes the suffering of individuals who endured the yoke of unrelenting racial oppression.

While the goal of racial equality has certainly not yet been fully realized, the racial progress that has been made over the generations has dramatically elevated the racial status of blacks. Examples abound of racial progress for blacks in their everyday lives.¹²⁵ To appreciate the genuine racial progress that has been made, it is necessary merely to recall the Supreme Court's statements in notorious cases openly acknowledging and affirming the inferior social status of blacks. In *Dred Scott v. Sandford*, Chief Justice Taney's opinion stated that, in the eyes of the Framers, blacks "had for more tha[n] a century before been regarded as beings of an inferior

¹²² See Marshall H. Medoff, *Discrimination and the Occupational Progress of Blacks Since 1950*, 44 AM. J. ECON. & SOC. 295, 295 (1985) (finding that "the occupational position of Blacks relative to Whites showed substantial improvement between 1950 and 1980 in both the North and South and the United States as a whole"); Tamar Jacoby, *Whatever Became of Integration?*, WASH. POST, June 28, 1998, at C2 ("Blacks as a group have made enormous progress in the past three or four decades. The black middle class has quadrupled, education levels have soared and blacks are increasingly represented in electoral politics and other influential realms of national life.").

¹²³ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) ("What has changed since the collapse of Jim Crow has less to do with the basic structure of our society than with the language we use to justify it. . . . We have not ended racial caste in America; we have merely redesigned it."); Charles Ogletree, Jr., *Black Man's Burden: Race and the Death Penalty in America*, 81 OR. L. REV. 15, 23 (2003) ("[T]he only difference between lynching and capital punishment is the gloss of legality and procedural regularity that the latter enjoys. In this regard, application of the death penalty may be fairer than the vigilante justice that characterized the Jim Crow era, but not by much.").

¹²⁴ See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 6–7 (2008) (describing how pop singer Prince claimed that his record label had made him a "slave").

¹²⁵ Philip Elman, who worked in the Solicitor General's office during the fall of Jim Crow, offers a pithy portrait of black life in Washington, D.C., before the Court deemed state-sanctioned racial segregation impermissible. Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 823–24 (1987) ("You have to remember that in 1952 the District of Columbia was a southern city; it had separate black and white school systems. Negroes were barred from eating in downtown restaurants. The only places they could eat were in the black ghettos. If Thurgood Marshall came to Washington to argue a case in the Supreme Court, he could not stay in a downtown hotel; he had to go out to Fourteenth and U Street, to the Dunbar Hotel. Even at the Supreme Court, the only blacks were messengers. There was no black in the Clerk's or Marshall's office, no black on the police force; they were considered white man's jobs. It seems incredible today, but that's the way it was not too long ago.").

order, and altogether unfit to associate with the white race, either in social or political relations."¹²⁶ In *Plessy v. Ferguson*, the Court made the then-unremarkable point that a black man "is not lawfully entitled to the reputation of being a white man."¹²⁷ Not only would such arguments no longer appear in the U.S. Reports but they would no longer be uttered in polite company. The significance of that change cannot be underestimated.

The Supreme Court has, moreover, played at least some role in closing the gap between the status of blacks and the status of whites. While many Supreme Court cases involving race received a great deal of attention because they seemed dramatic, it is perhaps most helpful here to remember a case that affected the quotidian. Not long ago, black people were typically denied the honor of being addressed formally, even in formal settings. Among the list of racial slights that Martin Luther King Jr. listed in his *Letter from Birmingham City Jail* as justifying his civil disobedience was the refusal of white people to accord blacks the respect of using formal titles:

I guess it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; . . . when your first name becomes "nigger" and your middle name becomes "boy" . . . and when your wife and mother are never given the respected title "Mrs." . . . then you will understand why we find it difficult to wait.¹²⁸

One year after King wrote his celebrated letter, the Supreme Court decided *Hamilton v. Alabama*.¹²⁹ In that case, the Supreme Court reversed the contempt conviction of a black woman who refused to answer questions addressed to "Mary" as opposed to "Miss Hamilton." *Hamilton* thus offers a prime instance of the judiciary refusing to permit black citizens to be treated with diminished status before the law. And in so doing, *Hamilton* represents a sharp break from the past in a way that is at once simple and profound.

2. *Status of Whites*.—Professor Bell suggests that the principal interest that whites are motivated to protect is their "superior societal status" as compared to blacks.¹³⁰ The interest-convergence theory provides that "it is

¹²⁶ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹²⁷ *Plessy v. Ferguson*, 163 U.S. 537, 549 (1896), *abrogated by* *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

¹²⁸ Martin Luther King, Jr., *Letter from Birmingham City Jail* (1963), *reprinted in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289, 292–93 (James Melvin Washington ed., 1986).

¹²⁹ 376 U.S. 650 (1964).

¹³⁰ Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 523. Professor Bell has sometimes explicitly suggested that racial "status" includes an economic component. See Derrick A. Bell, Jr., *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROBS. 341, 345 (1975) ("Full implementation of *Brown* remains an uncertain future prospect because of the continuing resistance of many whites who

clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites.¹³¹ If there is a conflict between white status, on the one hand, and black rights, on the other, there is no question that white status will prevail.¹³²

The increasing status of blackness is, of course, intimately connected to the decreasing status of whiteness as an automatic entitlement to exalted social standing. As blacks and other people of color have received the dignitary effects traditionally reserved for whites, it follows that whiteness, on its own, has decreased in value. Justice Stanley Reed keenly felt that decreased value of whiteness after the Supreme Court agreed to a tentative resolution at its conference in the case of *District of Columbia v. John R. Thompson Co.*¹³³ In that case, the Court considered whether restaurants in Washington, D.C., could continue to prohibit black people from dining on the premises. Justice Reed, who lived with his wife at Washington's Mayflower Hotel, was reported to have said after the Court agreed unanimously in conference to invalidate the racial restrictions on dining in the nation's capital: "Why—why this means that a nigra can walk into the restaurant at the Mayflower and sit down to eat at the table right next to Mrs. Reed!"¹³⁴

Where it once would have been risible to suggest that whites benefit from cross-racial interactions, by 1972 a unanimous Burger Court held in *Trafficante v. Metropolitan Life Insurance Co.* that—in the face of racially discriminatory rental practices—white plaintiffs have standing to sue for the "loss of important benefits from interracial associations."¹³⁵ Assuming that antidiscrimination law is, as Professor Wechsler posited, fundamentally about the right of association,¹³⁶ the Court made it clear well before Professor Bell articulated the interest-convergence theory that it would not permit whites' desire for strictly intraracial interactions to trump the desire for interracial contact. In considerable tension with a central tenet of interest convergence, *Trafficante* illustrates the Court's rejection of whites' interest in maintaining racial exclusivity as a ground for protecting white social superiority.

None of the foregoing should be interpreted as contending that whites are not accorded certain benefits as a result of their race that are routinely denied to blacks. Indeed, race and racial considerations continue to exercise meaningful influence on the lives of Americans of all races. I mean to

fear that the realization of 'equal educational opportunities' for blacks will mean the loss of economic and status benefits that they and their children now enjoy solely on the basis of race.")

¹³¹ Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 523.

¹³² *See id.*

¹³³ 346 U.S. 100 (1953).

¹³⁴ KLUGER, *supra* note 114, at 598.

¹³⁵ 409 U.S. 205, 209–10, 212 (1972).

¹³⁶ Wechsler, *supra* note 63, at 34.

suggest merely that whiteness qua whiteness has decreased in status as black citizenship and humanity have become everyday features of American life.¹³⁷ Although a good deal of my analysis focuses on improvements in race relations, that focus should not be taken as an indication that I believe racial prejudice no longer exists, or even that it imposes merely negligible effects on racial minorities. Conditions are far from perfect on America's racial front, a fact that is never more apparent than during difficult economic times.¹³⁸ Acknowledging racism's continued effects does not mean, however, that it is impossible to acknowledge simultaneously that the racial progress blacks have achieved since World War II has been anything less than profound.¹³⁹

C. Lack of Agency

The interest-convergence thesis accords an almost complete absence of agency to two groups of actors who exercise a great deal of control regarding the advancement of black interests: the black citizenry and the white judiciary.¹⁴⁰ By implicitly encouraging black citizens to await the magical moment when their interests converge with the white majority, the interest-convergence thesis sharply discounts the capacity of black people to participate in their own uplift. Conversely, by reducing white judges to mere functionaries who do the bidding of the white establishment, the interest-convergence thesis simultaneously diminishes the culpability of white judges who exercise their authority to maintain the existing racial hierarchy and denies the credit owed to white members of the judiciary who challenge that hierarchy.

¹³⁷ See SOKOL, *supra* note 115, at 4 ("The civil rights movement altered race relations, overturned ingrained practices, subverted traditions, ushered in political change, transformed institutions, undermined a way of life, and even turned cities upside down . . .").

¹³⁸ See, e.g., Michael Powell, *Decades of Gains Vanish for Blacks in Memphis*, N.Y. TIMES, May 31, 2010, at A1 (noting that "rising unemployment and growing foreclosures in the recession have combined to destroy black wealth and income and erase two decades of slow progress").

¹³⁹ See Michael Powell, *45 Years Later, Witnesses to Dr. King's Dream See a New Hope*, N.Y. TIMES, Aug. 28, 2008, at A1 (reporting the comments of Congressman and former civil rights activist John Lewis who said, "When people say nothing has changed, I feel like saying, 'Come walk in my shoes.'").

¹⁴⁰ There are, of course, nonblack citizens and nonwhite judges who are important actors in shaping American race relations. This Article addresses black citizens and white judges because they are, from the interest-convergence vantage point, at the opposite ends of society's power structure. It is worth noting, though, that Professor Bell does not discuss black members of the judiciary in the context of the interest-convergence theory. Were interest-convergence adherents to contemplate black judges, they might advance two principal arguments. First, they might contend that black people who are sufficiently palatable to the establishment so as to be nominated by the President and confirmed by the Senate are, virtually by definition, disinclined to seek profound racial reform. Cf. Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES, Oct. 13, 1968, § 6 (Magazine), at 56. Second, they might contend that, even assuming that a few right-thinking black judges could sneak through the process with their righteous views undetected, not enough such judges could be confirmed so as to make any meaningful difference in the lives of black people.

1. *Black Citizens.*—The interest-convergence theory’s assertion that blacks are permitted to advance only when white interests permit them to do so offers an inaccurately anemic conception of the ability of black people to create change on their own behalf. The theory’s emphasis on fortune and happenstance illuminates the theory’s low regard for black agency.¹⁴¹ Although Professor Bell briefly acknowledges that black people are not in fact inanimate objects, he makes it clear that their actions play an extremely limited role in shaping racial reality. Professor Bell writes:

Blacks are not neutral observers in their subordinate status, but even their most strenuous efforts seldom enable them to break free of a social physics in which even the most blatant discrimination is ignored or rationalized until black petitions find chance harmony with white interests. Racial justice, then, when it comes, arrives on the wings of racial fortuity rather than hard-earned entitlement. Its departure, when conditions change, is preordained.¹⁴²

Rather than black advancement being principally driven by canny litigation strategies, political mobilization, or other modes of self-assertion, interest convergence instead views black people as mere “fortuitous beneficiaries” and instructs them to expect (even fleeting) advances toward racial equality only if they possess the good luck to have their interests be perceived as aligning with those of whites.¹⁴³

¹⁴¹ BELL, *SILENT COVENANTS*, *supra* note 10, at 59 (“While blacks had been petitioning the courts for decades to find segregation unconstitutional, by 1954 a fortuitous symmetry existed between what blacks sought and what the nation needed.”). Professor Bell was not, of course, the only person who viewed *Brown* as the product of fortuity. Indeed, Justice Frankfurter famously viewed the unanimous decision in *Brown* as the result of divine fortune. See JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 57 (2001) (describing how Justice Felix Frankfurter called the death of Chief Justice Fred Vinson “the first indication I have ever had that there is a God”).

¹⁴² BELL, *SILENT COVENANTS*, *supra* note 10, at 9.

¹⁴³ Again, Professor Bell’s early formulation of the interest-convergence thesis demonstrated considerably greater awareness of both black agency and the need to pursue multiple strategies for racial reform simultaneously. See Bell, *Racial Remediation*, *supra* note 41, at 28 (“The quest for racial equality cannot be delegated. Programs and policies should be structured to harmonize with the principle: ‘no one can free black people but themselves.’”); *id.* at 14 (“[T]he quest by blacks for racial justice has resulted in dozens of major court decisions that led to social reforms of general significance. These decisions are seldom society’s gifts. The litigation is usually carefully planned and intelligently executed.” (footnote omitted)). Such statements, alas, seldom appeared in subsequent iterations of the interest-convergence thesis and were typically watered down when they did appear. See, e.g., BELL, *SILENT COVENANTS*, *supra* note 10, at 71 (“[R]acial policy actions may be influenced, but are seldom determined, by the seriousness of the harm blacks are suffering, by the earnest petitions they have argued in courts, by the civil rights bills filed in legislative chambers, or even by impressive protests conducted in the streets. None of these change blacks’ status as fortuitous beneficiaries.”).

This strikingly passive approach to agency afflicts many adherents to the interest-convergence theory. For example, Professor Yoshino contends, in explaining Professor Bell’s thesis, that *Brown* “happened in part because” of the Cold War. See Yoshino, *supra* note 35. Supreme Court cases do not, of course, simply “happen[]”; rather, parties brief cases, and Supreme Court Justices decide those cases. See also Lubinski, *supra* note 31, at 412 (“The [interest-convergence] theory . . . provides animal advocates with the rhetoric required for a successful campaign and the precedent to persist—eventually the

The interest-convergence theory risks reducing black people to the role of bystanders to the events of American history, individuals who occasionally get swept up in the current of world affairs but have a negligible role in shaping those affairs. So limited is their ability to shape their own realities, so complete is their subordination, that, in the absence of racial fortuity, struggling against the prevailing racial order constitutes an exercise in futility. In a passage that illuminates blacks' supposed inability to shape the world around them, Professor Bell contends: "It is as though black people are trapped in a giant, unseen gyroscope. Even their most powerful exertions fail either to divert the gyroscopic prison from its preplanned equilibrium, or to alter its orientation toward dominance for whites over blacks."¹⁴⁴

Black people, however, are not trapped in invisible gyroscopes. Nor are they potted plants. Even in the context of the brutally dehumanizing institution of slavery, black people were able to exercise various modes of resistance and exert at least some control within their thoroughly unenviable environments.¹⁴⁵ More recently, the civil rights movement—with both its legal component conceived of by Charles Hamilton Houston¹⁴⁶ and the direct action component principally identified with Martin Luther King Jr.¹⁴⁷—demonstrates that black people can assert their rights and succeed in bringing about real racial change even in the face of stifling racial oppression. Rather than waiting for fortune to smile upon them, these black people—and many more over the centuries—took fortune into their own hands and helped bend history to their will. Viewing African-Americans as mere "fortuitous beneficiaries" who are trapped in a "preplanned equilibrium" improperly suggests that the decisions and actions of black people are far less important, tending toward the irrelevant, in comparison with what whites deem permissible. In this manner, an absolutist conception of interest convergence may place an artificial limit upon what black people can achieve.

The interest-convergence theory's minimization of black agency also may have the regrettable effect of undermining the achievement of individ-

stars will align and breakthroughs will ensue."). Although Lubinski's excerpted analysis sounds almost satirical, read in context it appears to be sincere.

¹⁴⁴ BELL, *SILENT COVENANTS*, *supra* note 10, at 77.

¹⁴⁵ See, e.g., STEVEN HAHN, *A NATION UNDER OUR FEET: BLACK POLITICAL STRUGGLES IN THE RURAL SOUTH FROM SLAVERY TO THE GREAT MIGRATION* (2003).

¹⁴⁶ See generally KLUGER, *supra* note 114, at 125–31, 147–56 (providing Houston's biography and detailing his involvement in the campaign for civil rights); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 131–55 (1983) (describing Houston's work as Special Counsel for the NAACP); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987) (discussing the NAACP legal strategy).

¹⁴⁷ See DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 85–86 (First Quill 1999) (1986); see also Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 *YALE L.J.* 999, 1020–24 (1989) (describing King's background and involvement in the beginning of the bus boycotts).

ual blacks. In the event that a black person should achieve distinction in the professional world, interest convergence suggests that the white establishment permitted that black person's achievement as a small concession necessary to advance white interests and maintain racial order.¹⁴⁸ "Successful blacks serve white interests by providing the rationalizing link between the nation's espousal of racial equality and its practice of racial dominance," Professor Bell has written. "The unspoken and totally facetious maxim is that with self-improvement, the opportunity is available for all blacks to be successful."¹⁴⁹ While it would certainly go too far to suggest that black people exercise no control whatsoever regarding their occupational fates under the interest-convergence theory, the talent of the black individuals, say, in the laboratory or in the archives would appear to be relatively inconsequential in comparison to the white interests that select a small number of blacks to succeed. The interest-convergence theory might be understood as viewing a successful individual black person less as a role model and more as a mirage—an illusion that succeeds principally in legitimating black subordination.¹⁵⁰

To be sure, the interest-convergence theory does not wholly remove all traces of black agency. When the theory does allow for black agency, however, the amount of influence accorded black people over their own fates is a decidedly marginal phenomenon. In his analysis of *Brown*, for instance, Professor Bell observes that the NAACP's brief in the case, in addition to the Solicitor General's amicus brief, argued that invalidating segregated schools could aid the nation in waging the Cold War.¹⁵¹ Similarly, Professor Bell praises the efforts of the lawyers who won *Grutter* and *Gratz* for trumpeting the importance of diversity in an effort to appeal to the interest-convergence impulse.¹⁵² Interest-convergence theory puts forth a severely

¹⁴⁸ See Bell, *Racial Remediation*, *supra* note 41, at 24.

¹⁴⁹ *Id.*

¹⁵⁰ Professor Bell's emphasis on the legitimation aspect of black success may well stem from a desire to avoid a sense of complacency on the part of individuals who are now interested in pursuing racial equality. This anti-complacency motivation may also account for his insistence that America's racial climate remains largely unchanged since slavery. Although I share Professor Bell's concern that profound racial inequality continues to plague this nation, we appear to part company regarding which tactics will prove most helpful in addressing that inequality. In contrast to Professor Bell, it is my sense that forthrightly acknowledging considerable racial progress will—in addition to having the virtue of striking people as accurate—prevent individuals from believing that racial problems are intractable. Of course, it is also distinctly possible that a combination of approaches may well prove most effective in combating racial inequality.

¹⁵¹ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 524 ("[T]he decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government.").

¹⁵² See Bell, *Unintended Lessons*, *supra* note 49, at 1066 ("Once revealed as a motivating factor, interest convergence can be transformed into useful strategy. Those that defended the University of Michigan's affirmative action plans, for example, utilized interest convergence by promoting diversity as

crabbed understanding of what black individuals and other advocates of black advancement can do to achieve racial uplift. Appealing to interest-convergence sentiments is surely a valuable tool, but it should not be regarded as the only tool that is available. Because notions of interest can be so complex and varied,¹⁵³ it seems misguided to appeal only to an extremely narrow conception of self-interest. Confining black agency to operating within the interest-convergence paradigm artificially serves to constrain racial possibilities.

2. *White Judges.*—Just as the interest-convergence theory improperly minimizes the agency of black citizens, it does the same to white citizens. The denial of agency to one particular group of white citizens—white judges—merits scrutiny here in light of their perceived centrality to implementing the interest-convergence thesis. Indeed, the theory is predicated on the belief that legal decisions involving race are not made by individual judges who choose from a range of judicial determinations but instead are driven by a seemingly compelled predisposition to maintaining racial hierarchy. This minimization at once denies culpability to members of the judiciary who have ratified racism through their decisions and denies credit to members of the judiciary who have rejected racism. Although judges not infrequently make value-laden assessments regarding competing ideals in writing judicial decisions,¹⁵⁴ the interest-convergence theory incorrectly views judges primarily as mere automatons who almost invariably maximize the interests of whites.

While the interest-convergence theory appropriately suggests that more motivated the Supreme Court's racially egalitarian decisions than moral outrage at the injustice of legally sanctioned racism, the theory incorrectly gives short shrift to the moral agency that was central to those decisions.¹⁵⁵ In the middle third of the twentieth century, an all-white Supreme Court issued a number of decisions that confronted the racist treatment of blacks in a variety of contexts, including the electoral,¹⁵⁶ residential,¹⁵⁷ and, yes, the educational.¹⁵⁸ To pretend that such decisions, and similar decisions in the

being in the self-interest of the University. Interest convergence was part of their strategy, planned for in advance, rather than a happy coincidence recognized in retrospect." (footnote omitted)).

¹⁵³ See *supra* Part II.A.

¹⁵⁴ See KLARMAN, *supra* note 15, at 5–7.

¹⁵⁵ On the moral implications of *Brown*, see J. HARVIE WILKINSON, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION 62 (1979) ("No single decision has had more moral force than *Brown*; few struggles have been morally more significant than the one for the racial integration of American life.").

¹⁵⁶ See, e.g., *United States v. Classic*, 313 U.S. 299 (1941) (protecting a citizen's right to participate in primary elections).

¹⁵⁷ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (deeming racially restrictive covenants unenforceable).

¹⁵⁸ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

lower courts, were produced by a judiciary that was concerned primarily with maintaining whites' superior position in society denies those judges the plaudits that they deserve for issuing those decisions.¹⁵⁹

A central part of the interest-convergence theory's conspiratorial outlook is the casting of Supreme Court Justices in the role of omniscient conspirators. Under the interest-convergence theory, Justices resemble less a collection of individuals with varying ideological commitments than an undifferentiated mass composed of diabolical seers who are dedicated to prolonging black subordination by protecting white interests.¹⁶⁰ The interest-convergence theory does not allow that judicial decisions involving race may result in unintended consequences. Instead, under the interest-convergence theory, the Supreme Court issues decisions with an intent, and those decisions seemingly invariably have their desired effect.¹⁶¹ Rather than being all-knowing demigods, however, there is ample reason to believe that Justices often fail to appreciate the impact that their decisions will ultimately have on the nation.¹⁶² This statement, it has been argued, applies with particular force regarding the Court's decisions involving race.¹⁶³

While the history of the United States judiciary does not want for unreconstructed racists,¹⁶⁴ it is important to honor the judges who have affirmatively rejected racism. To take but one example, Judge J. Waties Waring of

¹⁵⁹ See Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 110 (2003) ("Because the Court in *Brown* was deeply committed as a matter of professional belief to the constitutional value of nondiscrimination, it was willing to undertake extraordinary efforts to transform constitutional culture.").

¹⁶⁰ Professor Bell has, on at least two occasions, singled out particular Justices for writing opinions worthy of praise. See Derrick A. Bell, Jr., *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster*, 30 LOY. L.A. L. REV. 1447, 1457–58 (1997) (praising Justice Stevens's dissenting opinion in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Stevens, J., dissenting), for encouraging the Court to acknowledge the constitutional distinction between programs designed to perpetuate racial subordination and programs designed to eradicate racial subordination); Bell, *Diversity's Distractions*, *supra* note 10, at 1624 (praising Justice Ginsburg's dissenting opinion in *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Ginsburg, J., dissenting), for its acknowledgement that the current racial disparities are owed to historical injustices). It is no coincidence that both of these opinions are in dissent.

¹⁶¹ See, e.g., Bell, *Racial Remediation*, *supra* note 41, at 6 ("[E]ven a rather cursory look at American legal history suggests that in the past, the most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks . . .").

¹⁶² See LUCAS A. POWE JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 279 (2009) (contending that none of the Justices realized that *Roe v. Wade*, 410 U.S. 113 (1973), would become an intensely reviled decision); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 362–63 (1995) (observing that, although the Supreme Court may have thought that its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), inflicted a fatal blow to the practice of capital punishment within the United States, that decision may have in fact helped to revive the practice).

¹⁶³ See, e.g., KLARMAN, *supra* note 15, at 389–408 (suggesting that *Brown* did not bring integration to the South but that it did succeed in eliminating the space for Southern moderate politicians on the racial question).

¹⁶⁴ See *id.* at 81 (labeling Justice James McReynolds "a notorious racist").

South Carolina issued opinions regarding blacks that challenged the racial hierarchy so thoroughly that white racists drove him from his home, forcing him to retire from the bench and to flee his home state for New York City.¹⁶⁵ In a dissent in *Briggs v. Elliott*,¹⁶⁶ one of the five cases that eventually became known as *Brown v. Board of Education*, Judge Waring expressly conceived of racial segregation as a moral problem: “[S]egregation in education can never produce equality and . . . is an evil that must be eradicated. . . . [T]he system of segregation in education adopted and practiced in the State of South Carolina must go and must go now. Segregation is per se inequality.”¹⁶⁷ Moral agency motivated Judge Waring’s opinion attacking segregation in *Briggs*, just as it motivated the majority opinion in *Briggs* that defended segregation. Denying the credit that is owed to the Judge Waring of the world is unwise because judges will be unlikely to issue progressive decisions on race—or other legal areas involving inequality—if they believe that their decisions will ultimately be understood as only protecting the prevailing order. The interest-convergence theory’s minimization of agency thus provides a myopic view of judicial behavior in all its moral dimensions.

D. Irrefutability

The interest-convergence theory is also marred by the impossibility of refuting its validity. In responding to *Grutter*, Professor Bell allows himself some measure of “a prophet’s pride” because, in his view, the Court embraced affirmative action in light of the policy being pitched as advancing establishment interests.¹⁶⁸ Like many self-styled prophets, however, Professor Bell can tout his foresight not least because he espouses a view of the world that is fundamentally incapable of being falsified by subsequent events. All judicial decisions involving race can, if subjected to sufficiently intense scrutiny, be understood to affirm the existence of the interest-convergence theory at work.¹⁶⁹ The interest-convergence theory’s irrefutability, moreover, is intensified by Professor Bell’s tendency to minimize and ignore data points that appear to refute or even complicate the thesis.

¹⁶⁵ See J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 10 (1961). Another example of a federal judge who was driven from the South is Judge J. Skelly Wright of Louisiana, who was labeled by local whites “Judas Wright” and “a traitor to his class.” PATTERSON, *supra* note 141, at 107; see also PELTASON, *supra*, at 237 (describing how Louisiana legislators called for Judge Wright’s imprisonment and condemned President-elect Kennedy for refusing to repudiate Judge Wright); see generally JACK BASS, UNLIKELY HEROES (Univ. of Ala. Press 1990) (1981) (chronicling the Fifth Circuit’s response to the Court’s decree of “all deliberate speed” in *Brown II*, 349 U.S. 294 (1955), focusing upon Judges Richard Rives, John Brown, John Minor Wisdom, and Elbert Tuttle).

¹⁶⁶ 98 F. Supp. 529 (E.D.S.C. 1951).

¹⁶⁷ *Id.* at 547–48 (emphasis omitted).

¹⁶⁸ Bell, *Diversity’s Distractions*, *supra* note 10, at 1624.

¹⁶⁹ For an early critique of this point, see Litowitz, *supra* note 37, at 525–26.

1. *Contradiction-Closing Cases.*—In his Foreword to the *Harvard Law Review*, Professor Bell explains why some cases that might initially be viewed as racial advances reveal themselves to be, upon closer inspection, merely legitimations of the prevailing racial hierarchy.¹⁷⁰ If legal rules expose the underpinnings of racism in an excessively blatant manner,¹⁷¹ the interest-convergence theory provides that the judiciary may grant some relief to black people because doing so serves larger white societal interests: namely, an interest in the appearance of meritocracy and an interest in the social stability necessary to avoid racial unrest. Professor Bell dubs these ostensible victories for racial equality “contradiction closing cases,” because “they narrow the gap between white and black rights that the framers wrote into the Constitution.”¹⁷² Contradiction-closing cases “serve as a shield against excesses in the exercise of white power, yet they bring about no real change in the status of blacks.”¹⁷³ Professor Bell suggests that such cases “provide[] blacks and liberals with the sense that the system is not so bad after all.”¹⁷⁴ Professor Richard Delgado has further explained that contradiction-closing cases occur “when the gap between our ideals and a pervasively racist reality grows too large. Such cases legitimate a generally indifferent legal system, permitting dominant society to believe that it is fair and just.”¹⁷⁵

The manner in which the interest-convergence theory can accommodate any decision that appears to reject racial hierarchy can be glimpsed in Professor Bell’s recent reassessment of *Brown*.¹⁷⁶ Apart from emphasizing the decision’s roots in geopolitical considerations, Professor Bell now views *Brown* as a decision that advanced racism by appearing to reject racism. “You would never know it from the opposition and determined resistance of so many whites,” Professor Bell has written, “but the *Brown*

¹⁷⁰ Derrick Bell, *The Supreme Court 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) [hereinafter Bell, *Foreword*]. It seems worth noting here that Professor Bell was the first, and for more than thirty years the only, black law professor to ever write the Foreword to the *Harvard Law Review*, perhaps the most esteemed platform that exists in legal academia. Professor Guinier recently became the second member of that exclusive club. See Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

¹⁷¹ See Bell, *Foreword*, *supra* note 170, at 32. Even expressing the notion that white people would be “shock[ed]” or “embarrass[ed]” by blatant racism, *id.*, evinces a great deal of progress on the racial front.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Delgado, *Two Ways*, *supra* note 18, at 2294 n.133 (citation omitted); see also Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 923–24 (1988) [hereinafter Delgado, *Will We Ever Be Saved?*] (reviewing BELL, AND WE ARE NOT SAVED, *supra* note 18) (“[O]ur system of civil rights statutes and case law serves a homeostatic function, assuring that society has exactly the right amount of racism: Too little would forfeit psychic and financial benefits, too much would risk disruption.”).

¹⁷⁶ Bell, *Unintended Lessons*, *supra* note 49.

decision was actually a good deal for white Americans.¹⁷⁷ Professor Bell explained that the Court's school desegregation decision provided a misleading appearance of meritocracy: "The *Brown* decision's rejection of the racial barriers imposed by segregation . . . reinforced the fiction that the path of progress was clear. Everyone could and should succeed through individual ability and effort."¹⁷⁸ This foregoing analysis suggests that it is whites, not blacks, who prevail when racial barriers fall because the erosion of such barriers perpetuates the myth of racial equality.

That a decision rejecting racial hierarchy in fact must be understood as reinforcing racial hierarchy lays bare the essential irrefutability of the interest-convergence thesis. Judicial decisions that seem to undermine the thesis are seamlessly transformed into confirmations of the thesis. Instead of calling out "heads, I win; tails, you lose," the interest-convergence thesis simply substitutes "heads, white people win; tails, black people lose."

The interest-convergence theory also accounts for judicial decisions that advance racial equality by claiming that such decisions were inevitable because the statutes or laws that the Court invalidated were simply too brazen in their advancement of racial subordination. Contradiction-closing cases, the interest-convergence theory posits, reveal that blacks "can depend on the courts . . . for the correction of racial outrages."¹⁷⁹ But viewing judicial decisions as mere "correction[s] of racial outrages" denies the existence, and even the possibility, of obtaining genuine victories on the road to racial equality. Indeed, even the term "correction of racial outrages" obscures racial progress, as one generation's everyday slight is the next generation's outrage. The "contradiction-closing" view of the legal world, moreover, dismisses judicial defeats on the racial front as expected outcomes and rejects victories for racial equality as necessary concessions in order to maintain the racial status quo. According to this mindset, then, the judicial system sometimes seems incapable of issuing a decision that merits praise for advancing black interests.

¹⁷⁷ *Id.* at 1059.

¹⁷⁸ *Id.* at 1060. This critique of legitimation was also voiced in the first sustained treatment of law and race by a scholar associated with the Critical Legal Studies movement. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051 (1978) (claiming that Supreme Court decisions that appear to benefit blacks in fact operate to validate a racially unjust legal structure); see also Charles J. Ogletree, Jr., *Tulsa Reparations: The Survivors' Story*, 24 B.C. THIRD WORLD L.J. 13, 21 (2004) (contending that whites permit "short-term gains for African Americans when doing so furthers the short- or long-term goals of the white elite. . . . This is an important check on widespread disaffection that may end in revolution."); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 717 (1992) ("The mere existence of *Brown* thus served to . . . legitimate current arrangements. True, many blacks remained poor and disempowered. But their status was now no longer a result of the denial of equality. Instead, it marked a personal failure to take advantage of one's definitionally equal status.").

¹⁷⁹ Bell, *Foreword*, *supra* note 170, at 32 (internal quotation mark omitted).

For example, Professor Bell dismisses the decision in *Strauder v. West Virginia*,¹⁸⁰ which invalidated a state statute prohibiting blacks from serving on juries, as correcting such an obviously outrageous racial injustice that the Court had no alternative other than to invalidate the statute.¹⁸¹ Viewing *Strauder* as a prototypical contradiction-closing case that merely corrected a “racial outrage,” Professor Bell wrote, “Even in the bleak period after Reconstruction came to an end, a quite conservative Supreme Court was willing to recognize the unfairness of convicting a black by a jury from which members of his race were excluded by law.”¹⁸²

Viewing *Strauder* as an inevitable victory for proponents of racial equality, however, badly misses the mark. *Strauder*, lest we forget, was decided some sixteen years before *Plessy v. Ferguson*, where the Court found that separate-but-equal was not only constitutionally permissible but indicated that if black people took exception to Jim Crow’s indignities the problem was in their minds rather than in objective inequities.¹⁸³ It is far from clear what renders the exclusion of blacks from juries an outrage that must be corrected but the exclusion of blacks from railcars a policy to be tolerated. One potential explanation for these seemingly incoherent decisions would contend that, during the late nineteenth century, the prevailing legal view regarded the Reconstruction Amendments as protecting “civil” and “political” rights in a manner that did not extend to “social” rights.¹⁸⁴ But that tidy explanation is undermined by the post-*Strauder* decision of *Giles v. Harris*,¹⁸⁵ where the Supreme Court expressed impotence in its ability to ensure that black people could exercise the franchise in the face of determined white opposition.¹⁸⁶ Rather than constituting an inevitable victory against a plainly racist statute, it is all too easy to envision the Supreme Court validating West Virginia’s statute in *Strauder*.¹⁸⁷

Quite apart from the underlying result in *Strauder*, moreover, the Court’s reasoning in the case struck a blow against white supremacy by rejecting notions of black inferiority. In his opinion for the Court, Justice Strong wrote:

¹⁸⁰ 100 U.S. 303 (1880).

¹⁸¹ Bell, *Foreword*, *supra* note 170, at 32.

¹⁸² *Id.*

¹⁸³ See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

¹⁸⁴ See Mark V. Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause*, Dr. Du Bois, and Charles Hamilton Houston, 74 J. AM. HIST. 884, 886 (1987).

¹⁸⁵ 189 U.S. 475 (1903).

¹⁸⁶ For an illuminating discussion of *Giles*, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

¹⁸⁷ It seems worth noting here that two Justices dissented in *Strauder*. See *Strauder v. West Virginia*, 100 U.S. 303, 339 (1880) (Field, J., dissenting).

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.¹⁸⁸

The point here is not to suggest that, in the wake of *Strauder*, states no longer found ways to exclude blacks from serving on juries. States certainly did continue to exclude blacks from juries for racial reasons in the late nineteenth century, and they continue to do so today.¹⁸⁹ The point, rather, is that the Supreme Court in *Strauder* refused to place its imprimatur on the notion that black people were, by virtue of their substandard intelligence and morality, uniformly unfit to deliberate with white people. And that reasoning represented an important break with then-prevalent racial understandings. The Supreme Court's racially egalitarian decision in *Strauder* cannot be dismissed as a decision that sought to maintain white supremacy in light of the blatant nature of West Virginia's racially exclusionary statute.

In writing the *Harvard Law Review's* Foreword to its annual Supreme Court issue in 1985, Professor Bell utilized a similar method to minimize the significance of *Bob Jones University v. United States*¹⁹⁰ and *Palmore v. Sidoti*,¹⁹¹ two prominent cases from the 1980s in which the Court issued decisions that were broadly understood to advance the cause of racial justice. In *Bob Jones*, the Court validated an Internal Revenue Service rule that denied tax-exempt status to educational institutions that practiced racial discrimination.¹⁹² In *Palmore*, the Court reversed a lower court's decision withdrawing child custody from a white mother because she decided to marry a black man.¹⁹³ One might think that such significant and recent Court decisions would receive more than passing reference in a Foreword called *The Civil Rights Chronicles*. Rather than offering a sustained analysis of the opinions, however, Professor Bell merely cited them in a footnote as instances of contradiction-closing cases.¹⁹⁴

2. *Avoidance of Racially Egalitarian Decisions.*—Although Professor Bell often criticizes Supreme Court decisions as racially unjust, he general-

¹⁸⁸ *Id.* at 308 (majority opinion).

¹⁸⁹ See, e.g., JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (Harvard Univ. Press 2000) (1994); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 *TEX. L. REV.* 1401 (1983).

¹⁹⁰ 461 U.S. 574 (1983).

¹⁹¹ 466 U.S. 429 (1984).

¹⁹² See *Bob Jones*, 461 U.S. at 595–96.

¹⁹³ See *Palmore*, 466 U.S. at 434.

¹⁹⁴ Bell, *Foreword*, *supra* note 170, at 32 n.94.

ly refuses to acknowledge judicial decisions that evince racial progress. This is the case even when transformations occur in the very areas of the law that Professor Bell has suggested require judicial attention in light of the interest-convergence thesis. Whatever the usual standard incumbent upon law professors to address doctrinal shifts that conceivably undermine the force of their analyses, the interest-convergence thesis is predicated on racial stasis and the Court's impervious approach to black interests. The interest-convergence thesis, then, imposes a special duty upon Professor Bell to grapple with doctrinal shifts in areas that he has criticized under the interest-convergence theory and that have subsequently been altered. All too often, however, the interest-convergence theory's analysis is jettisoned when confronted with judicial decisions that suggest racial progress.¹⁹⁵

In the law-of-democracy field, for instance, Professor Bell allowed in *Racial Remediation* that, while the Court might invalidate egregious instances of racial exclusion as it did in *Gomillion v. Lightfoot*,¹⁹⁶ it would not address more subtle instances of racial discrimination "that dilute seriously [blacks'] political potential" because of the requirement for "prov[ing] that the lines or policies were intended to have a racially discriminatory effect."¹⁹⁷ When Professor Bell first lodged this assessment in 1976, it was difficult to quibble with its accuracy. In the intervening years, however, approaches to minority political power have changed dramatically. In response to the Supreme Court's decision in *Mobile v. Bolden*, which required that election schemes evince racially discriminatory "intent" in order to trigger constitutional or statutory protection,¹⁹⁸ Congress clarified in 1982 that plaintiffs could prevail upon a claim under section 2 of the Voting Rights Act by examining "results" rather than intent.¹⁹⁹ Subsequently, the Court gave real shape to that more robust protection of minority voting rights in *Thornburgh v. Gingles*, which established a manageable, three-part test for proving vote dilution.²⁰⁰

Professor Bell has refrained from dedicating sustained attention to using the lens of interest-convergence to analyze how the Court, with prompting from the United States Senate, has substantially modified its approach for vindicating a minority vote dilution claim. Instead, the 2004 edition of *Race, Racism, and American Law* mentions *Gomillion* and the subsequent equipopulous cases and then states: "[T]hese precedents have been far more useful in correcting disparities in voting districts based on population than

¹⁹⁵ Cf. Kennedy, *supra* note 18, at 1749 (contending that the scholarship of several prominent Critical Race Theorists, including Professor Bell, "reveal[s] significant deficiencies—the most general of which is a tendency to evade or suppress complications that render their conclusions problematic").

¹⁹⁶ 364 U.S. 339 (1960).

¹⁹⁷ Bell, *Racial Remediation*, *supra* note 41, at 15–16.

¹⁹⁸ 446 U.S. 55 (1980).

¹⁹⁹ See Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716 (1983).

²⁰⁰ 478 U.S. 30, 50–51 (1986).

in ending those created or maintained to dilute the potential voting strength of blacks.²⁰¹ While Professor Bell does fleetingly acknowledge *Gingles* in his casebook,²⁰² he does not analyze the case in the context of interest convergence. Whether the new vote-dilution regime actually advances black interests²⁰³ or whether the Court's vote-dilution jurisprudence has been co-opted by white suburbanites²⁰⁴ are conversations well worth having. But it does not help to examine law and democracy with the interest-convergence lens when the theory leads to favorable results and to abandon that lens when arguably racially egalitarian judicial decisions muddy the analytical waters.

Similarly, Professor Bell has offered criticism of the Court's jurisprudence regarding the use of peremptory strikes in jury trials. In *Racial Remediation*, Professor Bell criticized the Court's holding in *Swain v. Alabama* and its "refus[al] to condemn more sophisticated and no less effective means of barring blacks from juries, particularly in those cases where racial issues are important."²⁰⁵ *Swain* surely presented a worthy target for criticism. But Professor Bell has not explored how the interest-convergence theory is undermined by the Court's repudiation of *Swain* in *Batson v. Kentucky*, which introduced a burden-shifting mechanism for determining whether peremptory strikes were exercised in a nondiscriminatory fashion.²⁰⁶ That is not to suggest that *Batson* has proven to be a completely effective remedy for rooting out racially-motivated peremptory strikes; to the contrary, its flaws are legion.²⁰⁷ Indeed, I share the view of Justices Thurgood Marshall²⁰⁸ and Stephen G. Breyer,²⁰⁹ among others, who have suggested that abandoning peremptory strikes altogether may present the only viable method of ensuring that the strikes are not exercised in a discriminatory manner. Despite its considerable shortcomings, however, one cannot doubt that *Batson* has provided at least some relief in instances where prosecutors strike black jurors.²¹⁰ And it is difficult to understand

²⁰¹ BELL, RACE, RACISM, *supra* note 82, at 210.

²⁰² *Id.* at 509–10.

²⁰³ See Guinier, *supra* note 96, at 1079–80 (expressing skepticism about whether the election of black officials necessarily advances black interests).

²⁰⁴ See James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982).

²⁰⁵ Bell, *Racial Remediation*, *supra* note 41, at 15.

²⁰⁶ 476 U.S. 79 (1986).

²⁰⁷ See, e.g., Shaila Dewan, *Blacks Still Being Blocked from Juries in the South, Study Finds*, N.Y. TIMES, June 2, 2010, at A14.

²⁰⁸ See *Batson*, 476 U.S. at 102–03 (1986) (Marshall, J., concurring) (contending that the only way to “end the racial discrimination that peremptories inject into the jury-selection process” is to “eliminat[e] peremptory challenges entirely”).

²⁰⁹ See *Miller-El v. Dretke*, 545 U.S. 231, 268–69 (2005) (Breyer, J., concurring) (advocating a reconsideration of peremptory strikes in light of discriminatory usage).

why a Court that, according to the interest-convergence theory, generally evinces hostility to black interests would render such a decision.

Professor Bell need not go so far as to concede that the doctrinal developments in *Gingles* and *Batson* irreparably damage the theory. Many commentators, as suggested above, have leveled criticisms of those decisions for providing insufficient relief to the problems that they purport to address. Nonetheless, Professor Bell should explain how these decisions, which would seem to reflect the Court's commitment to racial equality, are in fact merely further manifestations of the interest-convergence theory. Conversely, if these cases do in fact cut against the interest-convergence theory, Professor Bell should acknowledge that point frankly. Ignoring or minimizing the significance of seemingly important doctrinal shifts regarding race enhances the concern that the interest-convergence theory is less than fully committed to a candid assessment of developments in the legal world.

III. CONSEQUENCES OF THE INTEREST-CONVERGENCE THESIS

The interest-convergence theory's analytical flaws lead to several undesirable consequences in the arena of race relations. The most obvious consequence of contending that racial progress has been modest since the days of slavery is that doing so invites black people to despair about the possibility of achieving racial equality. Indeed, many scholars have criticized the fatalistic feature of Professor Bell's work.²¹¹ In response, Professor Bell and some of his admirers have attempted to defang the fatalism critique by contending that, even if black people cannot ultimately succeed in altering their subordinate condition in American society, there remains a certain nobility in the struggle.²¹² These efforts to deflect the critique of despair, however, seem highly unpersuasive. If efforts to throw off the yoke of racial oppression are truly futile, many black people can be expected to abandon efforts to win equality for the race, even if they do not forsake individual advancement.²¹³

²¹⁰ See, e.g., *Snyder v. Louisiana*, 552 U.S. 472 (2008) (reversing the Louisiana Supreme Court's determination that no *Batson* violation occurred where the prosecutor's explanation for peremptorily striking a black juror also would have required him to strike white jurors); *Miller-El*, 545 U.S. at 237 (finding a *Batson* violation where a prosecutor struck ten out of eleven black jurors from the venire).

²¹¹ See, e.g., John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533, 550 (1992) (observing that Professor Bell's analysis is "unsuccessful in avoiding despair").

²¹² See, e.g., BELL, *FACES*, *supra* note 87, at 10; Tracy E. Higgins, *Derrick Bell's Radical Realism*, 61 FORDHAM L. REV. 683, 692 (1992) (reviewing BELL, *FACES*, *supra* note 87) ("Bell's description of racism as a permanent condition is calculated to lead not to despair but, perhaps ironically, to freedom—the freedom from false hope in the unrealized and perhaps unrealizable promise of racial justice.").

²¹³ See George W. Dent, Jr., *Race, Trust, Altruism, and Reciprocity*, 39 U. RICH. L. REV. 1001, 1026 (2005) ("Expressions of despair like Professor Bell's become self-fulfilling prophecies. One who despairs does not bother to strive for racial progress." (footnote omitted)).

Rather than rehashing the despair critique, this Part will concentrate on two underappreciated consequences that flow from the interest-convergence thesis. First, the interest-convergence theory's conception of the conditions that are necessary to bring about change invites would-be racial reformers to adopt artificially constrained notions of what constitutes a viable method for seeking change. Second, the irrefutability of the interest-convergence theory lends itself to a racially conspiratorial viewpoint that hinders black advancement.

A. Constrained Racial Remedies

Proponents of the interest-convergence theory have long been concerned with its implications for advancing the cause of racial equality. Indeed, Professor Bell has suggested that the theory provides a comprehensive map of the path leading to racial progress. "Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized," Professor Bell has written.²¹⁴ Erasing any doubt as to whether he regards interest-convergence as the sole method of achieving racial progress, Professor Bell explained that "[t]he interest of blacks in achieving racial equality will be accommodated *only* when it converges with the interests of whites."²¹⁵ Many other scholars have also suggested that the interest-convergence theory demonstrates how minorities—racial and otherwise—will be able to win advancement.²¹⁶ But the assertion that black people receive favorable judicial decisions only when their interests converge with those of whites invites proponents of racial equality to limit the menu of possible remedial strategies for seeking black advancement. While appealing to interest-convergence impulses may present one powerful weapon for seeking racial advancement, it should not be viewed as the entire arsenal.

²¹⁴ Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 528.

²¹⁵ *Id.* at 523 (emphasis added).

²¹⁶ *E.g.*, Cashin, *supra* note 18, at 254–55 ("[T]he thesis of interest convergence advanced by Professor Derrick Bell, while pessimistic in its outlook, offers a key insight into human nature and American race relations that can and should be harnessed in order to build the sustainable multiracial coalitions that will be necessary if we are to close existing gaps of racial inequality."); Robert S. Chang & Peter Kwan, *When Interests Diverge*, 100 MICH. L. REV. 1532, 1537 (2002) ("The implications of this principle, if true, are far-reaching since the corollary of the principle is that where the judiciary perceives that interests of the white middle and upper class diverge from those of African Americans, they will not be willing to grant racial remedies to African Americans."); Powell, *supra* note 21, at 413 ("Derrick Bell's interest convergence formula holds that the interest of Blacks in achieving racial equality will be accommodated only when it converges with the interests of Whites. In a contest between White self-interest and White racism, justice is the product. This equation tells us that there are opportunities for social justice where allies of social progressives can identify and harness support of whites." (footnotes omitted)); Luong, *supra* note 21, at 274 ("Professor Bell's interest convergence theory is instructive because it helps identify the forces that animate civil rights victories and enable a strategic incorporation of legislative and political action.").

A leading consequence of subscribing to the interest-convergence theory as the only (or even the predominant) method of achieving reform is its inculcation of passivity in its adherents. This consequence is, of course, a logical outgrowth of the lack of agency that the interest-convergence theory accords black people. Waiting for moments of “racial fortuity” to present themselves is, in many ways, not all that distinct an endeavor from waiting for lightning to strike—or, perhaps more appositely still, waiting for the stars to align. Indeed, it is no accident that at least one interest-convergence proponent has suggested precisely this astronomical metaphor in seeking change in the animal rights context.²¹⁷ Passivity, though, seldom if ever lends itself to creating the conditions that are necessary to bring about successful challenges to racial hierarchy.

Concentrating on interest convergence as the predominant method of achieving racial equality often allocates insufficient space to other methods of attempting to bring about racial change. By consistently attempting to frame political and legal disputes in a manner that endeavors to explain why white people stand to benefit from adopting a particular posture, advocates of racial reform risk undervaluing the role that morality and honor play in shaping political and legal debates. And the moral considerations of many whites, contrary to Professor Bell’s view,²¹⁸ have played an important role in black advancement throughout American history.

Moreover, it can sometimes be very difficult, if not impossible, to explain why a particular decision will benefit white interests—at least in the narrow sense of that term.²¹⁹ The inability to frame an argument using the language of white and black interest convergence should not discourage black people from seeking governmental relief. This statement is particularly apt in the judicial realm, where the pull of interest convergence may be minimal, at least in comparison to the political realm. Black people will never know what governmental relief is possible if they limit the instances in which they seek relief to instances where they can appeal to a narrowly conceived notion of white self-interest.

The focus on interest convergence, to the virtual exclusion of other strategies for racial advancement, motivates some legal commentators to propose remedial ideas that are of dubious value. Two separate law review articles, for instance, have contended that the United States’ war on terrorism presents the optimal conditions for racial minorities to advance interest-convergence arguments.²²⁰ Professor Eric Yamamoto, in making a case for slavery reparations, has suggested that “the United States will lack unfet-

²¹⁷ See Lubinski, *supra* note 31, at 412 (“The [interest-convergence] theory . . . provides animal advocates with the rhetoric required for a successful campaign and the precedent to persist—eventually the stars will align and breakthroughs will ensue.”).

²¹⁸ See Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 525.

²¹⁹ See *supra* text accompanying notes 111–13.

²²⁰ See Yamamoto et al., *supra* note 34; Weinstein, *supra* note 34.

tered moral authority and international standing to sustain a preemptive worldwide war on terror unless it fully and fairly redresses the continuing harms of its own historic government-sponsored terrorizing of a significant segment of its populace."²²¹

If taken seriously, however, this scheme of attempting to capitalize upon a national tragedy would run a serious risk of retarding the cause of racial equality. If black people had begun pressing reparations claims with increased intensity on September 12, 2001, those assertions may have underscored the belief that black people are not, in some fundamental sense, truly Americans.²²² Reinforcing the notion that blacks are, at most, quasi-Americans would certainly delay the day that blacks achieve genuine racial equality. On a practical level, moreover, this adaptation of the interest-convergence theory would have little chance of actually succeeding. For one thing, many blacks view themselves as intensely patriotic and would have little stomach for attempting to divert attention away from capturing the nation's avowed enemies. For another, few government officials seem likely to view the connection between Osama bin Laden's brand of terrorism and Jim Crow's brand of terrorism as sufficiently strong so as to require political or judicial action.

One legal commentator has advanced a similarly flawed potential application of the interest-convergence theory in the context of achieving school financing reform.²²³ Because black students disproportionately attend inner-city schools, Professor David Singleton has argued, the interest-convergence theory dictates that suburban school districts will not be convinced to share their economic wealth with urban school districts unless it can be demonstrated that doing so would advance the interests of the suburban school districts.²²⁴ Among the other strategies for demonstrating how interdistrict sharing would serve white interests, Professor Singleton contemplates emphasizing that underfunded inner-city schools produce poorly educated black males who in turn commit crimes—sometimes against white suburbanites.²²⁵ This strategy for racial and educational uplift amounts

²²¹ Yamamoto et al., *supra* note 34, at 1329.

²²² Professor Bell contends that many people incorrectly view blacks as not truly American. See BELL, *SILENT COVENANTS*, *supra* note 10, at 195 ("Beyond the ebb and flow of racial progress lies the still viable and widely accepted (though seldom expressed) belief that America is a white country in which blacks, particularly as a group, are not entitled to the concern, resources, or even empathy that would be extended to similarly situated whites.").

²²³ See Singleton, *supra* note 18, at 664 ("[B]lack boys' interest in obtaining a quality education will only be accommodated when it converges with the interests of suburban whites.").

²²⁴ *Id.* at 674 ("As Professor Bell argues, blacks' interest in achieving racial equality will not be accommodated unless it converges with the interests of whites. Therefore, given the highly charged politics surrounding interdistrict desegregation remedies, economic integration of Greater Cincinnati schools will not occur unless white, suburban school districts are persuaded that such integration serves their interests.").

²²⁵ *Id.* at 675 ("People who live in the Cincinnati metropolitan area can scarcely pick up the morning newspaper without reading about crime rates spiraling out of control. . . . If emphasized, could the

roughly to instructing white citizens: “Give black people your tax dollars or else you will get robbed by a young, undereducated black man.” As even Professor Singleton seems to recognize, however, heightening notions of black criminality presents a reform strategy that may well contain considerable drawbacks.²²⁶

These efforts to shoehorn remedial policies regarding black reparations and school financing into the interest-convergence paradigm illustrate how the theory occupies an inordinately large place in the imagination of racial reformers. Not every cause lends itself to being framed in a manner that appeals to the interest-convergence impulse. Indeed, framing arguments in terms of interest convergence sometimes risks stalling progress toward racial equality, as the constant search for moments of interest convergence can cause advocates to overlook more promising avenues of achieving racial reform. Worse, the fixation on interest convergence could affirmatively retard racial progress by portraying blacks as quasi-Americans or accentuating the criminality of black males. None of this is to contend, of course, that proponents of racial equality should altogether abandon the interest-convergence strategy. Highlighting the ways in which society as a whole stands to benefit from black advancement can sometimes form the basis of a powerful argument in the judicial or the political realm.²²⁷ Focusing on the interest-convergence theory to the exclusion of all other strategies, however, unnecessarily closes off many promising avenues for racial reform.

B. Racial Conspiracy Theory

The inability to refute the suggestion that the interest-convergence theory is at work results in the reinforcement of racially conspiratorial thought, a mindset that is disturbingly prominent within the black community.²²⁸ Although conspiracy theories often flourish among the most mar-

link between black males' low graduation rates and increasing crime rates persuade white suburbanites to tolerate, if not embrace, interdistrict economic integration?”).

²²⁶ *Id.* at 675 (“Emphasizing this link . . . reinforces the stereotype of young black men as dangerous individuals who commit crime, the kind of people suburban families have fled Cincinnati to get away from.”).

²²⁷ See PELTASON, *supra* note 165, at 226 (describing Thurgood Marshall as arguing before a three-judge court in New Orleans in 1960 that “[t]his is no longer a case of Negro children seeking their constitutional right. This is now a challenge of the officials of the State of Louisiana to the sovereignty of the United States.”).

²²⁸ Comments revealing racially conspiratorial thought among African-Americans are legion. In one of the more recent such comments, filmmaker Spike Lee stated: “Many African-Americans—and I include myself in this group—don’t put anything past the United States government when it comes to black people.” John Colapinto, *Outside Man*, NEW YORKER, Sept. 22, 2008, at 52, 61. Instances of racialized conspiracies abound. See, e.g., Daniel Goleman, *Anatomy of a Rumor: It Flies on Fear*, N.Y. TIMES, June 4, 1991, at C1 (discussing the widespread rumor that the Ku Klux Klan was responsible for a soft drink called Tropical Fantasy that contained an ingredient that would sterilize black men); Nara Schoenberg, *Exposing the Output of America’s Busy Racial Rumor Mill*, CHI. TRIB., Jan. 18, 2002, § 5, at 1 (detailing myriad tales of racial conspiracy surrounding fried chicken: “that KFC founder Col. Har-

ginalized and disaffected members of society,²²⁹ large segments of even the most upwardly mobile black citizens appear to subscribe to racially conspiratorial ideas. One study that polled the attitudes toward racial conspiracy among college students found that 60.2% of black respondents thought that it was definitely true or possibly true that the AIDS virus was intentionally designed in a laboratory to infect blacks.²³⁰ Even more staggeringly, fully 84.1% of the black college students deemed it definitely true or possibly true that the United States government intentionally ensures that illicit drugs are available in impoverished black communities.²³¹ The belief that American society has systematically oppressed black people is, of course, far from a figment of the black imagination, as this nation's sordid racial past teems with examples of precisely such treatment.²³² Nevertheless, in the modern era, no evidence confirms that large-scale racial conspiracies exist within the United States.

The relentless search to identify widespread racial conspiracies exacts serious costs on many black citizens. Not the least of these costs is that when one constantly searches for racial conspiracies, they can often be found—even when they do not exist. While it is certainly true that just because you are paranoid does not mean that they are not out to get you,²³³ many individuals would do well to remember that the converse applies with at least equal force: espousing racially paranoid rhetoric does not mean that you have in fact uncovered a conspiracy to oppress black people. As political science Professor Edward Banfield wrote four decades ago, “It is bad enough to suffer real prejudice . . . without having to suffer imaginary pre-

land Sanders stole his recipe from a black domestic worker, that Church's Fried Chicken contained an ingredient manufactured by the KKK to sterilize black males, that the founder of Popeye's fried chicken made a major contribution to the Senate campaign of former KKK Grand Dragon David Duke.”)

²²⁹ See Michiko Kakutani, *It's a Plot!, No, It's Not: A Debunking*, N.Y. TIMES, Feb. 16, 2010, at C1; see also CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 108, 113 (2009) (dismissing the idea that subscribing to conspiracies is evidence of “individual pathology” and that “[f]or purposes of understanding the spread of conspiracy theories, it is especially important to note that group polarization is particularly likely, and particularly pronounced, when people have a shared sense of identity and are connected by bonds of solidarity”).

²³⁰ See Jennifer Crocker et al., *Belief in U.S. Government Conspiracies Against Blacks Among Black and White College Students: Powerlessness or System Blame?*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 941, 946 (1999). Just 9.5% of white respondents agreed with that assessment. *Id.*

²³¹ *Id.* Just 4.2% of white respondents agreed with that assessment. *Id.*

²³² Here, I have in mind the United States Constitution's accommodation of slavery as a prime example of systemic racial oppression. See, e.g., U.S. CONST. art. I, § 2, *superseded by* U.S. CONST. amend. XIV; U.S. CONST. art. IV, § 2; *superseded by* U.S. CONST. amend. XIII. In more recent years, the government targeted only black men to examine the effects of syphilis in the notorious Tuskegee Syphilis Study. See Susan M. Reverby, “*Special Treatment*”: *BiDil*, *Tuskegee*, and the *Logic of Race*, 36 J.L. MED. & ETHICS 478, 480 (2008).

²³³ This expression has been attributed to many people over the years. One such person is Huey P. Newton. See Delgado, *supra* note 22, at 59.

judice as well.²³⁴ A related cost of the racially conspiratorial viewpoint is that the search prevents at least some black people from seeking interracial understanding and relationships, as white people are warily viewed as potential conspirators in racial oppression.²³⁵ A final cost of ubiquitously perceived (and asserted) racial conspiracies stems from the risk that such claims become part of the nation's permanent background noise, preventing advocates for racial equality from gaining sorely needed attention to address policies and laws that have a disproportionately negative impact on black lives.²³⁶

Notably, the interest-convergence thesis accounts for the existence of “racial paranoia,” but it acknowledges the phenomenon as existing only among white people.²³⁷ Professor Bell, as early as 1979, contended that the idea underlying the interest-convergence theory means that white opponents of policies or decisions that would seem to benefit blacks evince a brand of racial paranoia.²³⁸ If blacks receive seemingly favorable decisions only when white interests are advanced (or at least not harmed), the theory runs, then clear-thinking white people should understand that they always gain more from what are ostensibly black victories. As Professor Bell has written, “One would imagine that only a perverse form of racial paranoia can explain white opposition to racial remedies that, history teaches us, benefit whites more than blacks.”²³⁹

In his recent elaboration upon this “perverse form of racial paranoia,”²⁴⁰ Professor Bell addresses white opposition to affirmative action in a way that is designed to critique racially conspiratorial thinking but in fact succeeds principally in exposing his own racially conspiratorial thought.²⁴¹ Professor Bell suggests that whites should actually support affirmative ac-

²³⁴ EDWARD C. BANFIELD, *THE UNHEAVENLY CITY: THE NATURE AND FUTURE OF OUR URBAN CRISIS* 87 (1970).

²³⁵ I do not mean to suggest that certain members of the black race are the only people capable of falling into racially conspiratorial viewpoints. Whites may be no more immune to baseless, racially conspiratorial viewpoints than blacks. See, e.g., Peter Beinart, *Erasing the Race Factor*, WASH. POST, Aug. 13, 2008, at A15 (suggesting that Democratic presidential nominee Barack Obama should adopt policy positions to mitigate the concern that an Obama administration would be dedicated to assisting primarily African-Americans).

²³⁶ Cf. FORD, *supra* note 124, at 19 (suggesting that unwarranted accusations of racial discrimination invite the dangers of crying “wolf”). It is important to note that policies that disproportionately impact blacks are distinct from conspiracies.

²³⁷ Bell, Bakke, *supra* note 84, at 14.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ BELL, *SILENT COVENANTS*, *supra* note 10, at 141.

²⁴¹ See *id.* Professor Bell also views white opposition to *Brown* as evincing a “perverse form of racial paranoia”: “[T]he generation-long struggle over school desegregation sparked by the *Brown* decision has brought far more attention to the plight of the public schools—and far more money and resources to improve their quality—than would ever have occurred had blacks not made the effort to achieve an ‘equal educational opportunity.’ Today, public schools are improved, but remain mainly segregated and unequal.” Bell, Bakke, *supra* note 84, at 14–15.

tion policies because doing so would advance their economic interests.²⁴² “White women have been the major beneficiaries of affirmative action,” Professor Bell contends.²⁴³ “And to the extent that affirmative action rules often require advertising jobs rather than simply filling them via existing ‘old-boy’ networks, white men have had access to positions they would have never learned of without the policies so many of them abhor.”²⁴⁴

This analysis is confounding. White men are, of course, the prototypical beneficiaries of the old-boy network, in which occupational positions are filled through back channels rather than formal applications. Thus, it is difficult to understand how white men would benefit from a system that decreases the importance of social capital.²⁴⁵ It is quite possible, of course, that the advertising requirement would result in no meaningful change whatsoever. Merely learning about the existence of a position is no guarantee of landing a position, as advertising the job may in fact constitute a mere formality, with the actual hiring decision occurring in much the way of the old-boy network.²⁴⁶ This strained effort to identify appreciable benefits for white men as a result of affirmative action, rather than to be content identifying even static racial conditions, reveals the conspiratorial nature of the interest-convergence ideology.

Like many conspiracy theories, a key feature of the interest-convergence theory views the search for racial conspiracies as being essential precisely because they are difficult to detect.²⁴⁷ Perhaps the clearest manifestation of the belief that conspiracies are often subtle comes in the epigraph to Professor Bell’s 2004 book, *Silent Covenants*:

The world is moved by diverse powers and pressures creating cross currents that unpredictably, yet with eerie precision, determine the outcome of events. Often invisible in their influence, these forces shape our destinies, furthering or frustrating our ambitions and goals. The perfection for which we strive is

²⁴² See BELL, *SILENT COVENANTS*, *supra* note 10, at 141.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See, e.g., Glenn C. Loury, *A Dynamic Theory of Racial Income Differences*, in *WOMEN, MINORITIES AND EMPLOYMENT DISCRIMINATION* 153, 176 (Phyllis A. Wallace & Annette M. LaMond eds., 1977) (contending that one’s informal social network shapes not only what knowledge one can access but also whether one can harness that knowledge in a productive manner). This analysis could intend to suggest that a different (i.e., less well-connected) variety of white man would benefit from a more transparent hiring system, but Professor Bell should spell out precisely how white men stand to benefit.

²⁴⁶ See, e.g., Kenneth L. Shropshire, *Minority Issues in Contemporary Sports*, 15 *STAN. L. & POL’Y REV.* 189, 206 (2004).

²⁴⁷ See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 134–35 (1997) (criticizing radical legal scholarship broadly for the negative effects of emphasizing the subtlety that is supposedly required to unmask conspiracy).

elusive precisely because we are caught up in the myriad of manifestations of perfection itself.²⁴⁸

In a tribute to Professor Bell's work, Professor Richard Delgado has also emphasized the subterranean aspect of racism: "American society oppresses and subordinates minorities of color at every turn, subscribing to a nearly invisible ideology that finds [racial] oppression tolerable, natural, and inevitable."²⁴⁹

The interest-convergence theory's conspiratorial view envelops itself in the notion that only the theory's adherents have the courage to see and acknowledge how racial considerations actually operate in the real world.²⁵⁰ Professor Bell has written that the outlook "is simply a hard-eyed view of racism as it is and [blacks'] subordinate role in [society]."²⁵¹ Individuals who disagree with the interest-convergence theory's conclusions are dismissed as being uninformed and naïve. For example, Professor Bell has recently explained that commentators who believe that "*Brown* was and is a valuable precedent" are "entitled to their views—but they fit quite nicely with those who hold that the earth is, after all, flat."²⁵²

The conspiratorial viewpoint is so thoroughly incorporated into the interest-convergence theory that it even serves to explain why people express skepticism of the theory's explanatory power. The completely self-reinforcing nature of the interest-convergence thesis is captured by Professor Delgado's fictional protagonist, Rodrigo Crenshaw. "As you'll see," Professor Crenshaw explains, "interest-convergence explains resistance to the very idea of interest-convergence."²⁵³ This sentence encapsulates how the interest-convergence theory offers a truly unified theory of law and race. Indeed, some interest-convergence adherents even go so far as to detect conspiracies in the reception to Professor Bell's scholarship.²⁵⁴

The conspiratorial manner in which the interest-convergence theory is propounded, thus, has the undesirable appearance of seeking to silence dissenting viewpoints. The theory's derision of potential objections either as evincing naïveté or further confirming the unified theory of race relations

²⁴⁸ BELL, *SILENT COVENANTS*, *supra* note 10, at epigraph.

²⁴⁹ Delgado, *Will We Ever Be Saved?*, *supra* note 175, at 926.

²⁵⁰ Professor Bartlett has identified a similar phenomenon among some feminists. See Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 WIS. L. REV. 303, 323–24.

²⁵¹ Bell, *Racial Realism*, *supra* note 85, at 378.

²⁵² Bell, *Unintended Lessons*, *supra* note 49, at 1054.

²⁵³ Delgado, *supra* note 22, at 48 (internal quotation mark omitted).

²⁵⁴ See Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 HOW. L.J. 473, 478 (2004) ("No, [Professor Bell] will never win a Nobel Prize, you can bank on it, and probably not a MacArthur 'genius' grant, either. Instead, glory, laud, and honor go to legal figures who *obscure* how power works, how law operates so that the haves always come out ahead, and how our system, even of race-remedies law, subjugates its supposed beneficiaries.").

does not exactly lend itself to probing scholarly exchange. Nevertheless, rejecting the interest-convergence theory's efforts to stifle intellectual exchange is nothing less than imperative.

CONCLUSION

The article that coined the term "interest convergence" ended with the suggestion that "awareness" is "always the first step toward overcoming still another barrier in the struggle for racial equality."²⁵⁵ Although the preceding pages have offered many theoretical criticisms of the interest-convergence thesis, this Article heartily endorses that conclusion. Indeed, this Article has been animated by the proposition that advocates of racial equality, who demonstrate intimate familiarity with the theory's virtues, would benefit from an increased awareness of the theory's vulnerabilities.

Beyond the racial context, moreover, my broader hope is that legal scholars and other individuals who have incorporated the insights of interest convergence wholesale into various legal and political arenas will critically examine both the theory and its applications. The interest-convergence theory can offer valuable and formidable insights into the way that change occurs; it should not, however, be viewed as either flawless or all-encompassing.²⁵⁶ Instead of adhering to any unified theory, reformers seeking change would do better to think of the interest-convergence thesis as but one weapon in the fight for progress rather than as the entire arsenal. Advocates for change, moreover, should be particularly circumspect of attempting to implement the interest-convergence strategy when doing so may further the very inequalities that they seek to erase. Initiating this conversation about the frailties of interest convergence, then, may well help to advance the nation's continuing struggle for equality—not only regarding race but along the many stubborn dimensions of inequality.

²⁵⁵ Bell, *Interest-Convergence Dilemma*, *supra* note 10, at 533.

²⁵⁶ *Cf.* FARBER & FRICKEY, *supra* note 112, at 5 ("Public choice can at least provide us with some overall concept of the dynamics of democratic government. So long as we remember that the theory is incomplete, it can provide a useful framework for analysis. The danger lies only in confusing the map with the territory.").

