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Why Obama? An Interest Convergence Explanation of the Nation's First Black President

Richard Delgado†

INTRODUCTION: EXTENDING DERRICK BELL'S LEGACY

This Essay continues a trilogy of efforts devoted to extending Derrick Bell's intellectual legacy. Earlier, I identified strands in Bell's scholarship in the period immediately preceding his death.¹ These clues show that Bell was intrigued by law's violence and was approaching a broad synthesis explaining how and why law sometimes reinforces oppression, with the racial kind just one of many. I identified two types of violence that were of interest to Bell—originary and ordinary—and discussed their relation to each other and the manner in which law interacts with and encourages each one.

The present Article shows how Bell, had he lived, might have applied one of his signature ideas, interest convergence, to explain events such as the 1964 Civil Rights Act and Obama's presidency. As readers may know, Bell scandalized many of his colleagues when he posited, in *Brown v. Board of Education and the Interest-Convergence Dilemma*,² that this landmark decision arrived when it did (in 1954) not because the Supreme Court underwent a belated spasm of conscience, but because of a temporary alignment of Black and White interests.³

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1. Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. (forthcoming 2015).

2. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*].

3. *Id.* at 524; see *infra* Part I. The alignment of interests that Bell described would soon dissipate. See *infra* notes 25–28 and accompanying text. On the role of Bell and other Critical Race theorists as cultural bellwethers, see andré douglas pond cummings, *Richard Delgado and Ice Cube: Brothers in Arms*, 33 LAW & INEQ.

Here, I show how that same feature entered into and explains *subsequent* events, including the 1964 Civil Rights Act.⁴ I demonstrate why this landmark law, which effectively pressured the South to desegregate,⁵ may have arrived when it did, ten years after *Brown*. Positing that it, too, arrived as a result of an alignment of political and domestic interests,⁶ I show how those interests first called forth this important civil rights act, then, when they retreated, caused it to fade as well.⁷ I then apply interest convergence to understand why Barack Obama won election to the presidency in 2008, the first African American to do so in over 200 years of U.S. history.⁸ As the reader will see, the executive branch “got wisdom” when it turned colorblind in 2008 because this development was necessary for globalization to advance, for the United States to impose environmental limits on the developing world, and for corporate capitalism to advance to the next level.⁹

This line of scholarship shows that the three branches of government, the judiciary, Congress, and the presidency, produce breakthroughs for minority interests when elite White self-interest requires them, and rarely otherwise. We may like to believe that, in the racial arena at least, we act according to high ideals. But the interests of elite groups play an equally important backstage role.¹⁰

Part I reviews Bell’s application of interest convergence to *Brown v. Board of Education*. Part II then applies the same principle to the 1964 Civil Rights Act. Part III discusses the

321 (2015).

4. See Richard Delgado, *The Shadows and the Fire: Three Puzzles for Civil Rights Scholars* (forthcoming 2015) [hereinafter Delgado, *Shadows*] (discussing the role of interest convergence in enacting civil rights legislation).

5. See RICHARD GAVIN WRIGHT, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH 19–23 (2013) [hereinafter WRIGHT, SHARING THE PRIZE]; Richard Gavin Wright, *The Economics of the Civil Rights Revolution*, in TOWARD THE MEETING OF THE WATERS: THE CIVIL RIGHTS MOVEMENT IN SOUTH CAROLINA 383 (Winfred O. Moore, Jr. & Orville Vernon Burton eds., 2007), available at <http://web.stanford.edu/~write/papers/THE%20ECONOMICS%20OF%20CIVIL%20RIGHTS%20REVOLUTION.pdf> [hereinafter Wright, *The Economics*].

6. See *infra* Part II.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part III.

10. National self-interest often aligns with that of elite groups such as the military-intelligence complex and international corporations interested in gaining access to global markets. See *infra* Parts I–III (noting this alignment in different settings).

conditions that enabled Barack Obama's successful campaign for the presidency in 2008.

**I. INTEREST CONVERGENCE AND THE JUDICIARY:
DERRICK BELL'S *BROWN* v. BOARD OF EDUCATION
AND THE INTEREST-CONVERGENCE DILEMMA**

To understand interest convergence at work in our time, it is helpful to recall how the concept first entered legal discourse. In *Brown v. Board of Education and the Interest-Convergence Dilemma*,¹¹ Derrick Bell accepted a challenge that his colleague Herbert Wechsler flung down in a classic article. Published a short time after the *Brown* decision, *Toward Neutral Principles of Constitutional Law*¹² challenged the civil rights community to identify a principled justification for favoring, as he saw it, the rights of Blacks over those of Whites in the landmark opinion.¹³ When the Supreme Court prioritized the right of the former group to associate with Whites over that of Whites not to associate with them, it provided no justification for this act of favoritism, Wechsler wrote.¹⁴ Why should the right of one group (Blacks) receive favored treatment and that of another (Whites) not?

For Bell, the answer was simple: courts will uphold Black interests when they align with those of White elites, and not otherwise.¹⁵ In overruling the longstanding rule of separate but equal,¹⁶ the Supreme Court was merely giving effect to a momentary coincidence of interests that enabled both elite Whites and ordinary Blacks to gain from a ruling striking down segregation.¹⁷ He enumerated several such interests, including international appearances.¹⁸ The United States was then engaged in the early stages of an intense Cold War competition with the forces of international communism for the loyalties of uncommitted Third World countries, most of which were Black,

11. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 524 ("I contend that the decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to [W]hites . . .").

12. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (pronouncing the *Brown* decision unprincipled and urging that the judiciary explain the ground of its decisions in neutral terms).

13. *Id.* at 34.

14. *Id.* at 32–34.

15. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 524.

16. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1895) (upholding separate but equal assignments of Black and White passengers to railroad cars).

17. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 518–25.

18. *Id.* at 524.

Brown, or Asian.¹⁹ Widely reported atrocities such as lynching, the murder of Emmett Till, or, a little later, the beating of peaceful civil rights protesters would cost the United States dearly in the competition for allies in the developing world.²⁰ Bell mentioned other interests as well, including avoiding domestic disruption by returning Black servicemen and women discontent with their lot in civilian life, and integrating and modernizing the South's economy.²¹

Bell's article shocked many of his readers who saw it as a gratuitous slight against a brave Supreme Court that was finally doing the right thing.²² Some of the criticism subsided when legal historian Mary Dudziak documented, years later, what Bell had merely posited in his 1980 article.²³ Following a review of archival material and documents gleaned through Freedom of Information Act requests, Dudziak showed that Bell's suspicion had been largely correct.²⁴ When the Supreme Court announced the *Brown* decision, the U.S. foreign policy establishment had been quietly imploring the U.S. Justice Department to support the NAACP's campaign to end segregation, and for the very reasons Bell identified.²⁵

Other scholars noted that the *end* of the civil rights period supplied further confirmation of Bell's hypothesis. When, beginning around 1980, the nation began to tire of clamor on

19. *Id.* at 524–25; see MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 45 (2000) [hereinafter DUDZIAK, COLD WAR CIVIL RIGHTS]; Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988) [hereinafter Dudziak, *Cold War Imperative*] (confirming Bell's hypothesis).

20. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 14–16; see also Richard Delgado, *Stark Karst*, 93 MICH. L. REV. 1460, 1464–65 (1995) (naming specific examples); Michele Goodwin, *The Body as Property Then and Now* (Oct. 10, 2014) (on file with author) (noting how uncaring treatment of Black bodies impaired America's image abroad); Alexander Tsesis, *Hate Speech Jurisprudence: Protected or Proscribed?* (Oct. 10, 2014) (on file with author) (positing that regulation of hate speech may arrive when the needs of an increasingly multiracial society demand it).

21. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 524–26.

22. See Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1906 (2012).

23. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 19, at 250–51; Dudziak, *Cold War Imperative*, *supra* note 19, at 118–19.

24. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 19, at 250–51; Dudziak, *Cold War Imperative*, *supra* note 19, at 118–19 (showing how Cold War politics and interests lay behind the landmark decision).

25. DUDZIAK, COLD WAR CIVIL RIGHTS, *supra* note 19, at 90; Dudziak, *Cold War Imperative*, *supra* note 19, at 112.

behalf of Blacks, White and Black interests diverged and retrenchment set in.²⁶ The Supreme Court accelerated this trend when it struck down metropolitan-wide relief in school segregation cases and enacted stringent rules that hampered proof of discrimination.²⁷ Sixty years after *Brown*, the nation's schools are nearly as segregated as they were when the Court announced the decision.²⁸ Once the country gained the ideological victory that the decision represented, further desegregation would bring few rewards. The judiciary could relax its vigilance, confident that the world press would not take note of the slow erosion in Black wellbeing that followed. Congress, the State Department, and other official actors would do the same.²⁹

II. INTEREST CONVERGENCE AND THE LEGISLATIVE BRANCH: THE 1964 CIVIL RIGHTS ACT

Before considering Obama's election, it will be helpful to examine briefly a second civil rights landmark that arrived between the *Brown* decision and Obama's election, namely the 1964 Civil Rights Act.³⁰

By the early 1960s, minorities had realized that Supreme Court victories were no sure guarantee of improvement in the material conditions of their lives. Frustration was beginning to set in, with demonstrations in many parts of the country and an equally forceful response from Southern sheriffs and governors, some wielding cattle prods, others standing in schoolhouse doors.³¹

26. See Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 369–71 (2002).

27. *Milliken v. Bradley*, 418 U.S. 717 (1994) (rejecting a metropolitan-wide desegregation plan); see also Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, in THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE ACT THAT ENDED RACIAL SEGREGATION 18, 38–42 (Robert D. Loevy ed., 1997).

28. See GARY ORFIELD ET AL., *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE* 20 (2014) (discussing the small amount of progress the nation has achieved in the years since *Brown*).

29. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 62–70 (1987) [hereinafter BELL, *AND WE ARE NOT SAVED*] (commenting upon this recurrent pattern of raised, then dashed hopes); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 107–56 (2d ed. 2008) [hereinafter ROSENBERG, *HOLLOW HOPE*] (citing this as an example of the judiciary's inability to effectuate fundamental social reform).

30. See Delgado, *Shadows*, *supra* note 4 (tracing this same path). The following sections build on this analysis and extend it to Obama's election.

31. See *Walker v. City of Birmingham*, 388 U.S. 307, 308–15 (1967) (describing Southern resistance to racial reform); ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* x–xi (1984);

In hopes of forestalling further unrest, President John F. Kennedy proposed a modest civil rights bill in mid-1963, shortly before his assassination in Dallas.³² Delivered in the form of a national address, his proposal arrived on the heels of civil rights marches in Birmingham and other cities and urgent conferences with his own advisers, including Robert Kennedy.³³ The nation seemed poised on a precipice.

After negotiating with the Republicans, President Kennedy proposed a rudimentary bill one week after his 1963 speech.³⁴ When Republican congressmen offered amendments weakening it, the Democrats responded by broadening it with provisions banning discrimination in employment, voting, and a number of other areas.³⁵ While Congress was deliberating, an assassin's bullets killed Kennedy, Lyndon Baines Johnson assumed the presidency, and public clamor increased for a major civil rights bill.³⁶ After strenuous debate, filibusters by Strom Thurmond and Robert Byrd,³⁷ and a last-ditch effort by Republicans to derail the bill by adding women as a protected class,³⁸ the law passed by wide margins in both houses.

JUAN PEREA ET AL., *RACE AND RACES* 168–70 (2d ed., 2007).

32. *E.g.*, Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1148–49 (2004) [hereinafter Rosenberg, *The 1964 Civil Rights Act*] (discussing the Kennedy Administration's proposal of the civil rights bill in February 1963, offering "a collection of minor changes far more modest than the 1956 Eisenhower program").

33. *Id.*; see CLAYBORNE CARSON, IN *STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, 2–3 (1981) (describing the Freedom Riders); Martin Luther King, Jr., *Letter from Birmingham Jail* (1963), in *A TESTAMENT OF HOPE* 289 (James M. Washington ed., 1968) (describing conditions in Birmingham during this period); MORRIS, *supra* note 31, at 83 (discussing the founding of the SCLC); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954–1980* at 144 (1981).

34. See Michael O'Donnell, *How LBJ Saved the Civil Rights Act*, ATLANTIC (Mar. 19, 2014, 9:06 PM), <http://www.theatlantic.com/magazine/archive/2014/04/what-the-hells-the-presidency-for/358630/> (discussing the maneuvering surrounding the bill's passage).

35. *Id.*; see also WRIGHT, *SHARING THE PRIZE*, *supra* note 5, at 14. The Voting Rights Act arrived one year later. *Id.* at 183.

36. O'Donnell, *supra* note 34; WRIGHT, *SHARING THE PRIZE*, *supra* note 5, at 13–14.

37. These may have been among the longest filibusters in U.S. history. See Robert Schenkkan, *LBJ's Second Great Battle: Enforcing the Civil Right Act*, SEATTLE TIMES, July 6, 2014, at A13.

38. See Rosenberg, *The 1964 Civil Rights Act*, *supra* note 32, at 1151–53; Schenkkan, *supra* note 37 ("Women had [received] special protection under the new law, not out of any moral imperative but as a poison-pill amendment introduced by Virginia Rep. Howard W. 'Judge' Smith, who hoped that Northern senators sensitive to union concerns would not support a bill that granted women equal rights.").

A. *Explaining the 1964 Civil Rights Act: The Standard Account*

Because the Act's trajectory differed little from the one that accompanied most previous pieces of major social legislation,³⁹ initial commentary explained its advent as a function of the times or of great men who struggled with their consciences and finally found the courage to vote their convictions.⁴⁰ Centering on the role of popular demand and brave leaders like the Kennedys, Fred Shuttlesworth, and Martin Luther King, Jr., these explanations have not much changed today and are what I term the "standard account."⁴¹ Even material determinists like Derrick Bell sometimes succumb to the temptation to speak this way.⁴²

39. This includes the usual editorials and speeches pro and con, congressional maneuvering, and a host of parliamentary maneuvers aimed at derailing its passage through Congress. See Rosenberg, *The 1964 Civil Rights Act*, *supra* note 32, at 1151–53. On the wrangling that often accompanies the legislative process, see BELL, *AND WE ARE NOT SAVED*, *supra* note 29, at 26–50 (describing a visit by a fictional super lawyer, Geneva Crenshaw, to the Constitutional Convention).

40. See PEREA ET AL., *supra* note 31, at 168–71 (explaining the Act as the product of a valiant civil rights movement); ROSENBERG, *HOLLOW HOPE*, *supra* note 29, at 133 ("The evidence plainly indicates that civil rights marches and demonstrations . . . provided a major impetus for civil rights legislation."); Schenkkan, *supra* note 37 ("The Civil Rights Act was the culmination of decades of bitter struggle and very real sacrifice. Only eleven days before Johnson signed the act, three young Freedom Summer volunteers disappeared in Mississippi. The bodies of James Chaney, Michael Schwerner, and Andrew Goodman would not be recovered for another month."); see also Derrick Bell, *Challenges of Relearning Brown: Applying the Lessons of Brown to the Twenty-First Century*, 29 N.Y.U. REV. L. & SOC. CHANGE 633, 637 (2005) [hereinafter Bell, *Challenges of Relearning Brown*] (attributing the 1964 Act to "the courage of thousands of [B]lack people and their [W]hite allies who refused to be intimidated by segregationist violence and disorder").

41. For example, nearly a half-century later, a major civil rights casebook attributed the Act to Black activism, beginning with A. Philip Randolph's threatened march on the capital years earlier. See PEREA ET AL., *supra* note 31, at 168. A prominent historian assigned credit to the development of nonviolent protest by Martin Luther King, Jr. See MORRIS, *supra* note 31, at xi, 37, 83, 91. A law professor at Georgetown attributed the Act to "years of organizing by some [eighty-five] local affiliates of the Southern Christian Leadership Conference" and "the integrated legion of Freedom Riders[,] . . . young activists in the Freedom Summer[,] . . . [and] the more than 250,000 demonstrators in the March on Washington, a quarter of whom were [W]hite." Sheryll Cashin, *Justice for Blacks and Whites*, N.Y. TIMES, July 2, 2014, at A23; see also Sheryll Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 264 (2014) (assigning credit to the Birmingham protests and the courageous leadership of Martin Luther King, Jr.).

42. That is, in "idealist" terms—including the courage of reformers, the force of ideas, and the imperatives of justice. See, e.g., Bell, *Challenges of Relearning Brown*, *supra* note 40, at 637 (attributing the 1964 Act to "the courage of thousands"); Alan Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (deploring Bell's pessimistic view of racial history and urging

An anthology devoted to the Act's enactment emphasizes the roles of John F. Kennedy, Lyndon Baines Johnson, and other national figures, describing their struggles with their consciences or obstructionist Southern constituents.⁴³ Legal casebooks do so as well.⁴⁴ Doris Kearns Goodwin, a prominent presidential historian, attributed the Act's passage to LBJ's consummate political skills and pressure from civil rights leaders such as Roy Wilkins and Whitney Young.⁴⁵ "The country responded with empathy and understanding," she said.⁴⁶ "More and more people realized something had to be done."⁴⁷

A *New York Times* book reviewer sounded many of the same themes. Reviewing two recent books about the Act, Kevin Boyle wrote: "Drafted in the midst of a crisis created by the courage of children, pushed through the Senate past the defenders of an indefensible social order, [the 1964 Civil Rights Act] marked one of those extraordinary moments when the promise and practice of equality align and democracy is affirmed."⁴⁸ One of the books, by a prominent magazine editor, is entitled AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964⁴⁹—a pristine example of a view of history that emphasizes great men, great ideas, and great deeds.

a place for idealism in teaching and writing about it). Ordinarily, Bell leaned toward materialist interpretations of racial events. See Bell, *Interest-Convergence Dilemma*, *supra* note 2; Derrick Bell, *The Freedom of Employment Act*, *NATION*, May 23, 1994, at 708, 711–12 (noting that severe contractions in civil rights promises are often products of changes in the economic structure of society). Books like Vincent Harding's *THERE IS A RIVER* and John Egerton's *SPEAK NOW AGAINST THE DAY* emphasize the role of ordinary people, some Black, some White, who demonstrated bravery in the face of danger and also fall within the idealist camp. See JOHN EGERTON, *SPEAK NOW AGAINST THE DAY* (1994); VINCENT HARDING, *THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA* (1992).

43. See Loevy, *supra* note 27 (describing the role of these and other figures); see also DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 365–69 (6th ed. 2008) [hereinafter BELL, *RACE, RACISM, AND AMERICAN LAW*] (describing the role of presidents Truman, Eisenhower, and Lyndon Johnson).

44. See BELL, *RACE, RACISM, AND AMERICAN LAW*, *supra* note 43, at 365–69 (describing the courage of three presidents); PEREA ET AL., *supra* note 31, at 168.

45. See Kenneth J. Cooper, *Conversation with Doris Kearns Goodwin*, *AARP BULL.* (June 2014), <http://www.aarp.org/politics-society/history/info-2014/doris-kearns-goodwin-interview.html>.

46. *Id.*

47. *Id.*

48. Kevin Boyle, *All the Way: The Civil Rights Act of 1964 Was Passed Through the Efforts of Political Operatives, Liberal Activists—and Lyndon Johnson*, *N.Y. TIMES*, May 18, 2014, at BR13.

49. See TODD S. PURDUM, *AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964* (2014).

*B. Questioning the Standard Account: New Arenas of
International Competition*

Just as the usual explanation for *Brown v. Board of Education* was soft and inexact, the standard account for the arrival of the 1964 Civil Rights Act sacrifices precision for emotional appeal. For example, it cannot easily explain why the 1964 Civil Rights Act arrived when it did. The country had long had visionary leaders and men and women of conscience. Blacks and other minorities had been discontent since early times. Although ideas—both the ones sweeping the nation and in the hearts and minds of national leaders—undoubtedly played roles in enabling the federal government to enact the bill, national self-interest played an even larger part.⁵⁰ It also helps one understand not merely why the Act arrived when it did,⁵¹ but why it lost force about twenty-five years later,⁵² so that today it offers little effective protection against most forms of discrimination.⁵³

One could, of course, attribute the Act's arrival to a resurgence of conscience, coming on the heels of new forms of advocacy, including, perhaps, the nonviolent kind pioneered by Martin Luther King, Jr. around this time.⁵⁴ In this view, the Act arrived because the civil rights community was doing what it had been doing for nearly a century, but with more energy and more impressive leadership than ever before.⁵⁵ Kennedy, Lyndon Baines

50. For example, presidential historian Doris Kearns Goodwin also mentioned the material needs of the citizenry as a possible cause: "You had huge monopolies swallowing up small businesses. You had a huge gap between the rich and the poor and the middle class struggling to survive . . . Suddenly, the country was talking about these problems." See Cooper, *supra* note 45.

51. Viz. in 1964.

52. That is, beginning around 1989. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (contracting the range of affirmative action); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (ruling that, when awarding public contracts, general assertions of past racial discrimination were insufficient to justify "rigid" racial quotas); see also *Mobile v. Bolden*, 446 U.S. 55 (1980) (establishing a more stringent intent test for violations of voting rights laws); *Washington v. Davis*, 426 U.S. 229 (1976) (establishing a more stringent intent test for employment discrimination).

53. That is, the veiled kind of discrimination that is not accompanied by curses and racial epithets so that the actor's discriminatory intent is obvious. See, e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3–5, 7–11 (2d ed. 2012) (explaining the role of unconscious or structural racism); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (highlighting that Americans' common cultural heritage imparts a shared unconscious racism that is not easily visible).

54. See *supra* notes 35–41 and accompanying text.

55. This is essentially the standard view. See *supra* Part II.A; see also WRIGHT,

Johnson, Ted Sorenson, and other national figures were more receptive, in this view, than their predecessors. Educated at Harvard and other elite institutions, or equipped by experience to understand the pain of racial exclusion, they were more attuned to civil rights demands than those who came before or later.

This type of argument is what Derrick Bell rejected in his *Brown v. Board of Education* article, whose premise now strikes most in the civil rights community as essentially correct. It would seem advisable, then, to consider the possibility that the arrival, only ten years later, of the 1964 Civil Rights Act, also had roots in material circumstances and Cold War imperatives, but perhaps of a different kind from those that brought forth *Brown*. What might those circumstances be? Derrick Bell suggested a few places where we should look.

*C. New Arenas of Competition with the Soviet Union—The
Struggle for Economic and Military Supremacy*

With the Civil Rights Act of 1964, many of the same forces that Bell saw as setting the stage for *Brown v. Board of Education*⁵⁶ were in operation a decade later, but with some subtle shifts. The main arena now was no longer ideological, but economic and military. With *Brown*, the main background forces had to do with Cold War appearances and ideology. Each side was striving to enhance its appeal in the eyes of the uncommitted Third World. Segregation, Jim Crow laws, lynching, and mistreatment of well-dressed Black college students at lunch counters in the South had marred the United States' image abroad.⁵⁷

By the late 1950s, however, competition between the two superpowers had entered a new phase. Few uncommitted nations remained who were naïve enough to join one side or the other

SHARING THE PRIZE, *supra* note 5, at 81–82 (rejecting this standard view and noting that the early sit-ins, boycotts, and demonstrations of the period immediately prior to the 1964 Civil Rights Act—evinced the newly refreshed vigor—failed). National action—especially legislation—coming just a few years later, coupled with federal enforcement and motivated by anti-Soviet concerns, proved the key. See *infra* notes 56–60 and accompanying text.

56. To wit, Cold War competition and large numbers of returned veterans of color from WWII or the Korean War unprepared to return to the former regime of second-class citizenship and deference to Whites. See *infra* notes 57–70 and accompanying text; WRIGHT, SHARING THE PRIZE, *supra* note 5, at 23 (noting that the two civil rights acts—the 1964 version and the Voting Rights Act that came soon afterward—were “made possible only by a unique and fleeting conjunction of circumstances”).

57. See *supra* notes 14–22 and accompanying text.

based merely on ideology and headlines. The new arena was economic development. Many postcolonial societies were eager to industrialize, exploit their natural resources and human capital, and develop modern economies that would enable them to feed their hungry people, build their cities, and develop their natural resources.⁵⁸ Colonialism, internal struggles, tribal wars, and diseases had left them far behind the developed nations.

With a high standard of living and a robust economy, the United States offered an attractive model for any new nation. But the Soviet Union had come out of nowhere, with one successful five-year plan after another expanding their agricultural production, factory output, infrastructure, and schools in impressive fashion.⁵⁹ Beginning from near-feudal conditions less than a century ago and enduring two world wars that brought famine and millions of deaths, the Soviets, by dint of central planning and concerted effort, had registered impressive gains.⁶⁰ Its citizens were by and large happy and well-fed, even if they often had to stand in long lines for staples. Soviet leaders invited Third World students to attend their world-class universities⁶¹ and delegations of unionists and workers to visit their well-run factories and farms. Visitors could admire ordinary citizens' housing and access to high culture, opera, symphony, theater, and ballet.⁶²

58. See JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 293–403 (1997) (describing features that accounted for some regions' rapid development and others' slower progress); MANFRED B. STEGER, *GLOBALIZATION: A VERY SHORT INTRODUCTION* 86–87, 91 (2d ed. 2009) (noting recent food riots in Haiti, Indonesia, the Philippines, China, and Cameroon).

59. See R.W. DAVIES, *SOVIET ECONOMIC DEVELOPMENT FROM LENIN TO KHRUSCHEV* (1998) (describing how central planning enabled the country to develop from an agrarian society with a subsistence economy to a major industrialized power in a relatively short period); *Stalin—The Five-Year Plans*, BBC, <http://www.bbc.co.uk/schools/gcsebitesize/history/mwh/russia/stalinfiveyearplansrev2.shtml> (last visited Feb. 16, 2015) [hereinafter *Five-Year Plans*]; see also ROBERT C. ALLEN, *FARM TO FACTORY: A REINTERPRETATION OF THE SOVIET INDUSTRIAL REVOLUTIONS* 153 (2003) (deeming the Soviet program largely successful).

60. ALLEN, *supra* note 59; DAVIES, *supra* note 59; *Five-Year Plans*, *supra* note 59.

61. See Guy Pandji, *Russia's Return to Africa—The Scholarship Dimension*, NORRAG (Apr. 2011), <http://www.norrag.org/en/publications/norrag-news/online-version/the-geopolitics-of-overseas-scholarships-awards-old-and-new-providers-east-west-north-south/detail/russias-return-to-africa-the-scholarship-dimension.html>.

62. The Soviet economy grew faster than that of the United States from 1950 to 1960. See Stanley Fischer, *Russia and the Soviet Union Then and Now*, in *THE TRANSITION IN EASTERN EUROPE* 228 (Olivier Jean Blanchard et al. eds., 1994). By 1970, its size was about sixty percent that of ours. See *USSR GDP, HISTORY OF*

For the first time, the United States had serious competition in an arena that we had long thought our strong point. It was time to retool. The South, in particular, seemed stuck in a time warp, with segregated housing, schools, and workplaces dragging its economy down.⁶³ The country needed an infusion of new energy; the South needed pressure from above to shake itself loose from the counterproductive condition in which it found itself trapped.⁶⁴

With these imperatives in mind, Congress passed the 1964 Act relatively easily. Most of the hoped-for gains arrived. The post-war economy soared, particularly in the South.⁶⁵ Employment rose, especially among Blacks.⁶⁶ Blacks' school

RUSSIA, <http://historyofrussia.org/ussr-gdp/> (last visited Feb. 21, 2015).

63. WRIGHT, SHARING THE PRIZE, *supra* note 5 (showing how Black activism and federal action, rather than slow evolution or population growth, transformed the South from a backward region into one with a vibrant economy and an integrated workforce). Management, local attitudes, and the preferences of White workers and patrons all combined to freeze the South in the practice of maintaining all-White workforces even when this was detrimental to a company's profit line. *E.g. id.* at 33–34 (noting that economic development in the South did not undermine racial segregation); *id.* at 53–57 (explaining segregation was reinforced by White consumers' preferences and attitudes); *id.* at 101 (highlighting the economic incentive to continue racially discriminatory practices among Southern businesses); *id.* at 124 (showing that Southern businessmen “found ways to rationalize their racially exclusive choices” rather than using Title VII to eliminate discriminatory practices); see Stephanie Wildman & Lucy Gaines, *Wise Latina/os Reflect on Role Models, Acting Affirmatively, and Structures of Discrimination: In Honor of Richard Delgado*, 33 LAW & INEQ. 459 (2015) (noting how White privilege operates forcefully even today); see also Shannon Gilreath, *Examining Critical Race Theory: Outsider Jurisprudence and HIV/AIDS—a Perspective on Desire and Power*, 33 LAW & INEQ. 371 (2015) (noting that structures of discrimination continue to marginalize some today).

64. WRIGHT, SHARING THE PRIZE, *supra* note 5, at 65 (noting that “[t]he vast majority of [W]hite southerners had a vision of economic progress in which [B]lacks had no more than a subordinate role” and that during the 1950s, urban businesses across a wide range hired few Blacks as clerks, bank tellers, firefighters, automobile mechanics or anything else); *id.* at 101 (noting that prior to this time, many Southern businessmen found themselves “locked into a low-level equilibrium,” even if “they did not see it that way themselves”); *id.* at 92–104 (noting that federal pressure provided the key to change across a host of industries and services); see also Kathleen O'Toole, *Economist Says Civil Rights Movement Was Economic Success*, STANFORD U. NEWS SERV. (Jan. 26, 2000), <http://news.stanford.edu/pr/00/000126CivilRightsEcon.html> (noting that even modern businessmen in the South worried about maintaining White patronage). Only coercion, emanating from above, could show White supervisors that desegregation was tolerable and show the owners that their customers would not flee if a Black or two were working in a business. See WRIGHT, SHARING THE PRIZE, *supra* note 5, at 106–14, 262.

65. WRIGHT, SHARING THE PRIZE, *supra* note 5, at 27–29.

66. See *id.* at 16–17 (noting that prior to the Act, Southerners practiced segregation not just in rural backwaters, “but in urban settings, in an attempt by leaders who considered themselves progressive to adapt the racial order to the

performance and graduation rate improved.⁶⁷ Housing markets desegregated slightly.⁶⁸ Many places of business that had formerly refused to serve Blacks began doing so.⁶⁹ Colleges and universities relaxed barriers to Jewish and Black students, with some even adopting affirmative action programs.⁷⁰ The number of minorities in the professions, Congress, corporate suites, and officer ranks in the military grew.⁷¹

The 1964 Civil Rights Act was a prime instrument of this economic revival, especially in the South. Historian Richard Gavin Wright argues that a national statute backed by the threat of federal troops was the only means by which elites could dislodge that region from the economically backward folkways and habits that were holding it back.⁷²

modern world”); *id.* at 26, 106–15, 240–49, 234–35 (noting that in the wake of the Act, poverty, unemployment, and other indicators of Black misery improved).

67. *See id.* at 26, 128, 150–66, 260 (noting that school desegregation arrived, but more slowly than it did with employment and public accommodations); Schenkkan, *supra* note 37; Office of Civil Rights, *Impact of the Civil Rights Laws*, U.S. DEP’T OF EDUC. (Jan. 1999), <http://www2.ed.gov/about/offices/list/ocr/docs/impact.html>.

68. WRIGHT, *SHARING THE PRIZE*, *supra* note 5, at 26, 172; *see* O’Toole, *supra* note 64 (noting both a regional and national trend in this direction).

69. WRIGHT, *SHARING THE PRIZE*, *supra* note 5, at 259. Before then, both craft and unskilled White workers felt certain that the repression of Black economic opportunities operated to their advantage and should continue. Most Whites in the South may have espoused belief in economic progress, but only if it would continue to relegate Blacks to a subordinate role. *Id.* at 65, 77, 90–104.

70. *See* JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (2005); Malcolm Gladwell, *Who Gets In: The Social Logic of Ivy League Admission*, *NEW YORKER* (Oct. 10, 2005), http://www.newyorker.com/archive/2005/10/10/051010crat_atlarge?currentPage=all (discussing a period during the first half of the 20th century when many selective colleges limited the number of Jewish students).

71. HARDING, *supra* note 42 (highlighting specific stories throughout the book).

72. WRIGHT, *SHARING THE PRIZE*, *supra* note 5, at 2, 25, 32–150 (describing racism’s “iron grip” on the region before the civil rights revolution). Civil rights laws disrupted trends that showed little sign of easing and turned the South in a direction it would never have chosen without outside force. A dirt-poor region made rapid advances in literacy, economic development, education, and economic opportunity. African Americans gained access to jobs formerly denied them, including some of the most desirable. Many returned home from the North, where they had moved to escape racial oppression. *Id.* at 142–46, 249. Black gains did not come at the expense of Whites; both groups benefited. *Id.* at xi, 9, 26–30, 146–213. But the South had to be forced by the federal government to act, in effect, in its own economic self-interest. *Id.* at 75, 110.

The Space Race and the Military

The U.S. intelligence establishment knew in advance that the Soviets were nearing a breakthrough in space.⁷³ Still, when Sputnik showed the world in 1957 that the Russians were indeed ahead in this arena,⁷⁴ the U.S. public was alarmed. Policymakers in Washington were as well.⁷⁵ They knew that Third World countries were comparing the two systems and deciding which one to emulate—collectivism or free-market capitalism.

Coming a few years later, the 1964 Civil Rights Act provided a much-needed boost to U.S. fortunes. It not only jump-started the economy,⁷⁶ it enabled the military to recruit from a larger pool of men and women of color for campaigns in Indochina and elsewhere.⁷⁷ Meanwhile, the country's scientists and engineers had been striving to bring the United States up to the Soviets' level in the area of space, which it did with an American satellite in 1958 and, a few years later, the first manned flight to the moon.⁷⁸ These accomplishments hastened the Soviets' downfall when the price of competing with the United States cost the Russians dearly, eventually bankrupting their economy.⁷⁹ The

73. Indeed, it appears that the Soviets, in a show of cooperative spirit, asked their American counterparts to supply a piece of scientific equipment for the satellite they were building. See Paul Dickson, *Sputnik's Impact on America*, NOVA-PBS (Nov. 6, 2007), <http://www.pbs.org/wgbh/nova/space/sputnik-impact-on-america.html>.

74. *Id.* (noting that the satellite, which the Soviets launched on October 4, 1957, prompted frantic concern among ordinary citizens and governmental leaders alike); see also PAUL DICKSON, *SPUTNIK: THE SHOCK OF THE CENTURY* (2001) (same).

75. DICKSON, *supra* note 74, at 1 (describing the impact of Sputnik as "enormous and unprecedented"); *id.* (explaining the "enormous and unprecedented" impact of Sputnik on the United States and the world).

76. See *supra* notes 65–71 and accompanying text. The Act boosted the economy by enabling Blacks to find more productive employment than shining shoes, cleaning hotel rooms, or picking cotton; see also WRIGHT, *SHARING THE PRIZE*, *supra* note 5, at 101, 258–66 (describing the economic aftermath of the Act); O'Toole, *supra* note 64 (same); Paul Tough, *Who Gets to Graduate?*, N.Y. TIMES, May 15, 2014, at MM26, MM54, available at http://www.nytimes.com/2014/05/18/magazine/who-gets-to-graduate.html?_r=0 (noting that American competitiveness depends on full mobilization of its workforce).

77. That is, recruits with better skills and education than before. The United States during this period was engaged in two proxy wars with communist-backed forces, namely Korea, 1950 to 1953, and Vietnam, 1955 to 1975.

78. On the U.S. space effort during this period, see *45 Moments in NASA History*, NASA, <http://www.nasa.gov/externalflash/NASA45/textonly/history.html> (last visited Feb. 21, 2015).

79. By the end of the arms race, the Soviet Union was devoting nearly one-third of its economy to the military. See ROBERT STRAYER, *WHY DID THE SOVIET UNION COLLAPSE 127–30* (1998) ("Did Western Pressure Push the Soviet Union over the Brink?").

Soviets cried uncle when Soviet leaders learned that President Ronald Reagan was secretly preparing to launch a “Star Wars” program that would negate the Soviet missile force and a neutron bomb that would eliminate its advantage in tank warfare.⁸⁰ Despite having advanced from a near-feudal condition to a modern industrialized one in a few short years, they realized that they could not match the West’s might. The Berlin Wall fell in November 1989,⁸¹ and the Soviet Union began breaking apart soon thereafter.⁸² Cuba and a few Third World countries continued to follow the socialist path, but the game was largely over. The West had won.

The United States had gained a remarkable victory in the war of appearances with *Brown v. Board of Education* in 1954. It would go on, a decade later, to win a second war of economic and scientific competition with a major civil rights act piling on pressure, enabling the United States to inflict defeat after defeat on the Soviet economy for twenty-five years until it collapsed.⁸³

But, just as had happened with *Brown*,⁸⁴ the story of progress has a coda that is not so attractive. When the Soviets finally admitted defeat, the 1964 Civil Rights Act no longer filled a vital need. Without the spur of foreign competition, the United States no longer needed Blacks so badly for their contribution to the economy and war effort. A conservative Supreme Court gutted the Act with a series of decisions that deprived it of much of its

80. See Benjamin B. Fischer, *A Cold War Conundrum: The 1983 Soviet War Scare* (“Star Wars”), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/a-cold-war-conundrum/source.htm#HEAD-ING1-11> (last visited Apr. 13, 2015); Michael A. Lev, *Friends, Foes Recall Victorious Cold Warrior*, CHI. TRIB. (June 6, 2004), http://articles.chicagotribune.com/2004-06-06/news/0406060270_1_soviet-economy-soviet-officials-soviet-union. President Reagan leaked the news that the United States was increasing its military budget and was pondering a Star Wars system that would guard the country from Soviet missiles, as well as a neutron bomb that would negate the Soviets’ advantage in armored tanks. See Robert T. McFadden, *Samuel T. Cohen, Neutron Bomb Inventor, Dies at 89*, N.Y. TIMES (Dec. 1, 2010), <http://www.nytimes.com/2010/12/02/us/02cohen.html?pagewanted=all>.

81. Jeffery Delviscio et al., *The Berlin Wall: 20 Years Later; the View from the Wall*, N.Y. TIMES (Nov. 6, 2009), http://www.nytimes.com/interactive/2009/11/09/world/europe/20091109-berlinwallthenow.html?_r=0.

82. See Marilyn Berger, *Boris N. Yeltsin, Reformer Who Broke up the U.S.S.R., Dies at 79*, N.Y. TIMES (Apr. 24, 2007), <http://www.nytimes.com/2007/04/24/world/europe/24yeltsin.html?pagewanted=all>.

83. STRAYER, *supra* note 79, at 114–20, 132–38 (describing the state of the Soviet economy and the effect of various Soviet market reforms prior to its collapse).

84. For a description of how *Brown* enhanced Black fortunes in the immediate aftermath of the decision (an effect that quickly faded), see *supra* Part I.

efficacy,⁸⁵ and retreats on affirmative action soon followed.⁸⁶ Today, Black participation in the workforce is low, with nearly as many Black men enmeshed in the criminal justice system as attending college.⁸⁷ And the nation's public schools are nearly as segregated as they were during the era of formal segregation.⁸⁸

Little of this happened by conscious design, much less as a result of a meeting in a smoke-filled room. Only a handful of policymakers and scholars have specifically identified economic or scientific competition as having enabled Congress to enact the 1964 Civil Rights Act, either at the time or later. Joseph Stiglitz is one. Reflecting on the postwar period, he asked:

So why has America chosen these inequality-enhancing policies [deregulation and a low corporate income tax]? Part of the answer is that as World War II faded into memory, so too did the solidarity it had engendered. As America triumphed in the Cold War, there didn't seem to be a viable competitor to our economic model. Without this international competition, we no longer had to show that our system could deliver for most of our citizens.⁸⁹

Other writers credit economic incentives as favoring the 1964 Act. Richard Gavin Wright, for example, highlights the financial underpinnings of the 1964 statute, noting that without it the South would not have developed as rapidly as it did.⁹⁰ Lyndon Baines Johnson supported the Act not merely because it was the right thing to do, but because "racial discrimination was . . . damaging the economy of his beloved South [which] . . . would have to abandon its racist attitudes to [prosper economically]."⁹¹ For Wright, the Act not only benefited the region, "expanding economic opportunity *was an important motivation for* [it] from its earliest days."⁹²

85. See *supra* note 52 and accompanying text.

86. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (striking down affirmative action at University of California-Davis); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (striking down affirmative action at the University of Texas).

87. See Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=all.

88. See ORFIELD ET AL., *supra* note 28 (noting the steady retreat in this area).

89. Joseph Stiglitz, *Inequality Is Not Inevitable*, N.Y. TIMES, June 29, 2014, at 1 (Sun. Rev.) (describing the costs of extreme economic inequality).

90. WRIGHT, SHARING THE PRIZE, *supra* note 5, at 4, 6, 11, 13–15, 19–23, 84, 156–63, 97–101, 116–21; O'Toole, *supra* note 64.

91. Sarah Heasman, *Lyndon Johnson*, HIST. LEARNING SITE, http://www.historylearningsite.co.uk/Lyndon_Baines_Johnson.html (last visited Feb. 19, 2015).

92. Wright, *The Economics*, *supra* note 5, at 383 (emphasis added).

Derrick Bell wrote that in order to understand the twists and turns of racial history, you needed to pay attention to interest convergence.⁹³ Racial progress for Blacks came, he wrote, when it also lay in the interest of elite Whites.⁹⁴ Reviewing the passage of the 1964 Civil Rights Act and its eventual demise twenty-five years later, one sees a pattern that, were Bell alive, might cause him to smile.⁹⁵ Material considerations explain why the 1964 Act arrived and went into retreat when it did. They explain why African American fortunes prospered when the Soviet economy was threatening to outshine ours and why this country reduced its support for Black programs in the Eighties with the Reagan revolution, Star Wars, and the fall of the Berlin Wall. As Bell put it, racial justice “may, from time to time, be counted among the interests” that elite groups deem important.⁹⁶ But even when they do, self-interest is apt to play an even more significant role.⁹⁷

III. INTEREST CONVERGENCE AND THE ELECTION OF BARACK OBAMA

Barack Obama won election to the presidency in 2008, the first African American to do so in over 200 years of U.S. history. This development fascinated Bell, who at the time of his death was struggling to understand its significance.⁹⁸

My own view—channeling him—is that elite forces backed Obama’s candidacy because a president like him was essential for the United States to defeat the forces of radical Islam, for globalization to succeed, for the United States to impose environmental limits in the developing world, and for corporate

93. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 522–28.

94. *Id.* at 523.

95. The sequence of events—a breakthrough followed by retrenchment—would be familiar to him. For evidence of that retrenchment, see MICHELLE ALEXANDER, *THE NEW JIM CROW* 59–96 (2012) (describing the United States’ high rate of incarceration); JONATHAN SIMON, *MASS INCARCERATION ON TRIAL* (2014) (highlighting the problem of mass incarceration in American prisons and the attendant legal concerns created by it).

96. Bell, *Interest-Convergence Dilemma*, *supra* note 2, at 523.

97. As Bell put it, when the interests of Whites and Blacks misalign: “[A]s with abolition, the number who would act on morality alone [will generally be] insufficient to bring about the desired . . . reform.” *Id.* at 525.

98. See Derrick Bell, *On Celebrating an Election as Racial Progress*, 36 *HUM. RTS.* 2, 2–5 (2009) (warning Blacks not to celebrate too soon and positing that Obama won only because a slight majority of Americans—including forty-three percent of Whites—believed he would deliver more jobs than his adversary, Senator McCain, who ran “one of the poorest campaigns in modern history . . .”). In a telephone conversation a few months before his death, he told me that he was thinking of writing more about Obama.

capitalism to achieve its aims in a time of increased competition.⁹⁹ His election, then, in many respects is a product of material circumstances and national self-interest much like the combination that yielded the Civil Rights Act four decades earlier and *Brown v. Board of Education* before that. Let us consider briefly each of these circumstances in turn.

A. *Winning the War Against Radical Islam*

Powerful actors must have realized, beginning in the late 1990s, how a president of mixed parentage and cosmopolitan upbringing could help America advance vital geopolitical, economic, and strategic objectives, in particular strengthening the hand of moderate Islam vis-à-vis the radical, extremist, jihad-embracing faction of that religion.¹⁰⁰ With credibility in the eyes of emerging middle eastern countries and oil-rich sheiks, a multiracial-looking president could not only enable the tentacles of American business to extend into new regions,¹⁰¹ he could enlist a higher degree of cooperation from African and Asian nations in the

99. An introvert by nature, Obama is something of an enigma, so I posit the following hypothesis concerning his election with the same tentativeness that Bell must have felt in putting forward his own interest convergence interpretation of *Brown*, if not more. Bell, *Interest-Convergence Dilemma*, *supra* note 2. In 1980, Bell was writing from the vantage point of twenty-five years of experience with that decision. By contrast, I write while Obama is still in office. Many circumstances about his election and backing are unknown but likely to come out later. See DUDZIAK, *COLD WAR CIVIL RIGHTS*, *supra* note 19; Dudziak, *Cold War Imperative*, *supra* note 19 (confirming much of what Bell had merely posited a decade earlier). Times have changed, however. The world moves much faster than it did before. As a writer, I feel compelled to put forward my interpretation now. Perhaps we cannot wait twenty-five years to begin discussing the meaning of Obama's election for our times. See STEGER, *supra* note 58, at 85 ("[T]he scale, speed, and depth of Earth's environmental decline have been unprecedented.").

100. See Ross Douthat, *Obama the Theologian*, N.Y. TIMES, Feb. 8, 2015, at SR11 ("Early in his administration, especially around his 2009 speech in Cairo, there was a sense that showing Muslims that an American president understood their grievances would help expand our country's options in the Middle East."); Julie Pace & Nancy Benac, *Yes-We-Can Leader Now Faces Maybes*, SEATTLE TIMES, Dec. 29, 2014, at A3 ("He's going to have a very unique opportunity and ability to reach young people not only here but in other countries," said Jon Favreau, Obama's longtime speechwriter who left the White House last year."). Note that members of the foreign policy establishment would have had a close look at the young Senator Obama when he gave the nominating speech at the Democratic Convention in 2004, and could have noticed his appearance, education, family background, and middle name. They could also have read his book of memoirs, *BARACK OBAMA, DREAMS OF MY FATHER* (1995), discussing his childhood in Indonesia and attendance at a Muslim *madrassa* (religious school). Is it far-fetched to suppose that, in their eyes, the young figure speaking so powerfully might someday serve as a vital intermediary between the United States and the Muslim world?

101. See *infra* Part III.C.

campaign against radical Islam than one which a European-looking president could easily secure.¹⁰²

In much the same manner as the Cold War provided the conditions for a Black breakthrough in *Brown v. Board of Education*, the United States' campaign to gain a foothold in the Muslim world supplies similar opportunities today.

The U.S. foreign policy establishment currently is highly concerned with what it sees as an internal struggle within Islam between a moderate, democratizing faction of that religion and a fundamentalist, puritanical one that embraces jihad, Sharia law, subjugation of women, and rejection of Western values, which it sees as corrupt and hedonistic.¹⁰³ The West wishes, of course, to strengthen the hand of the first faction vis-à-vis the second.

Recently, radical Islamic figures have been condemning the West for mistreatment of women, whom they see as compelled to dress provocatively and sell their femininity for the benefit of men.¹⁰⁴ They also charge that it is Americans, not they, who are

102. See STEGER, *supra* note 58, at 133 (noting that the United States needs partners in the campaign against terror and jihad); Mark Landler, *Obama Warns U.S. Faces Diffuse Terrorism Threats: Tells West Point Cadets that Critics Misread His Cautious Response to World Crises*, N.Y. TIMES, May 29, 2014, at A1 (“We need partners to fight terrorists alongside us.”); Eric Schmitt, *U.S. Terrorism Strategy Increasingly Involves Proxies to Fight Battles*, N.Y. TIMES, May 30, 2014, at A8 (noting that his administration will set aside a Counterterrorism Partnerships Fund to “facilitate partner countries on the front lines”).

103. See Cal Thomas, *ISIS: A Threat Across the Globe*, TUSCALOOSA NEWS, Aug. 24, 2014, at 5D (“If ISIS and the other fanatics don’t represent true Islam, the ‘moderates’ should take the lead”); David Brooks, *Clinton, Obama and Iraq*, N.Y. TIMES (Aug. 11, 2014), <http://www.nytimes.com/2014/08/12/opinion/david-brooks-clinton-obama-and-iraq.html?module=Search&mabReward=relbias&> (noting that the United States is in the early stages of a war against fanatical Islam “motivated by a hostile ideology: jihadism” that is advancing rapidly and that “Obama might have done more to help the moderate opposition”); see also Mohamad Bazzi, *Fertile Crescent*, N.Y. TIMES, Sept. 11, 2011, at BR11–12 (noting ongoing struggle within Islam between radical, jihad-embracing factions and moderates); Thomas L. Friedman, *Trust, but Verify*, N.Y. TIMES, Jan. 18, 2012, at A21 (noting that the United States needs to offer Islamists patient engagement that communicates that we believe in free elections, human rights, women’s equality, and religious tolerance—and that we will help anyone who respects these practices); Bernard Haykel, *Threat Level*, N.Y. TIMES, Sept. 11, 2011, at BR13 (discussing the internal struggles between the Muslim groups); Samuel J. Rascoff, *Uncle Sam Is No Imam*, N.Y. TIMES, Feb. 21, 2012, at A25 (observing that the United States has been attempting to build a network of “acceptable” Muslim leaders); Peter Schmidt, *Cables Spilled by WikiLeaks Portray College Campuses as Ideological Battlegrounds*, CHRON. HIGHER EDUC. (Dec. 8, 2010), <http://chronicle.com/article/Cables-Spilled-by-WikiLeaks/125659/> (discussing how State Department cables show concern over radical Islam and the need for the West to ease up on U.S. Muslims and admit more foreign students into U.S. universities).

104. Scott Shane, *Pornography Is Found in Bin Laden Compound Files*, U.S. OFFICIALS SAY, N.Y. TIMES, May 14, 2011, at A7 (noting that Bin Laden denounced

religiously intolerant, citing recent attacks on Muslims or the Muslim faith in general.¹⁰⁵ They seize upon events such as the shooting of an unarmed Black teen in Ferguson, Missouri that paint the United States in a bad light.¹⁰⁶ These conditions resemble those Bell used to explain interest convergence in his *Brown v. Board of Education* article. If, as seems likely, interest convergence and international appearances then played large roles in producing advances for Blacks, what do those same forces augur for today?

As mentioned, the United States enjoys little credibility in the minds of at least some in the Muslim world because of its poor treatment of domestic minorities and women.¹⁰⁷ Propagandists there ask their followers if the West offers a way of life that is worthy of emulation.¹⁰⁸ If our daily record includes reductions in women's health services, police profiling of minority motorists and pedestrians, new state laws transparently aimed at suppressing the Black vote, and widening economic inequality between ordinary people and the super-rich, why should Muslim societies emulate our example?¹⁰⁹ To strengthen moderate forces in worldwide Islam, the United States must itself model moderate, secular, and tolerant government. It cannot deplore fundamentalist Muslim schools—*madrasas*—that teach female subjugation and a government by theocracy¹¹⁰ while it is deporting large numbers of Latin American people,¹¹¹ incarcerating many

the United States in a 2002 letter for exploiting women's bodies in advertising and popular media).

105. See, e.g., PROFILE: ANWAR AL-AWLAKI, ANTI-DEFAMATION LEAGUE 3 (2009), available at http://www.adl/main_Terrorism/anwar_al-awlaki.htm?Multi_page_sections=sHeading_2 (noting the radical leader's call for retaliation against those who created or disseminated cartoons ridiculing the prophet Muhammed).

106. See Corky Siemaszko, *Iran's Ayatollah Ali Khamenei Weighs in on Twitter about Michael Brown Shooting*, N.Y. DAILY NEWS (Aug. 15, 2014, 4:16 PM), <http://www.nydailynews.com/news/world/ayatollah-khamenei-weighs-michael-brown-death-article-1.1905111> (observing that the Supreme leader used the mayhem in Ferguson "as an excuse to slam the U.S.").

107. See *supra* notes 104–106 and accompanying text.

108. See *supra* notes 102–104 and accompanying text (noting how some broadcasters and preachers seize on our flaws in this fashion).

109. See Keith B. Richburg, *Ten Years After 9/11, World's Sympathy Has Waned*, WASH. POST, Sept. 7, 2011, at A1 (reporting Pew Research Center report showing that large majorities of Muslims hold unfavorable opinions of the United States).

110. See CHRISTOPHER M. BLANCHARD, CONG. RES. SERV., RS 21654, ISLAMIC RELIGIOUS SCHOOLS, *MADRASAS: BACKGROUND* 3 (2008) (describing Islamic schools that teach a strict form of theology and personal praxis).

111. Ian Haney Lopez, *How the Politics of Immigration Is Driving Mass Deportation*, MOYERS & COMPANY (Oct. 7, 2014), <http://billmoyers.com/2014/10/07/>

more,¹¹² and requiring schools to teach Creationism¹¹³ and post religious slogans on their walls.¹¹⁴ Nor can one easily condemn strict enforcement of Sharia law while the U.S. judicial system insists on a literal interpretation (“original intent”) of a two-hundred-year-old document.¹¹⁵ Simple interest convergence, then, urges that the West moderate some of its harsher internal practices. A president like Obama could suggest that we are well on our way toward accomplishing that, while avoiding the hard work of actually doing so.

*B. Securing Cooperation from Developing Countries:
Environmental Controls and the Search for Clean Air
and Water*

As a developed country with a high standard of living, the United States desires to promote environmental measures worldwide.¹¹⁶ Since soot and other pollutants, borne by the wind, cross borders readily, this will necessitate convincing developing nations to forgo the smokestack industries and extractive ventures that many believe they need to advance rapidly, just as we did in

democrats-mass-deportation (noting that even though net immigration of undocumented entrants is now near zero, “[t]he total number of deportations under the Obama administration now exceeds 2 million persons . . . by far the highest sustained rate of removals this country has ever seen”); Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html> (noting that some consider Obama the “deporter in chief”).

112. See ALEXANDER, *supra* note 95.

113. See Elizabeth Flock, *Law Allows Creationism to Be Taught in Tenn. Public Schools*, WASH. POST (Apr. 11, 2012), http://www.washingtonpost.com/national/law-allows-creationism-to-be-taught-in-tenn-public-schools/2012/04/11/gIQAjxAT_story.html.

114. See David A. Fahrenthold, *House Treads Familiar Territory in Vote to Uphold ‘In God We Trust,’* WASH. POST, Nov. 3, 2011, at A4 (reporting a House measure to maintain the religious motto).

115. See SAMUEL MARCOSSON, ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES 2–4 (2002) (noting how some Supreme Court justices adhere to strict construction of constitutional texts).

116. See, e.g., STEGER, *supra* note 58, at 87 (noting that trans-boundary pollution is beginning to pose a serious danger to the collective survival of developed countries); Eduardo Porter, *China’s Hurdle to Fast Action on Carbon*, N.Y. TIMES, July 2, 2014, at B9 [hereinafter Porter, *China’s Hurdle*] (noting that “the U.S. leadership elicits reciprocal action from other countries”); Paul Krugman, *China, Coal, Climate*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/2014/11/14/opinion/paul-krugman-china-coal-climate.html?action=click&contentCollection=Opinion®ion=Footer&module=MoreInSection&pgtype=article> (discussing the agreement between China and the United States on carbon emissions); see also Chris Buckley, *China’s Plan to Limit Coal Use Could Spur Consumption for Years*, N.Y. TIMES, July 25, 2014, at A6 (same).

our own formative period.¹¹⁷ A president like Obama with multiracial parentage could more readily secure agreement from developing countries to forswear rapid development for “the common good” than one with a patrician background and family who immigrated on the Mayflower.¹¹⁸ A Black-looking son of a Kenyan father and White mother raised for much of his childhood in Indonesia can command respectful attention by leaders of developing countries. As commentators have noted, cultural factors play large roles in how people of different cultures and regions view the natural environment.¹¹⁹ The early record shows that the United States has been achieving somewhat greater success in enacting and enforcing environmental agreements since he took office.¹²⁰ It seems likely that farsighted and influential figures in the environmental movement foresaw this benefit and supported him for that reason.¹²¹

117. See Ellen Barry & Neha Thirani Bagri, *Indian Leader, Favoring Growth, Sweeps away Environmental Rules*, N.Y. TIMES, Dec. 5, 2014, at A5 (“Clean India is fine . . . But give us jobs.”); Eduardo Porter, *In Latin America, Growth Trumps Climate*, N.Y. TIMES, Dec. 20, 2014, at B1 (“Brazil doesn’t want its environment protected . . . it urgently wants its environment exploited . . . Pollution mean[s] progress.”); see also STEGER, *supra* note 58, at 93 (noting that poor countries object to U.S.-backed environmental controls because they need to build up their economies through industry and infrastructure); Buckley, *supra* note 116 (noting that “China and other large developing countries” do not wish to limit their own potential for growth); Porter, *China’s Hurdle*, *supra* note 116 (noting that “[a]ny hopes that American commitments to cut carbon emissions will have a decisive impact on climate change rely on the assumption that China will reciprocate and deliver aggressive emissions cuts of its own”); *The McLaughlin Group* (PBS television broadcast Oct. 3, 2014) (reporting that countries like India resist U.S. efforts to persuade them to impose rigorous environmental controls because they would like to advance industrially just as we did in our age of rapid development).

118. See Paul Krugman, *The Climate Domino*, SEATTLE TIMES, June 7, 2014, at A9 (noting the need for a multinational response to global climate change); Porter, *China’s Hurdle*, *supra* note 116 (“In 2009, the Copenhagen conference on climate change broke down to a large extent because big developing countries like China refused to accept legally binding commitments on emissions cuts, which might constrain their future development.”).

119. STEGER, *supra* note 58, at 84.

120. See STEGER, *supra* note 58, at 134 (noting the recent sense of urgency in environmental circles); Eduardo Porter, *A Paltry Start in Curbing Global Warming*, N.Y. TIMES, June 4, 2014, at B1 (calling one of Obama’s ventures a paltry start); Adam Vaughan & Karl Mathieson, *UN Climate Change Summit—As It Happened*, GUARDIAN (Sept. 23, 2014), <http://www.theguardian.com/environment/blog/live/2014/sep/23/un-climate-change-summit-in-new-york-live-coverage> (noting improved reception of Obama’s environmental initiatives).

121. See *supra* note 100 (observing that far-sighted observers would have had a good look at Obama, his qualifications, speaking ability, and style when, as a young Senator, he gave the nominating speech at the 2000 Democratic convention). They could also have read his book about his Kenyan father, upbringing by a White mother in Indonesia, and years on the Harvard Law Review.

C. *Paving the Way for Globalization and Profits*

In addition, a president of mixed race and cosmopolitan upbringing could help America advance its economic objectives both domestically and overseas. Globalizing capitalists believe that the world is flat¹²² and that capital, communications, and technology flow (or should be able to flow) everywhere without restriction.¹²³ From one perspective, Obama's election appears to be a case of an appealing and talented Black candidate overcoming America's racist past—a wholly welcome event—while helping its heads of industry gain entry to foreign markets.¹²⁴ From another perspective,¹²⁵ it looks like powerful interest groups advancing their version of the country's self-interest.¹²⁶

Consider a few ways that this prospect might have appealed to well-heeled donors and corporate backers, who might easily have reasoned that such a president would be well positioned to reduce his party's commitment to social causes, especially those of inner-city Blacks and, instead, champion those of the country's financial elite.¹²⁷ Such a candidate could easily win campaign

122. See TOM FRIEDMAN, *THE WORLD IS FLAT* (2005).

123. See STEGER, *supra* note 58, at 38.

124. This is the "idealist" view that tends to see events as the working out of ideas, ideals, hopes, norms, and cultural imperatives rather than as products of material forces and interests.

125. See *Ben Jealous: Black Americans Are Doing Far Worse Under Obama Administration*, BLACK NEWS (July 13, 2014), <http://www.yourblackworld.net/2013/01/black-news/ben-jealous-black-americans-are-doing-far-worse-under-obama-adm-in/> [hereinafter *Ben Jealous*] (noting that the president sometimes appears to be leaning backward, not favoring Black causes); Ryan Lizza, *The Obama Memos: The Making of a Post-Post-Partisan Presidency*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/reporting/2012/01/30/120130fa_fact_lizza?currentPage=all (noting that the President can be ruthless toward liberal pieties); see also Shikha Dalmia, *Why Obama Can't Lead on Racial Justice*, REASON.COM (Aug. 26, 2014), <http://reason.com/archives/2014/08/26/why-obama-cant-lead-on-racial-justice/print> (noting that the cause of racial justice might need to await a White Republican, not a Black Democrat like Obama because the citizenry are impatient with liberals' big-government programs and prefer the tough-on-crime politics of conservatives).

126. STEGER, *supra* note 58, at 38–39, 42–43, 102 (discussing the role of elite banking and media empires in spreading capitalism to the emerging world); *id.* at 130–31 (discussing the role of revolt against the forces).

127. *Ben Jealous*, *supra* note 125; Lizza, *supra* note 125; see also Kareem Crayton, *The Art of Racial Dissent: African American Political Discourse in the Age of Obama*, 89 CHI.-KENT L. REV. 689 (2014) (noting that Blacks supplied much of Obama's edge, yet he did relatively little for them once in office); Frank Michelman, "RSB," *the Social Contract, and a Bridge Across the Gap: Delgado Talks to Rawls*, 33 LAW & INEQ. 417 (2015) (considering this much-ignored source of misery); Thomas Frank, *Cornel West: "He Posed as a Progressive and Turned out to be Counterfeit. We Ended up with a Wall Street Presidency, a Drone Presidency,"* SALON.COM (Apr. 8, 2014), http://www.salon.com/2014/08/24/cornel_west_he_posed_as_a_progressive_and_turned_out_to_be_counterfeit_we_ended_up_with_a_wall

support from both camps of racial minorities and their supporters—and White power brokers.¹²⁸ After winning election, he could let off lightly the corporate executives who caused the country's economy to crash while reaping huge bonuses.¹²⁹ His regime could institute few far-reaching rules limiting corporate self-dealing, so that financial executives could go on much as before.¹³⁰ The military-intelligence complex would breathe a sigh of relief, too, because the regime would go lightly on torturers and writers of memoranda justifying waterboarding and secret rendition.¹³¹ His cabinet would look very much like those that came before, with names, faces, and attitudes that were reassuringly familiar.¹³² His presidency would validate the Supreme Court's hope, in *Grutter v. Bollinger*,¹³³ that a multiracial workforce would strengthen corporate power and the military.¹³⁴

Such a president could represent his program as a success story, the end point of a historic struggle against racism. His failure to embrace social programs for minorities and the poor could be cast in virtuous, colorblind terms and ones of national unity.¹³⁵

_street_presidency_a_drone_presidency/; Tali Mendelberg & Bennett L. Butler, *Obama Cares. Look at the Numbers*, N.Y. TIMES (Aug. 22, 2014), http://www.nytimes.com/2014/08/22/opinion/obama-cares-look-at-the-numbers.html?_r=0 (noting that Obama's speeches have "rarely mentioned poverty" and that terms like "the poor" or "the homeless" appear infrequently in his discourse, much less so than they did in that of Bill Clinton or Jimmy Carter. "When he did mention the needs of the poor, he tiptoed around them.").

128. Frank, *supra* note 127; see also Jeff Madrick, *Our Misplaced Faith in Free Trade*, N.Y. TIMES, Oct. 5, 2014, at SR5 (noting that one component of globalization, free trade, "has created tremendous prosperity—but mostly for those at the top").

129. Frank, *supra* note 127.

130. STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* 195–206 (2013) (noting the many failures to enact such rules in the wake of the 2007 financial crisis).

131. Frank, *supra* note 127.

132. *Id.*

133. 539 U.S. 306, 328–31 (2003) (noting the many amicus briefs from major corporations and the military supporting university affirmative action); see Juan Perea, *Of Word Grenades and Impermeable Walls: Imperial Scholarship Then and Now*, 33 LAW & INEQ. 443 (2015) (discussing different views of society's understanding of education).

134. *Grutter*, 539 U.S. at 328–30.

135. In other words, this is a country without sharp lines. We are not Black, we are not White. We are all Americans. See Maureen Dowd, *He Has a Dream*, N.Y. TIMES, Aug. 26, 2014, at A23 ("Obama has muzzled himself on race We can't expect the president to do everything. But we can expect him to do something."); see also Osamudia James, *White Like Me*, 89 N.Y.U. L. REV. 425, 441 (2014) (noting that the *Grutter* opinion encourages viewers to see non-Whites enrolled at major universities as a ticket to Whites' ability to negotiate the new globalized, multi-

CONCLUSION

An interest convergence explanation for the first Black presidency offers many advantages over the standard view. This latter view provides (in the right-wing version) that Obama arrived because the country has now become colorblind. The left-wing version holds that he arrived because he was a brilliant and charismatic figure and that many brave souls before him prepared the way by forcing the country to come to terms with its own longstanding racism.¹³⁶ And of course, we loved him so much.

Neither of these views is up to the task. The many racial incidents and death threats aimed at Obama (not to mention security lapses) since he took office show that the country is far from colorblind. And the country has long had highly intelligent Black figures and a vibrant civil rights community—their combination is not unique to today. An interest convergence explanation offers a satisfying account for why a multiracial, Black-looking president like Obama, with a cosmopolitan outlook and upbringing, would have greatly appealed to elite groups. If one wants to understand why racial events, like the 1964 Civil Rights Act or the Obama presidency happen—and if one wants to know when their influence is apt to wane—one is advised to consider what is going on in the broader world and, in particular, what lies in the interest of elite figures. Derrick Bell showed us as much with his analysis of the judiciary. We would do well to apply his teaching to the other branches of government as well.

racial workplace). Might Obama's election validate the same set of hopes?

136. *E.g.*, MARK WHITAKER, *COSBY: HIS LIFE AND TIMES* 448–63 (2014) (positing that the Huxtable family paved the way for the Obamas in the White House); Dwight Garner, *In Stand-Up and Sitcoms, Nonchalantly Blazing a Path*, N.Y. TIMES (Sept. 22, 2014), <http://www.nytimes.com/2014/09/23/books/bill-cosby-in-mark-whitakers-new-biography.html> (describing Bill Cosby as the first Black man to star in a television drama who contributed to paving the way for the Obamas in the White House); Remarks of Mark Whitaker, *GPS with Fareed Zakaria* (CNN television broadcast Oct. 5, 2014) (discussing the importance of Bill Cosby to President Obama's election).

