THE YALE LAW JOURNAL

M. BRODERICK JOHNSON

"Trying to Save the White Man's Soul": Perpetually Convergent Interests and Racial Subjugation

ABSTRACT. An assumption that dominates the discourse on race in the United States is that racial subjugation is only harmful to the subjugated. Many people take for granted that White people have nothing to gain from disrupting the existing racial hierarchy. Indeed, efforts to uplift people of color are typically viewed as coming at the expense of White people. This perspective is reflected in Derrick Bell's influential interest-convergence thesis, which asserts that Black interests in racial equality are accommodated only if and when they converge with White interests. Because Bell accepted that White people did not have any inherent self-serving interest in racial equality, he believed that White and Black interests would only rarely and temporarily converge to bring about racial progress.

This Note challenges that paradigm. It offers a bold and novel adaptation and rehabilitation of the influential interest-convergence thesis by arguing that there are White interests, particularly in spiritual well-being and membership in a democratic society, which perpetually converge with Black interests in racial equality. Recognition of these perpetually convergent spiritual and democratic interests is necessary to undermine the notion that racial equality is a zero-sum game and to ultimately attain sustained and meaningful progress toward equality.

After establishing this theoretical framework, the Note explores the rich but thus far disappointing legacy of the perpetually convergent interests in various landmark race and education cases such as *Brown v. Board of Education*, *Grutter v. Bollinger*, and, most recently, *Students for Fair Admissions v. Harvard* (*SFFA*). In *Brown*, the Court failed to recognize how segregation harmed White students and, in doing so, both implicitly affirmed Black inferiority and canonized a zero-sum perspective of racial equality that has infected legal and public discourse. *Grutter*, on the other hand, was a rare instance in which the Court relied on White perpetually convergent interests and adopted an affirmative-action doctrine that recognized, though incompletely, how all people benefit from policies that mitigate or remedy racial subjugation. *SFFA*, as widely expected, marked the end of *Grutter*, but the Court's rejection of the perpetually convergent interests in that case represents a more fundamental barrier to racial equality than many might realize.

In the wake of *SFFA*, it is important to recognize the perpetually convergent interests, both within and without the courts, if we are ever to make meaningful and sustained progress toward a more egalitarian society.

AUTHOR. Yale Law School, J.D. 2023; University of Texas at Dallas, B.S. 2020. This Note's publication would not have been possible without Gerald Torres, whose teaching provided an

opportunity and foundation with which to begin this project; Daphne Peng and Sherry Maria Tanious, who provided early feedback and encouraged me to pursue publication; and the *Yale Law Journal* Notes & Comments Committee and team of editors, who saw promise in what this project could be and worked diligently to bring it through to publication. For invaluable feedback at various points in the drafting process, I am deeply grateful to Justin Driver; Monica C. Bell and the participants in our Race, Inequality, and the Law writing group; Emma Kaufman; LaToya Baldwin Clark; Russell C. Bogue; Zachary Shelley; Helen Malley; Kacey Manlove; and Anastasia Zaluckyj. Finally, a special thanks is warranted to Valentina Guerrero for her wonderful insight, endless patience, and dedication throughout the editing process. This Note has been improved by those mentioned above and others unnamed.

NOTE CONTENTS

> The Negro came to the white man for a roof or for five dollars or for a letter to the judge; the white man came to the Negro for love. But he was not often able to give what he came seeking. The price was too high; he had too much to lose. And the Negro knew this, too. When one knows this about a man, it is impossible for one to hate him, but unless he becomes a man—becomes equal—it is also impossible for one to love him.
>
> —James Baldwin[1]

> [S]ometimes I get awfully tired of trying to save the white man's soul.
>
> —Thurgood Marshall[2]

INTRODUCTION

Thurgood Marshall was almost lynched in Tennessee.[3] He had come to town as a lawyer for the NAACP Legal Defense Fund to defend Black people who were rounded up after the Columbia Race Riot of 1946. The "riot" was an act of racial terror during which the White[4] residents of Columbia, city police, highway pa-

1. James Baldwin, The Fire Next Time 102 (Vintage International 1993) (1962).

2. Gilbert King, Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America 4 (2012).

3. *Id.* at 14-20.

4. Throughout this Note, I capitalize the words "Black" and "White" when I use them to describe a racialized group. As the capitalization of "White" is not yet widespread, I point unfamiliar readers to the comprehensive justification provided in LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. Rev. 566, 568 n.1 (2021), which contends that "capitalizing 'Black' . . . without also capitalizing 'White' normalizes Whiteness, while the proper noun usage of the word forces an understanding of 'White' as a social and political construct and social identity in line with the social and political construct and social identity of 'Black.'" *See also* Kwame Anthony Appiah, *The Case for Capitalizing the* B *in Black*, Atlantic (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159 [https://perma.cc/FM38-4GJT] ("[L]et's try to remember that black and white are both historically created racial identities—and avoid conventions that encourage us to forget this."); Nell Irvin Painter, *Opinion: Why 'White' Should be Capitalized, Too*, Wash. Post (July 22, 2020, 10:57 AM EDT), https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized [https://perma.cc/DUD7-FNTU] ("[I]n terms of racial identity, white Americans have had the choice of being something vague, something unraced and separate from race. A capitalized 'White' challenges that freedom, by unmasking 'Whiteness' as an American racial identity as historically important as 'Blackness'—which it certainly is. No longer should White people be allowed the comfort of this racial invisibility; they should have to see themselves as

trolmen, and state troopers violently descended upon the city's Black neighborhood.[5] Businesses were destroyed, phone lines into and out of the neighborhood were cut off, and dozens of Black people were injured, killed, or arrested.[6]

After winning the acquittal of two Black men who were alleged to have shot and wounded a state highway patrolman during the riot, the townsfolk wanted "justice"—the type of justice that ended with the bodies of NAACP lawyers in "the famous Duck River."[7] Marshall and his colleagues, aware that tensions were high, attempted to escape the sundown town before it was too late.[8] But police were waiting on the road toward Nashville.[9] They identified Marshall and arrested him on a phony charge of drunk driving.[10] Once he was in the police car, the officers drove straight to Duck River.[11] Marshall was lucky to survive the night.

His two colleagues bravely followed the police to the river and refused to leave.[12] The presence of these extra witnesses somehow pressured the officers to

---

raced."); *NABJ Statement on Capitalizing Black and Other Racial Identifiers*, NAT'L ASS'N BLACK JOURNALISTS (June 2020), https://www.nabj.org/page/styleguide [https://perma.cc/E77G-5TWP] ("The organization believes it is important to capitalize 'Black' when referring to (and out of respect for) the Black diaspora. The National Association of Black Journalists (NABJ) also recommends that whenever a color is used to appropriately describe race then it should be capitalized within the proper context, including White and Brown."); Kristen Mack & John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MACARTHUR FOUND. (Aug. 26, 2020), https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity [https://perma.cc/638B-QB5L] ("We will also begin capitalizing White in reference to race. Choosing to not capitalize White while capitalizing other racial and ethnic identifiers would implicitly affirm Whiteness as the standard and norm. Keeping White lowercase ignores the way Whiteness functions in institutions and communities.").

Furthermore, this Note often speaks in a Black/White paradigm. This is not meant to ignore the relevance of other racial groups to the conversation. Instead, the binary is used because it provides the quintessential example of racial subjugation in American society. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 224 (2003) ("'[W]hiteness' in the United States is a measure . . . of one's social distance from blackness.").

5. KING, *supra* note 2, at 11-14; Chris Lamb, *America's First Post-World War II Race Riot Led to the Near-Lynching of Thurgood Marshall*, WASH. POST (Feb. 25, 2021, 7:00 AM EST), https://www.washingtonpost.com/history/2021/02/25/columbia-race-riot-wwii-thurgood-marshall [https://perma.cc/SP8X-KPWB].

6. KING, *supra* note 2, at 11-14.

7. *Id.* at 14-15, 18.

8. *Id.* at 15-16.

9. *Id.* at 16.

10. *Id.* at 16-17.

11. *Id.* at 17-18.

12. *Id.* at 18-19.

abandon the lynching—at least for a couple of hours.[13] The officers took Marshall to the Columbia courthouse so that a magistrate could rubber stamp the arrest. From there, the locals could simply "storm[] the jail with some rope and finish[] the job" later that night.[14] Yet, as fate would have it, Marshall appeared before the only magistrate in town that had refused to sign warrants for the bogus arrests of Black people during the riot.[15] The judge released Marshall, but there was still the matter of getting out of town alive. A decoy driver was placed into Marshall's car and sent toward Nashville, while Marshall took a different car and left town through backroads.[16] Though Marshall was finally able to escape Columbia, the decoy driver was stopped and beaten so badly that he was hospitalized for a week.[17]

This was the evil that Thurgood Marshall and his colleagues faced for years on their many travels into the Deep South. Yet, despite the death threats, the lynch mobs, and the Klansmen moonlighting as judges and police officers, Marshall continued his crusade to fight for racial justice. By 1951, Marshall was litigating what would become two of the most important Supreme Court cases of his career.[18] In the lower courts, he was taking up the fight to desegregate public schools[19] in an effort that would ultimately culminate in *Brown v. Board of Education*.[20] Meanwhile, Marshall was litigating before the Supreme Court to overturn the racially motivated convictions of two of the Groveland Four who were wrongfully punished for allegedly raping a White teenager and assaulting her husband.[21] It was around this time that one of Marshall's colleagues had begun to "notice[] the 'battle fatigue' setting in on the lawyer."[22] "'You know,' Marshall said to him, 'sometimes I get awfully tired of *trying to save the white man's soul*.'"[23]

This was a profound admission. Thurgood Marshall, a leader of the NAACP who spent years fighting on behalf of Black clients to challenge the violence and

13. *Id.* at 19-20.

14. *Id.* at 20.

15. *Id.* at 19.

16. *Id.* at 20.

17. *Id.*

18. *Id.* at 4.

19. *Id.*

20. 347 U.S. 483 (1954).

21. KING, *supra* note 2, at 3-4; *see* Shepherd v. Florida, 341 U.S. 50 (1951); Erik Ortiz, *Groveland Four, the Black Men Accused in a 1949 Rape, Get Case Dismissed*, NBC NEWS (Nov. 22, 2021, 7:16 PM EST), https://www.nbcnews.com/news/us-news/groveland-four-black-men-accused-1949-rape-get-case-dismissed-rcna6016 [https://perma.cc/A5RA-MCVF].

22. KING, *supra* note 2, at 4.

23. *Id.* (emphasis added).

injustice of White supremacy, had characterized his mission as an effort to save *White* people.[24] In doing so, he acknowledged an often unrealized (or perhaps ignored) truth about racial equality—that the fight against racial subjugation and the fight for "the white man's soul" are two sides of the same coin. They are coextensive. This is because White supremacy exacts a heavy spiritual toll on its beneficiaries who perpetuate, or at least tolerate, the subjugation of others.

Marshall's comment expressed a frustration with White America's failure to appreciate its own interest in ending White supremacy because it fueled a fierce and unyielding opposition to racial justice. This failure has persisted throughout the nearly seventy years since Marshall fought for desegregation in *Brown*. And despite the progress that has been made, the nation is still woefully far from achieving racial equality. This Note argues that if we are ever to do so, it is imperative that the nation understands how White supremacy necessarily always harms White people as well as people of color.

The idea that there exists a White spiritual interest in ending racial subordination that coincides with a Black interest in our own liberation, as exemplified by Marshall's comment about saving the White man's soul, supports a bold intervention in and expansion of the renowned interest-convergence thesis.[25] The thesis, developed by legal scholar and civil rights activist Derrick Bell, argues generally that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[26] Notably, Bell's conception of white interests, though he did not emphasize this, is limited to material self-interest or interest in other manifestations of power.[27] Thus, it disregards the significance of idealistic self-interest, such as an interest in saving

---

24. In this Note, the term "White supremacy" means more than simply explicit hate for or bigotry against non-White people. It is meant to refer to the substantive conditions of racial subordination. My use of the term "is premised on the notion that a society once expressly organized around white supremacist principles does not cease to be a white supremacist society simply by formally rejecting those principles. The society remains white supremacist in its maintenance of the actual distribution of goods and resources, status, and prestige in which whites establish norms which are ideologically self-reflective." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 n.20 (1988); *see also* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989) ("[White supremacy is] a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.").

25. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) [hereinafter Bell, *Dilemma*].

26. *Id.*

27. *See* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 169 (2011) (criticizing the theory on these grounds).

one's soul or an interest in being a member of a genuine and robust democratic society. Such disregard is a mistake. One cannot fully appreciate the universality of the harm wrought by White supremacy, to White, Black, and indeed all people in society, without recognizing White idealistic self-interest.

This Note introduces a new conception of the interest-convergence thesis that better reflects this universal harm and offers a different paradigm through which we should orient our legal and public discourse on racial equality. The Note proceeds in four Parts. Part I explains Bell's traditional interest-convergence thesis and highlights a few flaws that undermine its usefulness as a framework for achieving robust and sustainable racial equality. In so doing, it excavates an underacknowledged hallmark of Bell's traditional thesis—"interest divergence."

Part II then introduces the concept of "perpetually convergent interests" as an adaptation or rehabilitation of Bell's interest-convergence thesis. I identify two such interests: the spiritual interest and the democratic interest. The Part then concludes that appealing to these interests could present a powerful means to win support for racial justice, legally, politically, and socially.

Part III explores the legacy of these perpetually convergent interests in the courts by examining how they have been invoked, ignored, or relied upon in landmark racial-justice cases. I focus on the education context here because judicial recognition of the perpetually convergent interests is most salient in that area of law. This Part establishes that the perpetually convergent interests are legally cognizable and have rich historical roots. It explains how the Supreme Court failed to recognize the perpetually convergent interests at stake in *Brown v. Board of Education*, and that this failure both was rooted in an assumption of Black inferiority and unfortunately canonized a zero-sum perspective on racial equality that has become entrenched as the norm in legal and social discourse today. Finally, the Part discusses the affirmative-action cases. Specifically, it explains how the Court's adoption of the diversity rationale in *Bakke* and *Grutter* was a unique instance in which the perpetually convergent interests were invoked, though incompletely, as a driving force of a doctrine that ostensibly promoted racial equality. However, with the recent decision in *Students for Fair Admissions* (*SFFA*), that doctrine has ended. In *SFFA*, the Court deemed the diversity rationale, and thus also the particular manifestations of the perpetually convergent interests on which it relied, to involve too "amorphous" of concepts to allow for adequate judicial scrutiny. In doing so, the Court has potentially erected a larger threat to racial equality than many might realize.

Part IV concludes by highlighting the importance and prospects of the perpetually convergent interests in the wake of *SFFA*. It is more important than ever for the nation to recognize the perpetually convergent interests as the battles over the legacy of *SFFA* are beginning to be waged. Such recognition does not depend

on the existence of some profound legal doctrine like what existed during the *Bakke*/*Grutter* era. Rather than a change in doctrine, the perpetually convergent interests require a change in mindset. Accordingly, the interests can be applied in subtle ways beyond the context of education law or even the law itself. Indeed, at a time when the Supreme Court has used the existing paradigm to consistently weaken the law's potential to bring about meaningful progress toward racial justice, the perpetually convergent interests would likely be more effectively utilized within a larger social movement where litigation plays only a supporting role.

Before turning to the argument itself, I write to briefly address a concern that some may initially have with this intervention. Some may argue that this Note wrongly emphasizes White interests rather than those of the people of color who bear the brunt of White supremacy's harm. Their hesitation is understandable and appreciated. By virtue of our humanity, people of color are entitled to being treated with equal dignity to our White compatriots. Recognition of this truth alone should provide sufficient motivation and justification for the nation to actualize racial equality. Any appeal to separate, uniquely White interests in reaching that goal seems like a frustrating and counterproductive concession of Black inferiority. However, this Note should not be misunderstood to condone the nation's failure to vindicate Black equality for its own sake. Nor should it be misunderstood to equate the magnitude of White supremacy's harm to White people with its harm to people of color.

Rather, this Note highlights White interests in addition to (not at the expense of) Black interests for two reasons. First, doing so reflects the reality that all races in this nation "are caught in an inescapable network of mutuality" and "tied in a single garment of destiny."[28] Throughout this nation's history, racial equality has been continuously impeded by a perception that we are playing a "zero-sum game, in which material and status gains for Blacks and other racial minorities are viewed only as losses for Whites."[29] Such a destructive perspective is undermined by discourse which emphasizes how White people benefit from racial equality.

---

28. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL 2 (1963). Dr. King's use of this language was to respond to those who criticized his efforts to fight racism in Birmingham by framing him as an "outsider[]" who was agitating a community with issues that didn't affect him. *Public Statement by Eight Alabama Clergymen (A Call for Unity)*, *in* KING, *supra*. In addition to the language quoted above, Dr. King's response included the famous line "[i]njustice anywhere is a threat to justice everywhere" to explain why it was proper and incumbent upon him to get involved in the city. KING, *supra*. I thought it fitting to repurpose Dr. King's language here to challenge the common presumption that White people are "outside" of White supremacy's harm, and thus it is not incumbent on them to challenge the system.

29. Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 348 (2019).

The second reason to highlight these White interests is a practical rather than idealistic one: the interest-convergence thesis. Bell's basic idea, which this Note adopts, is that as a descriptive matter, appealing to the interests of White America is necessary to achieve equality. This Note offers a more sustainable and hopefully more authentic framework through which to do so.

I. THE INTEREST-CONVERGENCE THEORY

Derrick Bell was a distinguished civil rights lawyer, activist, and legal scholar.[30] As an attorney, he led many of the post-*Brown* desegregation cases for the NAACP.[31] As a scholar, he became the first Black tenured professor at Harvard Law School, and his work was foundational to the development of critical race theory.[32] Bell's interest-convergence thesis, which permeated much of his scholarship, is one of his most significant contributions. In the over forty years since Bell introduced his thesis, it has become accepted as providing a "[]reasonable reading of history"[33] and remains a significant lens through which scholars explain struggles for racial justice as well as other social movements.[34]

---

30. *See* NYU Law News, *In Memoriam: Derrick Bell, 1930-2011*, N.Y.U., https://www.law.nyu.edu/news/DERRICK_BELL_MEMORIAM [https://perma.cc/KZY6-Q8DR].

31. *See* Matt Schudel, *Derrick A. Bell, Legal Scholar Who Developed Theories on Race, Dies at 80*, WASH. POST (Oct. 8, 2011, 6:21 PM), https://www.washingtonpost.com/local/obituaries/derrick-a-bell-legal-scholar-who-developed-theories-on-race-dies-at-80/2011/10/06/gIQA7kdBWL_story.html [https://perma.cc/MN5K-JUTM].

32. Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory [https://perma.cc/J5TY-BU55].

33. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 39 (2d ed. 1980); *see also* Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 248 (2012) ("Many scholars . . . accept the validity of Bell's thesis . . . ."); Kevin Terry, Note, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell's Interest-Convergence Thesis*, 88 N.Y.U. L. REV. 1483, 1489 (2013) (describing Bell's thesis as "one of the most frequently cited principles guiding the study of race and the law").

34. *See* Driver, *supra* note 27, at 152 n.18 (collecting several sources of significant scholarly engagement with the theory); Feldman, *supra* note 33, at 248 ("Many scholars . . . extend [Bell's thesis] . . . to other contexts."); Melvin J. Kelley IV, *Retuning Bell: Searching for Freedom's Ring as Whiteness Resurges in Value*, 34 HARV. J. ON RACIAL & ETHNIC JUST. 131, 136 (2018) (explaining that the interest-convergence thesis "has not been limited to cases involving the Equal Protection Clause or even to legal developments explicitly impacting people of color"); Terry, *supra* note 33, at 1489 (characterizing the thesis as "a cornerstone of efforts by legal academicians . . . to theorize the ways in which race interacts with the legal system in the United States").

According to Bell's thesis, acknowledging how Whites are harmed by Black subjugation and benefit from equality is necessary for any significant racial-justice achievement. Bell believed that "[r]acial remedies may . . . be the outward manifestations of unspoken and perhaps subconscious . . . conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites."[35] This is not to say that empathy for the plight of Black people is not an important factor. However, empathy alone is never enough. This Note adopts the general thrust of Bell's thesis as summarized above. However, it builds upon Bell's writings and that of his critics to ultimately propose a new, more complete theoretical framework. This Part provides a foundational understanding of Bell's traditional interest-convergence thesis and highlights some significant flaws that will be alleviated by the perpetually convergent-interest thesis offered in Part II.

Across decades of writing, Bell fit much of America's racial-justice progress into the interest-convergence framework. For example, he explained 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."[36] President Lincoln's Emancipation Proclamation also fit nicely into Bell's theory. While Lincoln was personally opposed to slavery,[37] as President, he famously wrote that "[i]f I could save the Union without freeing any slave I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone, I would also do that."[38] Illustrative of that final option, the Emancipation Proclamation offered only as much liberation as was thought necessary to preserve the Union, which was not much. The order, on its face, left slavery intact in the Union states as well as in the parts of the Confederacy already under Union control.[39] Yet, of course, even the order's application to the Confederacy was contingent upon a later Union military victory. While not being very useful as a means of emancipation, the great Proclamation proved an effective weapon against the Confederacy. By symbolically making the

---

35. Bell, *Dilemma*, *supra* note 25, at 523.

36. Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 7 (1976) [hereinafter Bell, *Racial Remediation*]. Bell also argued that "abolition both lessened the ever-present fear of slave revolts, and the concern that blacks, slave or free, would reside in the 'free' states in large numbers." *Id.*

37. *See generally* Harry S. Blackiston, *Lincoln's Emancipation Plan*, 7 J. NEGRO HIST. 257 (1922) (recording the history of Lincoln's opposition to slavery).

38. Letter from Abraham Lincoln to Horace Greeley (Aug. 22, 1862), *in* DAILY NAT'L INTELLIGENCER, Aug. 23, 1862 (emphasis omitted). Lincoln made it clear that "[w]hat I do about slavery and the colored race, I do because I believe it helps to save this Union." *Id.*

39. Bell, *Racial Remediation*, *supra* note 36, at 8.

war about ending slavery, Lincoln "disrupt[ed] the Confederate workforce and discourag[ed] European nations . . . from siding with the Confederacy."[40] The order also made it possible for the Union to ultimately enlist almost 200,000 Black soldiers.[41]

Perhaps the most popular example of the interest-convergence theory is *Brown v. Board of Education*.[42] Bell described how de jure segregation, despite being consistently challenged throughout much of the nation's history, was maintained until it created a significant burden upon White America's wartime efforts. Segregation inspired potent foreign criticism that threatened the United States's zealous efforts to win the Cold War and curb the spread of communism.[43] In fact, the United States was so concerned with segregation's impact on its reputation during the Cold War that it famously submitted an amicus brief in *Brown*, expressing the importance of desegregation in the "present world struggle between freedom and tyranny."[44] Whites also feared the outrage that segregation provoked among Black Americans who, after serving in World War II, expected the ideals of justice and equality to be more than empty words that were fought for abroad but abandoned at home.[45] Further, segregation was also proving to be a barrier to modernizing the South's economy.[46] Bell argued that without these White interests, *Brown* would not have happened when it did.[47]

Though it offers a powerful lens through which to view history, Bell's interest-convergence thesis has acquired one notable critic—Professor Justin Driver.

---

40. Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. Sch. L. Rev. 1053, 1057 (2005).

41. Bell, *Racial Remediation*, *supra* note 36, at 9.

42. 347 U.S. 483 (1954).

43. *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988) (exploring desegregation in the 1940s and 1950s through the lens of anticommunism and the Cold War); Bell, *Dilemma*, *supra* note 25, at 524. While the *Brown* Court did not expressly situate its decision within the context of the Cold War, the benefit of desegregation to American foreign interests was widely recognized at the time. Albert P. Blaustein & Clarence Clyde Ferguson, Jr., Desegregation and the Law: The Meaning and Effect of the School Segregation Cases 12-13 (1957).

44. Brief for the United States as Amicus Curiae at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8). For a more comprehensive discussion of desegregation as motivated by the context of the Cold War, see Dudziak, *supra* note 43.

45. Bell, *Dilemma*, *supra* note 25, at 524-25.

46. *Id.* at 525.

47. *Id.* ("These points may seem insufficient proof of self-interest leverage to produce a decision as important as *Brown*. They are cited, however, to help assess and not to diminish the Supreme Court's most important statement on the principle of racial equality. Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.").

In his article, *Rethinking the Interest-Convergence Thesis*, Driver identified and explained what he deemed to be some "analytical flaws that diminish the theory's persuasiveness."[48] This Note does not adopt the full sweep of Driver's refutation of Bell's thesis, but it does embrace two of his critiques in particular—namely, that "interests" should be understood more broadly to include abstract, social interests and that advocates and judges exercise considerable agency when working to resolve a case.

First, Driver argued that Bell relied on too narrow a conception of "interests."[49] Driver suggested that it is a mistake to limit "interest" to "raw material self-interest."[50] He believed that "more idealized interests involving concepts like honor, altruism, justice, and morality" should also be considered.[51] For instance, when it comes to *Brown*, Driver questioned whether the international embarrassment caused by Jim Crow in the United States during the Cold War was necessary to bringing about desegregation.[52] Instead, Driver wrote that it is "distinctly possible" that the nation's more "abstract interests in justice and equality" were enough to carry the day.[53] Ultimately, Driver's position was that Bell should not have been so certain of the insufficiency of White idealistic interests in bringing about progress toward equality.[54]

Second, Driver pointed out that Bell's thesis ignores or minimizes the agency of Black advocates who fight for justice and White judges who decide their cases.[55] By framing Black people as "fortuitous beneficiaries" of interest convergence, Bell's thesis runs the risk of discounting the "capacity of black people to participate in their own uplift" while also "diminish[ing] the culpability of white judges who exercise their authority to maintain the existing racial hierarchy and den[ying] the credit owed to white members of the judiciary who challenge that

48. Driver, *supra* note 27, at 156, 164-88.

49. *Id.* at 165-71.

50. *Id.* at 169. Driver also argued that Black people differ as to their understanding of what is in their best interest. Further, he explained that White people in different economic classes so differ in their interests as to materially prevent or minimize the potential for a monolithic White interest that he ascribed to Bell's theory. *Id.* at 165-69.

51. *Id.* at 169.

52. *Id.* at 169-70; *see also* Gregory Briker & Justin Driver, Brown *and Red: Defending Jim Crow in Cold War America*, 74 STAN. L. REV. 447, 451-55 (2022) (arguing that anticommunism was central to segregationists' opposition to *Brown* and civil rights).

53. Driver, *supra* note 27, at 170.

54. *Id.* at 169-70.

55. *Id.* at 175-81.

hierarchy."[56] However, Driver did acknowledge that it is possible to subscribe to the interest-convergence framework without minimizing agency in this way.[57]

Motivating Driver's criticisms is a fundamental difference between how he and Bell view race and society's capacity for empathy. Driver is more optimistic, allowing for the possibility that there is a "genuine white [and Black] interest in promoting equality and justice for its own sake."[58] And Driver sees courts as productive forums for the realization of such an interest.[59] On the other hand, Bell believed racism and White supremacy to be an insurmountable constant in society that is facilitated by the legal system.[60]

Bell's pessimism, whether rightly or wrongly held, supports my own critique of his interest-convergence framework: it is nearly useless to advocates or others who wish to attain meaningful and sustained racial justice. This is because just as fortuitous interest convergence is a catalyst for racial-justice progress, a later inevitable divergence of interests causes that advancement to decay or cease altogether. In fact, interest *divergence* (though not referred to as such by Bell) is a hallmark corollary to Bell's theory.[61]

Bell illustrated this corollary well in his article, *Racial Remediation: An Historical Perspective on Current Conditions*, in which he analyzed the nation's history of racial progress and backslides. First, Bell gave examples of "political advances for blacks" that "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"—in other words, examples of his interest-convergence

---

56. *Id*. at 175-76.

57. *Id*. at 176 n.143.

58. *Id*. at 170.

59. *See id*. at 175-81*; see generally* Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187 (2019) (analyzing Professor Driver's faith in the judiciary as a venue for vindicating rights).

60. Bell, *Dilemma*, *supra* note 25, at 5-6; Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 HOW. L.J. 79, 88 (1991) [hereinafter Bell, *Now What?*] ("[W]e live in a society in which racism has been internalized and institutionalized to the point of being an essential and inherently functioning component of that society."); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 92 (1992) (explaining that racism is "a permanent part of the American landscape").

61. The idea, stemming from the interest-convergence thesis, that diverging interests motivate opposition to racial equality is not new. For example, see Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004), for a comprehensive analysis of how *Brown* actually cemented interest divergence within and between the Black and White communities, which has yet to be disrupted. Yet, despite the recognition of interest divergence as a significant phenomenon, its function as a necessary component of Bell's interest-convergence theory has not been recognized explicitly.

thesis in action.[62] However, the latter sections of the article, discussing "tragic developments in the history of blacks in America" and the failures of civil-rights laws to remedy racial inequality, demonstrate how racial remedies soon decayed after they were achieved because White interests subsequently diverged from the cause of racial equality.[63]

The Hayes-Tilden Compromise and the abandonment of Reconstruction after the Civil War is a notable example of this phenomenon.[64] The Hayes-Tilden presidential election of 1876 was highly contentious. The South's candidate, Democrat Samuel J. Tilden, appeared to have defeated the Republican Rutherford B. Hayes. He had a plurality of the popular vote and seemed to also have more electoral votes (though the returns from the three Southern states where Black people still had political power were challenged). The election ended up being decided by a congressional commission, which voted 8-7 for Hayes along party lines. There had been rumblings of civil war over the results of this election, but the South ultimately accepted the Republican president after the Republicans promised that, among other things, they would withdraw the remaining federal troops from the South and include Southern Democrats in the president's cabinet. The fulfillment of these promises marked the official end of Reconstruction and precipitated an end to the political and economic power that Black people had earned in the South since the Civil War.

Another example of racial remedies being subverted due to interest divergence is the underwhelming application of the Reconstruction Amendments.[65] Bell explained how "[w]ithin a decade it became apparent that the 13th amendment abolishing slavery was obsolete" because "Southern planters could achieve the same benefits with less burden through the sharecropping system and simple violence."[66] Indeed, many Black people were effectively re-enslaved from the end of the Civil War until World War II through the deadly systems of sharecropping, convict leasing, and peonage.[67] Corporations experienced a "period of ambivalence" under the Fourteenth Amendment, which then allowed them to be

62. Bell, *Racial Remediation*, *supra* note 36, at 6-13.

63. *Id.* at 16-20.

64. *Id.* at 19-20 (explaining the Hayes-Tilden Compromise). *See generally* C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (Oxford Univ. Press 1991) (1951) (detailing the Hayes-Tilden Compromise and its implications).

65. Bell, *Racial Remediation*, *supra* note 36, at 11.

66. *Id.*

67. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (describing the convict-leasing system to illustrate the continued subjugation of Black people after the Civil War).

treated as "persons" and gave them more protection in the courts than Black people.[68] Even worse, the Fourteenth Amendment was weaponized against efforts for Black equality or otherwise so limited as "to render the promised protection meaningless in virtually all situations."[69] And the Fifteenth Amendment, meant to protect the Black vote, was "politically obsolete at its birth" and "not effectively enforced for almost a century."[70]

Furthermore, when Bell discussed *Brown*'s ultimate failure to desegregate the nation,[71] he explained that "*Brown II* traced a well-set pattern of racial policymaking. Spurred by the need to confront a political or economic danger to the nation as a whole, serious racial injustice is acknowledged and enjoined," (i.e., interest convergence) "but necessary remedies are not implemented once the economic or political irritant is removed" (i.e., interest divergence).[72]

Toward the end of *Racial Remediation*, Bell actually brought together his interest-convergence thesis with its corollary, interest divergence, in an offhand paragraph:

> 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 . . . . When interests change, support fades. The

---

68. Bell, *Racial Remediation*, *supra* note 36, at 11.

69. *Id.*

70. *Id.*

71. Bell, *Dilemma*, *supra* note 25, at 526-28 (discussing the decline of judicial enforcement of *Brown*); *see also* Alana Semuels, *The U.S. Is Increasingly Diverse, So Why Is Segregation Getting Worse?*, TIME (June 21, 2021, 5:35 AM EDT), https://time.com/6074243/segregation-america-increasing [https://perma.cc/77TM-XJ3S] (explaining a report that finds that the increase in diversity has not led to less residential segregation within major U.S. metropolitan areas); Stephen Menendian, *U.S. Neighborhoods Are More Segregated than a Generation Ago, Perpetuating Racial Inequity*, NBC NEWS (Aug. 16, 2021, 7:04 PM EDT), https://www.nbcnews.com/think/opinion/u-s-neighborhoods-are-more-segregated-generation-ago-perpetuating-racial-ncna1276372 [https://perma.cc/3X52-QVGY] (same); Emma García, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL'Y INST. (Feb. 12, 2020), https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price [https://perma.cc/KK5D-BEW3] (describing the segregation by race and ethnicity that remains prominent in U.S. schools and the effect this segregation has on student performance); Jorge De la Roca, Ingrid Gould Ellen & Katherine M. O'Regan, *Race and Neighborhoods in the 21st Century: What Does Segregation Mean Today?*, 47 REG'L SCI. & URB. ECON. 138, 148-49 (2014) (finding that although segregation between Blacks and Whites has declined in the last decade, the level of segregation remains high, resulting in unequal neighborhood environments).

72. Bell, *Racial Remediation*, *supra* note 36, at 13. For a particularly contemporary example, one might look to racial reckoning catalyzed by the police killing of George Floyd in the summer of 2020.

> rights may remain on the books, but they are evaded rather than obeyed, repealed rather than enforced.[73]

Though Bell expressed this idea of interest divergence in many ways throughout his writing, he never explicitly acknowledged it as a robust corollary to his interest-convergence thesis.[74] Nonetheless, because of inevitable interest divergence, the interest-convergence thesis—as Bell offers it—provides proponents of racial equality with little more than the tragic knowledge of the ultimate futility of their pursuits to attain meaningful and sustained racial justice.[75] Indeed, Bell himself succumbed to this logical conclusion. Eventually, in what has been referred to as Bell's era of racial realism, he acknowledged the hopelessness that follows from his interest-convergence and divergence framework, stating that "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."[76]

However, there is hope for the interest-convergence thesis to produce more than superficial results. The next Part introduces a rehabilitating adaptation of Bell's interest-convergence thesis that responds to the issues identified above and

---

73. *Id.* at 21.

74. The closest that Bell came to offering interest divergence as a part of his interest-convergence framework was in Derrick Bell, *Epilogue: Affirmative Action: Another Instance of Racial Workings in the United States*, 69 J. NEGRO EDUC. 145, 146 (2000). In this piece, Bell offered two "rules" to the "Derrick Bell Pre-Memorial Principle of Racial Loss and Gain": "Rule One—Society is always willing to sacrifice the rights of Black people in order to protect important economic or political interests of Whites"; and "Rule Two—The law and society recognize the rights of African Americans and other people of color only when, and only for as long as, such recognition serves some economic or political interests of greater importance to Whites." *Id.* (emphasis omitted). Rule Two is clearly Bell's interest-convergence thesis. If one assumes, as Bell clearly did throughout his writing, that White interests will inevitably diverge from Black interests in racial equality, then Rule One manifests as the corollary of interest divergence.

75. Bell acknowledged this hopelessness but argued that we must still press on in our struggle against racial subjugation because doing so offers the potential for "ethical success." DERRICK BELL, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH 172 (2002). And doing so is a "manifestation of our humanity." Bell, *Now What?*, *supra* note 60, at 92. However, some scholars have adopted Bell's theory without also necessarily succumbing to his ultimate pessimism. *See, e.g.*, Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 254-55 (2005) ("[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."). *See generally* Feldman, *supra* note 33 (arguing that the pessimistic outlook of Bell's racial realism can be analytically divorced from the interest-convergence theory).

76. BELL, *supra* note 60, at 12 (emphasis omitted).

offers a useful rationale for sustainable racial-justice progress. It relies on a broader understanding of White interests, appeals to the agency of advocates and judges, and, most importantly, if recognized, is unlikely to be threatened by diverging interests. This theory could be seen as a sort of middle ground between Bell and Driver. It goes beyond the "material self-interest," which motivates Bell's theory, by including more idealistic and moral interests. However, it does not go so far as to adopt Driver's apparent faith that a White interest in justice for its own sake could provide sufficient motivation for decisions promoting racial equality. In other words, while my theory incorporates a more inclusive notion of White interests, these interests are still self-serving.

II. PERPETUALLY CONVERGENT INTERESTS

As discussed above, inevitable interest divergence is fatal to the viability of Bell's traditional interest-convergence thesis as a framework for producing sustained and genuine progress toward racial equality. This Part introduces a theory of what I call "perpetually convergent interests." Perpetually convergent interests are White interests that are so inherently intertwined with racial equality that they will never diverge from corresponding Black interests, binding Black and White people on parallel journeys to attain an equal society. Nonetheless, these White interests are still self-serving and accordingly do not depend on a purely humanitarian White interest in uplifting the marginalized for their own sake.

This Part identifies two perpetually convergent interests in particular. First is a spiritual interest, which concerns the moral, emotional, and psychological effects of White supremacy on White people. Second is a democratic interest, which concerns racial subjugation's harm to democracy. Either of these interests are sufficient to advance racial justice, but they often appear in tandem because they are rooted in similar or overlapping ideals.

There cannot be racial discrimination that works to subjugate Black Americans that does not also harm White Americans' spiritual and democratic interests. Thus, White spiritual and democratic interests perpetually converge with Black interests in racial equality. Because these interests do not rely on circumstantial alignment but instead necessarily always coexist, they cannot diverge, providing a more complete and likely more sustainable framework through which to pursue racial justice. The rub, of course, is that it is no easy feat for White America to realize that it has these interests.

This Note particularly looks to the courts as valuable sites to vindicate the perpetually convergent interests and argues that litigants should rely on them in their arguments and that judges should consider them in their cases. As I demonstrate throughout the Note, doing so would be a rather modest, but

meaningful, undertaking. Despite the Note's focus on the judiciary, the perpetually convergent-interest framework is ripe for use by advocates beyond the courts. It offers a new paradigm through which to conceptualize racial equality, or the lack thereof, that could prove valuable to a larger social movement, of which litigation is only one aspect. Indeed, as Part III discusses, the recent *SFFA* decision signaled the Supreme Court's likely hostility to significant reliance on perpetually convergent interests, so a strategy that depends too heavily on the judiciary may be unwise. Regardless of the forum, widespread recognition of the perpetually convergent interests would, at a minimum, provide a more honest discourse around racial inequality and erode the dominant perspective that racial justice is a zero-sum game. At its best, it has the potential to bring about genuine and lasting progress toward racial equality.

A. The Spiritual Interest

The spiritual interest concerns the moral, emotional, and psychological harm to White people that stems from White supremacy as well as the in-kind benefits to White people that stem from racial equality.[77] The idea is that precisely inasmuch as White America tolerates or perpetuates racial subjugation, it suffers spiritual harm. And, inasmuch as the nation achieves progress toward racial equality, it also achieves progress toward White spiritual well-being. Herein lies the *perpetual* convergence.

Thurgood Marshall's comment about saving the White man's soul succinctly articulates the concept of a perpetually convergent spiritual interest. Many others have also recognized this dual, or universal, harm of White supremacy. Perhaps none have done so more eloquently than one of Marshall's contemporaries—James Baldwin. In *The Fire Next Time*, Baldwin noted that "the value placed on the color of the skin is . . . a delusion"[78] that serves to maintain the "white man's sense of his own value."[79] Yet, he believed that upholding this fiction is not only a detriment to Black people, but it also perpetuates a profound "anguish"[80] upon White Americans, preventing them from being "in fruitful communion with the depths of [their] own being."[81] In response to all of this, Baldwin's solution was

77. There are significant economic and material costs to the majority of White people due to White supremacy, but such kinds of interests are beyond the scope of this Note.

78. BALDWIN, *supra* note 1, at 104. For Baldwin's discussion on the matter generally, see *id.* at 100-01.

79. *Id.* at 94-95.

80. *Id.* at 95.

81. *Id.* at 97.

simple, though as he acknowledged, perhaps also impossible[82]: "The price of the liberation of the white people is the liberation of the blacks . . . *before the law, and in the mind*."[83] Baldwin's phrasing here is strikingly consistent with the framing of the interest-convergence thesis. Almost as if writing to a White audience, Baldwin presents the liberation of Black people merely as a price to be paid in pursuit of the ultimate goal that is a White spiritual peace.

My argument that there exists a White spiritual interest in racial equality primarily rests upon what I believe to be a moral axiom—that treating another person with less than equal human dignity or tolerating such treatment comes at a cost to one's own spiritual well-being. It seems to me that this would be a rather uncontroversial belief. Nonetheless, the spiritual interest is also supported by the studies of social scientists who have undertaken the task of studying the "negative cognitive, affective, and behavioral consequences experienced by Whites as dominant group members in a White supremacist system."[84] Lisa B. Spanierman and D. Anthony Clark have surveyed such scholarship and found a consensus, concluding that by "sitting atop a racial hierarchy," White people tend to experience "various negative consequences," among them, "emotional effects such as isolation, guilt, and shame."[85] It was also found that when reconciling their place in the societal hierarchy, White people often develop and maintain a false sense of superiority.[86] Such a hollow and artificial positive self-esteem can lead to feelings of insecurity concerning their own worth and ability.[87] Spani-

82. *Id.*

83. *Id.* (emphasis added).

84. Lisa B. Spanierman & D. Anthony Clark, *Psychological Science: Taking White Racial Emotions Seriously—Revisiting the Costs of Racism to White Americans*, *in* IMPACTS OF RACISM ON WHITE AMERICANS IN THE AGE OF TRUMP 115, 118 (Duke W. Austin & Benjamin P. Bowser eds., 2021); *see also* DIANE J. GOODMAN, PROMOTING DIVERSITY AND SOCIAL JUSTICE: EDUCATING PEOPLE FROM PRIVILEGED GROUPS 105 (2000) (noting the "psychological, social, moral/spiritual, intellectual, and material/physical costs of oppression to people from privileged groups").

85. Spanierman & Clark, *supra* note 84, at 119.

86. *See* GOODMAN, *supra* note 84, at 106-07; Spanierman & Clark, *supra* note 84, at 119 (citing a study that "observed a condition that [was] termed 'White inauthenticity' wherein Whites are not true to themselves or the world (e.g., belief in the myth of meritocracy)"). This false sense of superiority is addressed in the next Part, which discusses *Brown*.

87. GOODMAN, *supra* note 84, at 107. One could easily regard the so-called anti-Critical-Race-Theory (anti-CRT) movement that developed in the fall of 2020 as a realization and manifestation of the spiritual harms that these social scientists discuss. The anti-CRT proponents vehemently oppose the possibility that K-12 students be taught about the United States in a way that highlights White supremacy and systemic racism by explicitly decrying its potential to make White students feel "guilty" or "ashamed" for being White. The strength of the anti-

erman and Clark explained that "racism promotes a 'double social and psychological consciousness' among Whites where they suffer from a split between deed and creed (e.g., perpetuating racism while believing in freedom and democracy for all)."[88]

This finding aligns with Diane J. Goodman's conclusion that "[s]ystems of oppression constrain the ability of people from privileged groups to develop their full humanity."[89] She found one such constraint to come from the occasions when White people must confront the contradiction, consciously or subconsciously, between the ideals of equality and justice that they believe in and the norms of inequality that they are expected to uphold.[90] Reconciling this contradiction could be thought of as a sort of moral injury.[91] Such an injury consists of "the damage done to one's conscience or moral compass when that person perpetrates, witnesses, or fails to prevent acts that transgress one's own moral beliefs, values, or ethical codes of conduct."[92] The injury can manifest in the forms of shame, anger, and guilt.[93] In a sense, when confronted with their contribution

CRT movement is particularly strong evidence of the existence of the spiritual interest because it shows just how much White America seeks to avoid the "anguish" associated with confronting the reality of White supremacy. *See* LaToya Baldwin Clark, *The Critical Racialization of Parents' Rights*, 132 YALE L.J. 2139, 2159-78 (2023) (cataloguing an extensive list of anti-CRT policies, which were often explicitly motivated by a desire to avoid White anguish and guilt related to racial inequality).

88. Spanierman & Clark, *supra* note 84, at 119 (quoting Rutledge M. Dennis, *Socialization and Racism: The White Experience*, *in* IMPACTS OF RACISM ON WHITE AMERICANS 71, 75 (Benjamin J. Bowser & Raymond G. Hunt eds., 1981)).

89. GOODMAN, *supra* note 84, at 105.

90. *See id.* at 106.

91. Moral injuries are typically studied in connection with significant traumatic experiences such as veterans who participated in war. More recently, it has been studied in connection with many other classes of people following the hardships associated with the COVID-19 pandemic. *See* Moral Injury Project, *What Is Moral Injury*, SYRACUSE UNIV., https://moralinjuryproject.syr.edu/about-moral-injury [https://perma.cc/FTH8-D4U3]; *see also* Sonya B. Norman & Shira Maguen, *Moral Injury*, U.S. DEP'T VETERANS AFFS., https://www.ptsd.va.gov/professional/treat/cooccurring/moral_injury.asp [https://perma.cc/EX9R-YU8Y] (noting that while most research around moral injury has focused on veterans, moral injury can also occur among "health care workers"); Harold G. Koenig & Faten Al Zaben, *Moral Injury: An Increasingly Recognized and Widespread Syndrome*, 60 J. RELIGION & HEALTH 2989, 2996 (2021) (explaining that "[s]ymptoms of [moral injury] may also be experienced by those outside the military," including "healthcare professionals and first responders"); Elizabeth Svoboda, *Moral Injury Is an Invisible Epidemic That Affects Millions*, SCI. AM. (Sept. 19, 2022), https://www.scientificamerican.com/article/moral-injury-is-an-invisible-epidemic-that-affects-millions [https://perma.cc/D2DU-GC3C] (describing one emergency room physician's experience with moral injury).

92. *See* Moral Injury Project, *supra* note 91.

93. *Moral Injury*, PSYCH. TODAY, https://www.psychologytoday.com/us/basics/moral-injury [https://perma.cc/2DJL-BKX8].

to or tolerance of a system of inequality, White people must either face a moral injury or reject that such inequality is unjust.[94] And because the latter option hinders one's "development and use of empathy," both options lead to spiritual harm.[95]

The spiritual interest, as articulated here, clearly transcends what Bell was willing to incorporate into his theory. Though he has acknowledged that racial discrimination against Black people might have high "moral or ethical" costs to White people, he was doubtful that White people would ever recognize or value these interests in a way that would produce racial justice.[96] I disagree. In Part III, I demonstrate how the Court has in fact relied on reasoning that resonates with the perpetually convergent interests, although incompletely, in its affirmative action cases from *Bakke* up until *SFFA*. And in Parts III and IV, I demonstrate how modest considerations of the perpetually convergent interests by the Court in *Brown* and *Palmore* could have easily produced opinions that more fully capture the universal harm of racial inequality.

B. The Democratic Interest

The democratic interest refers to the goal of attaining and promoting a thriving democracy in the United States. This interest perpetually converges with a Black interest in opposing subjugation because social equality is a necessary predicate to democracy. Inasmuch as racial inequality is maintained, democracy suffers. Inasmuch as racial equality is promoted, democracy is promoted. The interest in democracy thus provides a justification for racial justice that is distinct, though flowing, from the worthy humanitarian value of ending racial subjugation.

---

94. *Cf.* Spanierman & Clark, *supra* note 84, at 119 (explaining that, when "sitting atop a racial hierarchy," White Americans experience "isolation, guilt, and shame").

95. *See* GOODMAN, *supra* note 84, at 106 (offering the example of the harm that one experiences when they avoid eye contact with a homeless person who is asking for money).

96. *See* Derrick Bell, *Wanted: A White Leader Able to Free Whites of Racism*, 33 U.C. DAVIS L. REV. 527, 532 (2000); Bell, *Racial Remediation*, *supra* note 36, at 23 ("I suggested that most whites view the racial plight of blacks as an injustice that should be corrected. But on a priority scale, the elimination of racism would rate only a step or two higher than the campaign to end the senseless slaughter of the oceans' great whales. In other words, racial equality, like whale conservation, should be advocated, but with the understanding that there are clear and rather narrow limits as to the degree of sacrifice or the amount of effort that most white Americans are willing to commit to either crusade."); Bell, *Dilemma*, *supra* note 25, at 525 ("Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.").

The democratic interest, as this Note conceives of it, is largely shaped by the conception of democracy presented in Elizabeth Anderson's book, *The Imperative of Integration*.[97] Through this lens, true democracy cannot be realized by laws alone.[98] Rather, a democratic system of government is an expression of democratic *culture*, "consist[ing] in the free, cooperative interaction of citizens from all walks of life on terms of equality in civil society."[99] The law thus becomes a tool to serve a democratic community and "realize its promise of universal and equal standing."[100]

Without a democratic culture, the cold cogs of democratic governance produce "only a tyranny of one part of the people over the other."[101] Such a mechanical understanding of democracy would often allow the dominant class of society to exclude and ignore everyone else and settle public issues by deciding only amongst themselves.[102] A majority vote under these circumstances could not be lauded as a product of democracy and certainly could not create a just government that stands on the consent of the governed.[103] True democracy requires a community of people who are joined together with mutual regard for each other's interests and are in pursuit of conciliation.[104] This is only possible if people truly regard each other as equals and have the opportunity to meaningfully engage with all members of society in private as well as public life, so that people may "adjust their sense of the common purpose to others' interests."[105] Against this backdrop, a democratic need for racial justice and actual integration develops. Through integration, our shared humanity is revealed. Stereotypes are broken down, empathy is fostered, and equality blossoms.

To date, the United States has resisted its constitutional duty to realize democracy by denying full and equal citizenship to Black Americans. Citizenship rights can be understood as divided into "civil," "political," and "social" rights. America's historical denial of all three rights to Black Americans was clearly spelled out by the Supreme Court in *Dred Scott v. Sanford* when it held that Black

---

97. Elizabeth Anderson, The Imperative of Integration (2010).

98. *Id.* at 89.

99. *Id.*

100. *Id.*

101. *Id.* at 90.

102. *See id.* at 92.

103. *See id.*

104. *Id.* at 94.

105. *Id.*

people "had no rights which the white man was bound to respect."[106] Eventually, Black people would at least win legal claims to equal civil and political rights through interventions like the Reconstruction Amendments, the Civil Rights Act, and the Voting Rights Act.[107] But these interventions have been rendered inadequate to bring about civil and political equality.[108] Further, the law has thus far been unable (or unwilling) to pursue significant social equality.[109] So long as Black Americans are not given equal regard in society, the full promise of democracy is yet to be realized.

On this view, the democratic interest is motivated by many of the same underlying moral values as the spiritual interest. Discussions of either interest can blend into the other at times because the spiritual value generated by racial equality can be seen as fueling the democratic value. Nonetheless, discussions of these interests by others — such as the judges and litigants involved in the cases discussed in the next Part — do not always overlap. Therefore, it is worth conceptualizing them separately. One way to understand the difference between the two interests is that rather than focusing on the existential abstractions as applied to the psychology and morality of individuals, as is done through a spiritual-interest lens, the democratic interest is grounded in a legal and cultural commitment to democracy. Democracy is fundamental to our understanding of the American project, and it is a structural requirement of our constitutional system. Thus, the democratic interest could be seen as more legally cognizable than (though necessarily intertwined with) the spiritual interest.

C. The Inexorability of White Supremacy?

Having established that there exist White perpetually convergent interests, there remains the question of whether such interests are significant enough to bring about sustained and meaningful progress toward racial equality. Many scholars have, like Bell, taken the position that White supremacy is an inexorable

106. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857); *see also* ANDERSON, *supra* note 97, at 89-90 (describing how the *Dred Scott* Court "made plain the symbolic and political import of denying citizenship [to Black Americans]" because, in their view, "the Constitution . . . deemed them 'beings of an inferior order'" (quoting *Dred Scott*, 60 U.S. at 407)).

107. U.S. CONST. amends. XIII, XIV, XV; Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (2018); Voting Rights Act of 1965, 52 U.S.C.A. §§ 10101, 10301-10303 (2018).

108. Consider the subjugating effects of things like racial gerrymandering, felon disenfranchisement, and other voter suppression tactics or the effects of mass incarceration and discriminatory policing.

109. Consider the limitations on the extent to which the law can address "private" (nonstate action) discrimination, such as White flight. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (noting that "[p]rivate biases may be outside the reach of the law" and that "[t]he Constitution cannot control such prejudices").

force in the United States and given different names to the same phenomenon by which it persists. Indeed, Bell's interest-convergence framework has been described as simply an "explanation" of one of critical race theory's "core" ideas: the "reform/retrenchment dynamic."[110] This dynamic challenges the narrative that the history of race relations in the United States is one of linear progress.[111] Instead, it shows how even modest racial reform is inevitably followed by backlash and retrenchment of racial subordination, and that "sometimes the backlash is more enduring than the reform."[112] This view is consistent with that of scholars who have observed how racial discrimination has and continues to adapt to social and legal efforts to dismantle racial inequality, resulting merely in the transformation of the rules and rhetoric of racial subordination without abolishing it.[113]

Overall, it would appear that to learn from history would be to conclude that White supremacy is likely a genie that cannot be put back in its lamp. While I do not intend, through this Note, to reject that possibility, I have not yet given up hope. And I believe that the perpetually convergent interests offer a promising means through which to overcome the adaptive and persistent nature of White supremacy. This is because the perpetually convergent-interest theory cuts at the heart of what drives interest divergence, adaptive discrimination, and retrenchment by perpetually aligning White interests with racial equality. So long as the

---

110. Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1608 (2011).

111. *Id.* at 1607-08.

112. KK Ottesen, *An Architect of Critical Race Theory: "We Cannot Allow All of the Lessons from the Civil Rights Movement Forward to Be Packed Up and Put Away for Storage,"* WASH. POST (Jan. 19, 2022, 7:00 AM EST), https://www.washingtonpost.com/lifestyle/magazine/an-architect-of-critical-race-theory-we-cannot-allow-all-of-the-lessons-from-the-civil-rights-movement-forward-to-be-packed-up-and-put-away-for-storage/2022/01/14/24bb31de-627e-11ec-a7e8-3a8455b71fad_story.html [https://perma.cc/J7BC-AFVR]; *see also* Carbado, *supra* note 110, at 1607-08 ("Consider the following three examples: (1) the end of legalized slavery and the promulgation of the Reconstruction Amendments (the reform) inaugurated legalized Jim Crow and the promulgation of Black Codes (the retrenchment); (2) *Brown v. Board of Education*'s dismantling of separate but equal in the context of K-12 education (the reform) was followed by *Brown II*'s weak 'with all deliberate speed' mandate (the retrenchment); (3) Martin Luther King, Jr.'s vision of racial cooperation and responsibility, which helped to secure the passage of the Civil Rights Act of 1964 (the reform), was redeployed to produce a political and legal discourse that severely restricts racial remediation efforts: colorblindness (the retrenchment)."). *See generally* Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. RACE, GENDER & SOC. JUST. 61 (2021) (explaining how the insights of critical race theory explain the retrenchment and backlash to the racial-justice movement).

113. *See, e.g.*, Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1112 (1997); Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1248 (2016).

White spiritual or democratic interests in racial equality outweigh White interests that diverge from racial equality, White supremacy will decay rather than overcome.

It does not seem to me a foolish assumption that people would prioritize an interest in saving their soul or other idealistic self-interests over their material self-interests. Thus, the main hurdle for the success of the perpetually convergent interests is in getting White America to be conscious of the interests' existence and significance. This is why the prescriptive thrust of this Note is for proponents of racial equality to rely on the perpetually convergent-interest framework in their discourse and strategy so that it disrupts and subverts the dominant discourse that assumes racial equality is a zero-sum game.

Furthermore, even if some people might actually prioritize material interests despite being fully informed of their perpetually convergent interests, perpetually convergent interests have a practical and rhetorical advantage. Unlike with the spiritual and democratic interests, public appeals to White material interests are rarely seen as virtuous or legitimate. Such interests are the quiet part that should not be said out loud. When someone argues for an outcome that would retrench racial subjugation, they do not dare justify it to society by appealing to their property interest in White supremacy.[114] That motivation exists in the shadows, or the subconscious, but it typically manifests in a disguise of some facially "neutral" argument. For instance, the recent policy efforts across the nation to entrench White supremacy through the curriculum of K-12 schools must rely on rhetoric around parental rights and colorblindness rather than explicitly on White material interests.[115] While these are powerful proxies, they constrain and complicate the maintenance of racial subjugation. On the other hand, appeals to the perpetually convergent interests are intuitive and virtuous. As the next Part will demonstrate, the perpetually convergent interests are legally cognizable, making the courts particularly valuable forums for their vindication.

III. EDUCATION LAW AND THE LEGACY OF PERPETUALLY CONVERGENT INTERESTS

There is perhaps no better area of law through which to explore the perpetually convergent interests than the education context. Schools are valuable sites of social reproduction, and, accordingly, they are often the battlegrounds upon which the war for the nation's soul is fought. When disputes over the schoolhouse have arrived at the courthouse, and particularly when such disputes are

114. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1757-77 (1993).

115. Baldwin Clark, *supra* note 87, at 2189; LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 399-401 (2019).

constitutional in nature, the Supreme Court has consistently deemed the abstract idealistic values that the perpetually convergent interests implicate to be legally cognizable and often determinative. This is because the Court justifies its education-law decisions upon a normative view of what the role of schools in society is and should be, a view which does not flow from any particular constitutional or statutory text. The extent to which courts are willing to entangle themselves in moral and idealistic musings in the education-law context stands out from the judiciary's typical modus operandi of hewing to legal texts in resolving disputes that mostly concern concrete and measurable harm in the physical world.[116]

The Court rightly conceives of (public) schools as institutions that are uniquely responsible for "awakening the child to cultural values" and "inculcat[ing] the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."[117] The Court has often invoked the doctrine of *in loco parentis* to describe schools' authority over children as delegated from, or standing in for, that of parents. In recognizing schools' responsibility to, in some sense, "raise" children to be members of society,[118] the courts and parties before them are necessarily concerned with how schools do so. Thus, legal appeals to the spiritual and democratic interests have rich historical roots, and courts have had significant opportunities to consider their merits.

This Part situates the perpetually convergent interests within the context of a few salient race and education-law cases. It highlights how they were invoked and to what extent they were rejected or adopted by courts, explores what could have been, and discusses what the future might have in store. Section III.A discusses *Roberts v. City of Boston*, the first significant suit over school segregation.[119] In that case, the Massachusetts Supreme Court heard an incredible oral argument that drew heavily upon the spiritual and democratic interests. Though the court paid lip service to desegregationist ideals, it ultimately rejected their arguments. Section III.B examines *Brown v. Board of Education*[120] and concludes that, despite reaching the correct holding that school segregation is unconstitutional,

116. *But see* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023). As will be discussed later in this Note, the Court's most recent education-law decision in *SFFA* relied on the difficulty in measuring the benefits of racially diverse student bodies to effectively eliminate race-consciousness in college admissions.

117. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (William Beard ed., 1968)).

118. See, for example, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021), where Justice Breyer referred to schools as the "nurseries of democracy."

119. 59 Mass. (5 Cush.) 198 (1849).

120. 347 U.S. 483 (1954).

the Court ignored the spiritual and democratic interests and thereby implicitly affirmed conceptions of Black inferiority while setting a powerful precedent perpetuating the notion that racial justice is a zero-sum game. Finally, Section III.C analyzes the race-conscious college-admission (affirmative-action) cases. It discusses how the Court's diversity-based doctrine adopted, though incompletely, the perpetually convergent interests and how the recent decision in *SFFA* dealt a blow to race consciousness as well as to the courts' capacity to employ the perpetually convergent interests.[121]

A. Roberts v. City of Boston

The notion that White supremacy's spiritual and democratic harm to White people could provide a legal justification for racial justice is not new. Over a century before the Supreme Court decided *Brown* and over a decade before the Civil War began, the perpetually convergent interests were wielded in an infamous challenge to school segregation in the Massachusetts Supreme Court case *Roberts v. City of Boston*.[122] Though the interests did not carry the day, their prominence in the case is a powerful testament to their legitimacy and historical grounding in the nation's fight for racial justice.

In 1849, Boston maintained two schools for the exclusive use of Black students and 159 schools for White students, roughly reflecting the demographic breakdown of the city.[123] Sarah Roberts, a five-year-old Black child, was repeatedly refused admission into the White primary schools nearest her home, and her father, Benjamin Roberts, filed suit on her behalf.[124] Representing Roberts before the Massachusetts Supreme Court were Robert Morris, Jr. and Charles Sumner.[125] Morris was an abolitionist and civil-rights activist and today is regarded as the first Black lawyer in the nation to ever argue a case before a jury.[126] Sumner was also a famous abolitionist and would later become widely known as

121. 600 U.S. 181.

122. 59 Mass. (5 Cush.) 198.

123. *Id.* at 198-99.

124. *Id.* at 198, 200.

125. *Id.* at 201; *Sarah C. Roberts vs. The City of Boston*, Long Road to Just., http://www.longroadtojustice.org/topics/education/sarah-roberts.php [https://perma.cc/B2HL-XVTU].

126. Cynthia Wilson, *Robert Morris, Sr. (1823-1882)*, BlackPast (Mar. 25, 2018), https://www.blackpast.org/african-american-history/morris-robert-sr-1823-1882 [https://perma.cc/9RSD-VTBE]; *Robert Morris*, Nat'l Park Serv. (Jan. 16, 2023), https://www.nps.gov/people/robert-morris.htm [https://perma.cc/4HMA-DRNJ].

the U.S. Senator who was brutally caned in the Senate Chamber in retaliation for his fierce criticism of slavery.[127]

In arguing that Sarah was entitled to attend the school in her neighborhood with White children, these two lawyers dedicated a significant amount of airtime to calling on the court to recognize how segregation created spiritual and democratic harms to White people and to society generally.[128] The *Roberts* opinion highlights the lawyers' briefing, which stated that "[t]he separation of the schools, so far from being for the benefit of both races, is an injury to both. It tends to create a feeling of degradation in the blacks, and of prejudice and uncharitableness in the whites."[129]

In oral argument, Sumner elaborated further in a section titled "Evils of Separate Schools."[130] First, Sumner acknowledged the spiritual harms in a way that sounds in the same register as Baldwin:

> Nothing unjust, nothing ungenerous can be for the benefit of any person or anything . . . . The whites themselves are injured by the separation. Who can doubt this? With the law as their monitor they are taught to regard a portion of the human family, children of God, created in His image, coequals in His love, as a separate and degraded class; they are taught practically to deny that grand revelation of Christianity, the Brotherhood of Man. Hearts while yet tender with childhood are hardened and ever afterward testify to this legalized uncharitableness. Nursed in the sentiment of Caste, receiving it with the earliest food of knowledge, they are unable to eradicate it from their natures, and then weakly and impiously charge upon our Heavenly Father the prejudice derived from an unchristian school.[131]

Sumner then shifted to a discussion centered more around the democratic harm:

---

127. *The Caning of Senator Charles Sumner*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Caning_of_Senator_Charles_Sumner.htm [https://perma.cc/KK9G-3SVL]; *Charles Sumner: A Featured Biography*, U.S. SENATE, https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Sumner.htm [https://perma.cc/Z7HC-VEDE].

128. CHARLES SUMNER, EQUALITY BEFORE THE LAW, UNCONSTITUTIONALITY OF SEPARATE COLORED SCHOOLS IN MASSACHUSETTS: ARGUMENT OF CHARLES SUMNER, ESQ., BEFORE THE SUPREME COURT OF MASSACHUSETTS, IN THE CASE OF SARAH C. ROBERTS VS. THE CITY OF BOSTON, DECEMBER 4, 1849, at 13-15 (Washington, F. & J. Rives & Geo. A. Bailey 1870).

129. *Roberts*, 59 Mass. (5 Cush.) at 204.

130. SUMNER, *supra* note 128, at 14-15128.

131. *Id.*

> Their characters are debased, and they become less fit for the duties of citizenship . . . . The whole system of Common Schools suffers also. It is a narrow perception of their high aim, which teaches that they are merely to furnish an equal amount of knowledge to all, and, therefore, provided all be taught, it is of little consequence where, and in what company. The law contemplates not only that all shall be taught, but that *all* shall be taught together. They are not only to receive equal quantities of knowledge, but all are to receive it in the same way. All are to approach the same common fountain together . . . . The school is the little world where the child is trained for the larger world of life. It is the microcosm preparatory to the macrocosm, and, therefore, it must cherish and develop the virtues and the sympathies needed in the larger world. And since, according to our institutions, all classes, without distinction of color, meet in the performance of civil duties, so should they all, without distinction of color, meet in the school–beginning there those relations of Equality which Constitution and Laws promise to all.
>
> As the State derives strength from the unity and solidarity of its citizens without distinction of class, so the school derives strength from the unity and solidarity of all classes beneath its roof.[132]

While the Massachusetts Supreme Court commended the "great principle [of equality before the law], advanced by the learned and eloquent advocate of the plaintiff," it nonetheless found a way to uphold the legality of segregation.[133] Finding "no specific direction how schools shall be organized,"[134] the court held that the primary school committee that managed and supervised all 161 primary schools in Boston[135] had the discretion "to arrange, classify, and distribute pupils, in such a manner as they think best adapted to their general proficiency and welfare."[136] In making its decision, the court relied on a resolution passed in 1846 stating that "the continuance of the separate schools for colored children, and the regular attendance of all such children upon the schools, is not only legal and just, but is best adapted to promote the education of that class of our population."[137] Ultimately, the court held that the resolution was made pursuant to the

---

132. *Id.*

133. *Roberts*, 59 Mass. at 206.

134. *Id.* at 207.

135. *Id.* at 198-99.

136. *Id.* at 208.

137. *Id.* at 201.

committee's discretion and was the "honest result of [the committee's] experience and judgment."[138]

In considering the challenge to school segregation, the court did interestingly "[c]onced[e], therefore, in the fullest manner, that [Black people] are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and *social* . . . ."[139] Such a concession of rights was much more than what many believe was intended by the Congress that passed the Reconstruction Amendments.[140] Despite espousing such an expansive view of racial equality, the court still rejected Sumner and Morris's arguments that racial segregation in schools served to maintain a system of caste based on public prejudice.[141] The court responded:

> This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children . . . .[142]

The U.S. Supreme Court later relied on this language in *Plessy v. Ferguson*[143] and in *Gong Lum v. Rice*.[144]

In *Roberts*, we see a court uphold segregation despite the arguments that it harms both Black and White Americans. While the *Brown* Court would later hold that segregation in schools was inherently unequal due to the psychological damage it imposed on Black students, it also failed to acknowledge the spiritual and democratic damage that segregation causes to White students. The argument made by Sumner and Morris that White people might benefit from inte-

---

138. *Id.* at 209. The Court saw such racial segregation as welfare-promoting, similar to that of school segregation based on the gender of students or teachers, the age of students, or the relative knowledge level of students despite their age. *Id.* at 208.

139. *Id.* at 206 (emphasis added).

140. *See* William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1324 (2007) ("The Republican coalition's conservatives and moderates agreed with progressive Republicans that the federal government should protect the civil rights of African Americans, but disagreed as to whether this included rights to full political participation or 'social' equality.").

141. *Roberts*, 59 Mass. at 209-10.

142. *Id.* at 209.

143. 163 U.S. 537, 544 (1896).

144. 275 U.S. 78, 85-87 (1927).

gration would not return to the foreground until the Court decided the affirmative-action cases in the late 1900s and early 2000s. And even then, as I will discuss later in this Note, the perpetually convergent interests took on a distorted manifestation until they were all but explicitly rejected by the Court in *SFFA*. Nonetheless, it is a profound testament to the merit of the perpetually convergent-interest thesis that such interests were recognized and argued for by attorneys so far back in this nation's history.

B. Brown v. Board of Education

Brown v. Board of Education[145] is perhaps the most exalted Supreme Court decision of all time.[146] It is used as a constant, to which all sound judicial philosophies must conform.[147] Its declaration that schools segregated by race are inherently unequal is undoubtedly a profoundly important holding,[148] and its prohibition against state-imposed segregation represented a milestone toward racial equality.[149] Yet, there are also many who criticize the legacy of *Brown*. Some do so on the grounds that it did not achieve the goal of educational equality that spurred the litigation to begin with.[150] Others criticize it for not addressing racism as the motivation for segregation and shying away from accusatory language.[151]

This Section provides a rarely acknowledged critique of *Brown*[152] that flows from an analysis of the case in the context of the perpetually convergent interests.

---

145. 347 U.S. 483 (1954).

146. *See* Onwuachi-Willig, *supra* note 29, at 343 n.1 (compiling sources praising *Brown*).

147. *See* Jack M. Balkin, *What* Brown *Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1537 (2004) ("Most law professors agree that any serious normative theory of constitutional interpretation must be consistent with *Brown v. Board of Education* and show why the case was correctly decided." (footnote omitted)); Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383, 384-85 (2000).

148. *Brown*, 347 U.S. at 495.

149. *But see* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955) (limiting *Brown I*'s potential for bringing about an end to segregation by allowing for slow implementation and resistance by local school districts).

150. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976).

151. *See, e.g.*, Randall L. Kennedy, *Ackerman's* Brown, 123 YALE L.J. 3064, 3066-68 (2014).

152. *See, e.g.*, 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) (providing alternative *Brown* opinions written by prominent legal scholars explaining how the Court should have decided the case but all nonetheless failing to discuss the

Brown presented an incredible opportunity to recognize these interests, but even after prompting by some of the briefs in the case, the Court refused to acknowledge the harm that segregated schools might cause White students and society in general. Instead, the Court justified its ruling only on the fact that segregated schools disadvantaged Black people. While this was certainly a sufficient justification for desegregation, it exhibits a fundamental misunderstanding of racism's ubiquitous harms. This Section first acknowledges how *Brown*'s consideration of social science and the psychological goals and effects of education support the legitimacy of judicial reliance on the spiritual and democratic interests. Second, it discusses how this inquiry stopped short of considering such effects on White students. Third, the Section explores how the failure of the Court to rely on the perpetually convergent interests in reaching its holding established an incomplete model of equal-protection analysis that affirmed Black inferiority and has perpetuated a destructive view of racial justice as a zero-sum game.

When *Brown* was taken to the Supreme Court, over a century had passed since *Roberts*, and new ears were ready to hear the old arguments for school desegregation. Despite this fresh opportunity and Marshall's admitted understanding of racial justice as a means to "save the white man's soul," he and his colleagues at the NAACP opted not to rely on segregation's harm to White America in their briefing.[153] This curious omission is unfortunate as it implicitly signaled to the Court that such a concern was not worth confronting. Nonetheless, the Court was still on notice of the White spiritual and democratic interests at stake in the case. Many amicus briefs submitted in *Brown* made specific appeals to the perpetually convergent interests in their arguments for desegregation.

---

perspective provided in this Note). For examples of the few instances of scholarship that articulate such a critique, see Onwuachi-Willig, *supra* note 29, at 348-49; Kevin Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579, 1581-82 (2004); and Rogers M. Smith, *Black and White After* Brown*: Constructions of Race in Modern Supreme Court Decisions*, 5 U. PA. J. CONST. L. 709, 714 (2002).

153. I do not know what motivated this decision, but it is possible that they could have been wary of making an argument that would have been so radical in the minds of the White justices that he would stand before. While White America may have been prepared to admit that its centuries of de jure racial discrimination and segregation had produced an injured Black race that it could have sympathy for, it is an entirely different matter to accept an argument that implicitly challenges White superiority. To accept that White students might be morally and democratically deficient in such a way that could inhibit their capacity to be good citizens requires admitting that at some level being White is not better than being Black. Such an admission would diminish the psychic value of Whiteness in a way that the decision in *Brown* would ultimately avoid. *See* Onwuachi-Willig, *supra* note 29, at 346-48 (highlighting the unpopularity of such a racial perspective by discussing how in *To Kill a Mockingbird*, what sealed Tom's fate at trial was "suggesting, through his own sympathy for Mayella, that any white person could ever be on the receiving end of a black person's sympathy"); Harris, *supra* note 114, at 1751.

For example, the American Federation of Teachers submitted an amicus brief that challenged the separate-but-equal doctrine in part because they found that when people from different groups came together, it fostered an environment that promoted civil rights.[154] This observation sounds in the democratic interest. They further appealed to the values of both the spiritual and democratic interests when they discussed a survey of nearly 850 social scientists which found that "[e]ighty-three percent of the respondents believe that enforced segregation has detrimental psychological effects on the group which enforces segregation."[155] The survey provided the Court with particularly relevant insight:

> Clinical experience and experimental evidence point unmistakably to the conclusion that segregation implies a value judgment which in turn arouses hostility in the segregated and guilt feelings in the segregator. The effect is to set up a vicious circle making for group conflict . . . . The more powerful group may like the effect it has on itself in short term values, but hatred, rebellion, or despair are attitudes they have aroused toward themselves and they will always have to cope with these results sooner or later . . . .[156]

Their brief concluded with a direct invocation of the democratic interest by declaring that "any restriction, particularly in the form of segregated and discriminatory schooling, which prevents the interplay of ideas, personalities, information and attitudes, impedes a democratic education and ultimately prevents a working democracy."[157]

The American Veterans Committee's brief also included an appeal to the perpetually convergent interests. They argued that "segregation in schools stimulates and deepens divisiveness in our population," and it "obstructs efforts to dissolve prejudices through the process of education and voluntary adjustments."[158] Further, they recognized that "[t]hese ill effects, not only on the Negro children but also on the community and the Nation, should be weighed against the insubstantial reasons of 'usages, customs and traditions' which are based wholly on prejudice."[159]

---

154. Brief for Am. Fed'n of Tchrs. as Amicus Curiae Supporting Petitioners at 6, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1).

155. *Id.* at 14.

156. *Id.*

157. *Id.* at 15.

158. Brief for Am. Veterans Comm. as Amicus Curiae Supporting Petitioners at 15, *Brown*, 347 U.S. 483 (No. 8).

159. *Id.*

Finally, the amicus brief for the American Jewish Congress spoke unequivocally when describing the organization's stake in the case. They claimed that "all Americans are indissolubly linked and that any act which unjustly injures one group necessarily injures all";[160] that "the policy of segregation has had a blighting effect upon Americans and consequently upon American democratic institutions"; and that "the doctrine of 'separate but equal' has engendered hatred, fear and ignorance."[161] To hammer home this point, the brief concluded a section by acknowledging that

> our concern must not be construed as limited to minorities alone. The treatment of minorities in a community is indicative of its political and moral standards and ultimately determinative of the happiness of all its members. Our immediate objective here is to secure unconditional equality for Americans of Negro ancestry. Our ultimate objective in this case, as in all others, is to preserve the dignity of all men so that we may achieve full equality in a free society.[162]

Despite being confronted by forceful arguments that segregation harms White people, the Court's ultimate opinion, like that in *Roberts*, makes no mention of the issue. In fact, the opinion famously does not say much at all. The relevant part of the unanimous opinion that actually addressed the question of whether the doctrine of separate but equal was to remain constitutional takes up just four pages.[163] Legal historians have documented that the opinion's short length was purposeful, as it made the revolutionary decision more accessible to the lay audience who could see it published in full within newspapers across the nation.[164] The short and simple nature of the opinion likely also served another aim—achieving unanimity, which Chief Justice Warren desperately lobbied for.[165] It was likely only along such general and minimal lines that the nine Justices could come to full agreement. We know that Warren was careful to omit

---

160. Brief of Am. Jewish Cong. as Amicus Curiae at 1, *Brown*, 347 U.S. 483 (No. 8), 1952 WL 47254, at *1.

161. *Id.* at 2,*2.

162. *Id.*

163. *Brown*, 347 U.S. at 492-95. The full opinion sits at a whopping eleven pages.

164. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 696 (rev. & expanded ed. 2004) (1975); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 29 (2000).

165. *See* Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741, 748-49 (2004); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 34-44 (1979); Kennedy, *supra* note 151, at 3068 ("Warren insisted upon writing an opinion that was non-accusatory."); KLUGER,

any language that could come across as emotional or accusatory towards the South,[166] so avoiding any justification for the decision that sounded in the spiritual interest and thus implicated the morality of White Americans would be consistent with that aim. Yet, as I explain below, the detriment of excluding segregation's harm to White people has outweighed the *Brown* Court's concerns that their opinion would be seen as too inflammatory to the Southerners who vowed not to submit to the decision anyway.[167]

When it comes to what the Court did say, the rationale for the decision could be seen as depending almost entirely on the spiritual and democratic interests of Black people. On the spiritual level, the equal-protection violation can essentially be boiled down to the conclusion that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children" because it "generates a feeling of inferiority as to [the Black students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[168] In reaching this conclusion, the Court relied, controversially, on social-science studies which were put forth to demonstrate the extent to which segregation caused psychological harm to Black children. The most prominent among them is the "doll study"[169] in which young Black children were given Black and White dolls and asked a series of questions, such as which dolls they would "play with or like best"; which was the "nice" or "pretty" doll; and which doll "looks bad."[170] The majority of children attributed positive characteristics to the White dolls and negative ones to the Black dolls.[171] Regardless of the study's rigor, the Court's reliance on the perceived psychological effects of racial subjugation demonstrates a willingness to accept spiritual harm as a valid justification for legal remedy.

---

supra note 164,164 at 696 (explaining that Chief Justice Warren wanted the opinion to be "short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory").

166. *See* KLUGER, *supra* note 164, at 696.

167. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 4 (1958); *see also* Declaration of Constitutional Principles ("Southern Manifesto"), 102 CONG. REC. 4515 (1956) (demonstrating Southern White resistance to *Brown*); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1063-67 (2014) (explaining the sophisticated legal arguments used in the Southern Manifesto).

168. *Brown*, 347 U.S. at 494 (citation omitted).

169. *Id.* at 494 n.11 (citing the "doll study" as the first among a list of studies supporting the Court's conclusion that Black students feel inferior as a result of segregation).

170. Kenneth B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, *in* READINGS IN PSYCHOLOGY 169, 175 (Theodore M. Newcombe & Eugene L. Hartley eds., 1947).

171. Clark, *supra* note 170; Clark & Clark, *supra* note 170, at 175.

The Court deemed the inequality inherent in school segregation to be particularly troubling because of its tendency to inhibit the democracy-producing goals of education. This is clear in the Court's famous line extolling "the importance of education to our democratic society" by proclaiming that education "is the very foundation of good citizenship."[172] "[I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[173] The Court further noted that the importance of "intangible considerations," including being able to "engage in discussions and exchange views with other students," "apply with added force to children in grade and high schools."[174]

Though it is clear that the Court considered spiritual and democratic interests to be legally cognizable (so much so that they formed the basis for a unanimous decision to dramatically change the social reality of the nation), the Court utterly failed to recognize the corresponding White interests at stake in this case. On the spiritual side, if segregation tends to create false feelings of inferiority in Black children, might it also create a false sense of superiority in White children? As the "learned and eloquent advocate" argued in *Roberts*,[175] might the othering and lack of interaction with Black people foster the same negative stereotypes and culture of dehumanization that perpetuate racial subjugation to begin with? Despite the Court's demonstrated interest in exploring the psychological harms of segregation to students, it overlooked these questions.

Similarly, Black students are not the only ones who suffer a democratic injury from segregated schooling. Segregated schools cannot somehow inhibit "good citizenship" for Black students but not for their White counterparts. Despite *Brown* noting the issue with Black students not being able to participate in the exchange of ideas with their White peers, the Court did not take issue with White students missing out on the exchange of ideas with Black students.[176] As the Court has repeatedly recognized, the democratic value of education is derived from more than the mere reception of information through the school curriculum. "[F]ounders of the early common school felt that public schools could foster democratic equality by 'provid[ing] citizens of the republic with a common culture and a sense of shared membership in the community.'"[177] This aligns well

172. *Brown*, 347 U.S. at 493.

173. *Id.*

174. *Id.* at 493-94 (quoting McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950)).

175. *See* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 206 (1849).

176. *See Brown*, 347 U.S. at 493-94.

177. Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2404 (2021) (quoting David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RSCH. J. 39, 45 (1997)).

with Anderson's notion of a democratic culture, which requires integration to facilitate cross-cultural understanding and equal regard for others in society. If we think about the democratic value of integration from this perspective, White students are the most in need. White people are typically more racially isolated than other races, so they are generally more deprived of meaningful exposure to Black people than the other way around.[178] In other words, desegregated schools would do more to remedy White isolation and racial ignorance than Black, and thus produce greater democratic benefits for White students.[179] Yet, again, the Court did not see such a concern.

The *Brown* Court's sole reliance on psychological harm to Black students and corresponding failure to mention White spiritual and democratic interests is problematic for two reasons, as will be explored further in this Section. First, it rested on an assumption of Black inferiority. And second, it entrenched the view that racial equality is a zero-sum game.

1. The Assumption of Black Inferiority

Despite being a revolutionary milestone toward racial justice, the *Brown* decision's reasoning nonetheless implicitly affirmed Black inferiority. By only considering segregation's harm to Black students, the Court seemed to imply that White children have nothing to gain from integrated schools, nothing to gain from knowing or seeing Black children as peers and equals, and nothing to lose from excluding Black students from their company. Yet, on the other hand, the Court saw Black students as so affected by their separation from White students that the psychological damage may never be undone.[180]

---

178. Many have pointed this out in the affirmative-action context. Affirmative action was predicated on a goal of promoting the educational benefits of diversity on college campuses. White students generally obtain the maximum benefit of such diversity by virtue of being the majority racial group in the nation.

179. In 2016-2017, the typical White student went to a school that was nearly seventy percent White, only eight percent Black, and less than fourteen percent Latinx. Contrast this with the typical Black student who goes to a school that is forty-seven percent Black, nearly twenty-six percent White, and nearly twenty percent Latinx. Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue & Gary Orfield, *Harming our Common Future: America's Segregated Schools 65 Years After* Brown, C.R. Project & Ctr. for Educ. & C.R. 23 fig.4 (May 10, 2019), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf [https://perma.cc/3FHU-VYWP].

180. *Brown*, 347 U.S. at 494. Rogers M. Smith referred to this as the "damaged race" conception of racial identity and similarly found it to affirm Black inferiority. *See* Smith, *supra* note 152, at 709.

This flaw in *Brown*'s reasoning is woefully underappreciated, but there is one particularly prominent voice that has similarly challenged calls for integration founded upon such an asymmetric view of segregation's harm.[181] That is the voice of Justice Thomas, who wrote that "the theory that black students suffer an unspecified psychological harm from segregation that retards their mental and educational development . . . rests on an assumption of black inferiority."[182] In *Missouri v. Jenkins*, Justice Thomas wrote an opinion concurring with the Court's judgment that a district court's orders designed to attract nonminority students from outside the school district in an effort to follow *Brown*'s edict were beyond the scope of remedying the effects of de jure segregation.[183] The fiery opinion began, "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior."[184] He condemned the district court's apparent assumption that the separation of the races itself creates harm to Black students.[185] He noted that if this were true, "and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks."[186]

This implication that "blacks cannot succeed without the benefit of the company of whites" was evident in *Brown*'s asymmetric vision of the harm of segregation.[187] However, rather than recognize this, Justice Thomas attempted to apply a saving interpretation of *Brown*.[188] He claimed that *Brown* does not support the notion that racial isolation is itself harmful to Black students; only *state-enforced* segregation creates such harm.[189] This is one way to deal with the issue.

---

181. By "asymmetric," I, of course, do not mean to suggest that White supremacy's harm to White people is the same as its harm to people of color. Rather, I am using the term more generally to refer to a view that overlooks the existence of significant spiritual and democratic harms to White people altogether.

182. Missouri v. Jenkins, 515 U.S. 70, 114 (1995) (Thomas, J., concurring).

183. *Id.*

184. *Id.*

185. *Id.* at 119-22.

186. *Id.* at 122.

187. *Id.* at 119.

188. *Id.* at 120-21.

189. *Id.* at 122. This does have *some* intuitive appeal. The Court's power was constrained to only prohibit state action, and the opinion did note that the detrimental "impact [of segregation] is greater when it has the sanction of the law." Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). Furthermore, it has the benefit of not calling into question the legitimacy of majority-minority organizations. For if Black students were truly harmed by simply being separated from White students without the force of law, what do we make of the existence and success of historically Black colleges and universities (HBCUs)? Justice Thomas goes on in his opinion to say that "there is no reason to think that black students cannot learn as well when surrounded by

However, while it is true that *Brown* only outlawed de jure segregation, the discussion of segregation's harm that motivated the decision was not constrained by such superficial limits. The Court said that segregation itself "has a detrimental effect upon the colored children," and it simply highlighted that the "impact is *greater* when it has the sanction of the law."[190] The opinion nowhere suggests, as Thomas claimed, that the harm identified in *Brown* was limited to government-imposed segregation rather than the existence of segregation itself. Nonetheless, in making this interpretive move, Thomas—like the Court in *Brown*—ignored the dual harm of White supremacy. He failed to recognize that White students might actually suffer from being separated from Black students as well. If he had, then it would not necessarily follow that recognizing racial isolation as harmful in itself would depend on a predicate of Black inferiority. So, while Thomas ultimately reached a conclusion at the opposite end of the spectrum from mine, our conclusions are both rooted in a similar criticism of a theory of integration that is based on segregation's harm to Black students alone.

---

members of their own race as when they are in an integrated environment. Indeed, it may very well be that what has been true for historically black colleges is true for black middle and high schools. . . . [B]lack schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement." *Jenkins*, 515 U.S. 70, 121-22 (1995) (Thomas, J., concurring). The merits of HBCUs, educationally and psychologically, are well documented. *See* Sean Seymour & Julie Ray, *Grads of Historically Black Colleges Have Well-Being Edge*, GALLUP, (Oct. 27, 2015), https://news.gallup.com/poll/186362/grads-historically-black-colleges-edge.aspx [https://perma.cc/VK2V-YHCD]; Naomi Harada Thyden, Cydney McGuire, Jaime Slaughter-Acey, Rachel Widome, John Robert Warren & Theresa L. Osypuk, *Estimating the Long-Term Causal Effects of Attending Historically Black Colleges or Universities on Depressive Symptoms*, 192 AM. J. EPIDEMIOLOGY 356, 361 (2023); Erica L. Green, *Why Students Are Choosing H.B.C.U.s: '4 Years Being Seen as Family'*, N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/06/11/us/hbcu-enrollment-black-students.html [https://perma.cc/M7KM-ASJB]. Yet, this does not necessarily disprove the existence of harm to Black students stemming from segregation, which is a product of racism, whether state-endorsed or not. Furthermore, the fact that Black students might find benefits from being given resources and community in a refuge from overwhelming exposure to White supremacy goes further to highlight segregation's spiritual and democratic harm to White people. It also seems absurd as a matter of common sense to suggest that all would be well if only segregation was solely the product of private choices rather than also of state action.

190. *Brown*, 347 U.S. at 494 (emphasis added) (citations omitted). Indeed, the Court later held that a desegregation plan that simply allowed families the freedom to choose what school their students attended did not comply with *Brown*'s mandate "to achieve a system of determining admission to the public schools on a non-racial basis" because it had not produced a unitary school system. Green v. Cnty. Sch. Bd., 391 U.S. 430, 432, 441 (1968) (quoting *Brown II*, 349 U.S. 294, 300-01 (1955)). This is despite the fact that such school-choice plans have formally removed any direct state school-assignment system based on race. Thus, a reasonable reading of *Green* is that segregation itself is the evil *Brown* sought to remedy rather than simply state-imposed segregation.

It is also worth noting here how my critique of *Brown* is in conversation with that of Herbert Wechsler. Wechsler's famous *Harvard Law Review* article, *Toward Neutral Principles of Constitutional Law*, puts forth one of the few significant legal attacks on *Brown*'s holding rather than simply its reasoning or legacy.[191] Wechsler seemed to doubt that segregation was so clearly inherently subjugating to Black people as to raise an equal-protection concern.[192] Instead, he framed the issue of segregation as concerning whether the First Amendment freedom of White people not to associate with Black people should overcome the corresponding freedom of Black people to associate with White people.[193] Put this way, Wechsler seemed to adhere to a view of segregation that would provoke the ire of Justice Thomas in how it gestured toward an assumption of Black inferiority and a Black desire to be in proximity to White people. Yet, Wechsler's account is more nuanced, or perhaps more confused, than this. In nearly the same breath that he called into question the validity of segregation's psychological harm to Black people, he also acknowledged the existence of the institution's spiritual harm to Whites, writing, "I think . . . that the Southern white also pays heavily for segregation, not only in the sense of guilt that he must carry but also in the benefits he is denied."[194] In reconciling this statement with his notion of segregation as a freedom-of-association issue, one could conclude that Wechsler believes that to the extent that White people wish to avoid associating with Black people, they are not recognizing their own interests in the "benefits" of such association. Thus, whatever assumption of Black inferiority is contained within his legal theory notwithstanding, Wechsler's writing also supports a position that the White desire for segregation rests upon a false sense of superiority.

2. Racial Equality as a Zero-Sum Game

The second problem with *Brown*'s omission of the White spiritual and democratic harm is that its asymmetric analysis assumes, or at least perpetuates, a view of racial equality as a zero-sum game in which material and status gains for Black people are viewed only as losses for White people. This perspective has

---

191. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959); *see also* Driver, *supra* note 167, at 1063-67 (explaining how, contrary to popular understanding, the Southern Manifesto presented a rather sophisticated and significant legal counter to the *Brown* opinion).

192. *See* Wechsler, *supra* note 191, at 33 ("[I]s there not a point in *Plessy* in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it'?" (quoting Plessy v. Ferguson, 163 U.S. 537, 551 (1896))).

193. *Id.* at 34.

194. *Id.*

continuously been entrenched by the canonical stature of the landmark case and its progeny.[195]

By failing to acknowledge that White people have significant interests in integration, *Brown* created the impression that "as a remedy for segregation, desegregation . . . conferred benefits only on blacks, which necessarily were paid for by whites."[196] In particular, desegregation presented a threat to poor and working-class White people who feared downward social and economic mobility due to association with Black people.[197] While the *Brown* Court was willing to make such a trade-off, this is not a calculus that has endured in the law or in the public eye.[198] The desegregation regime established by *Brown* soon began to crumble due to cases like *Keyes v. School District No. 1*[199] and *Milliken v. Bradley*,[200] which were aided by an implicit foundational understanding of racial equality as a zero-sum endeavor.[201] As policy efforts moved from desegregation to affirmative action, the zero-sum theory became explicit, and it plagued affirmative-action doctrine from its creation to its recent demise.

In *Keyes*, the Court was presented with its first opportunity to consider segregation in a non-Southern school district, in a state where explicit de jure segregation had not existed in 1954. Rather, the complaint in that case was that the state school boards had structured attendance zones in ways that isolated Black and Brown students.[202] While all but Justice Rehnquist agreed that there was unconstitutional segregation present in Denver, there was an important disagreement between Justice Brennan's opinion for the Court and the separate opinions of Justices Powell and Douglas. The opinions of Douglas and Powell would have held that there is a national constitutional duty to attain integrated school systems and that the presence of a substantially segregated school district was

195. *See, e.g.*, Transcript of Oral Argument at 133, Students for Fair Admissions v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023) (No. 21-707); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 203-04, 223-35 (2010).

196. Brown, *supra* note 152, at 1581-82; *see* Guinier, *supra* note 61, at 101 (explaining how desegregation presented a threat to poor and working-class White people who feared downward social and economic mobility due to association with Black people).

197. *See* Guinier, *supra* note 61, at 101.

198. *See* Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game that They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 216-17 (2011).

199. 413 U.S. 189, 191 (1973).

200. 418 U.S. 717, 752-53 (1974).

201. For similar analyses of these cases, see Brown, *supra* note 152, at 1584-89.

202. *Keyes*, 413 U.S. at 198-202.

alone enough to establish a prima facie constitutional violation, the Court's opinion held that there was only a constitutional violation if the school boards or the state had intentionally and directly acted to segregate.[203]

Justices Douglas and Powell would have taken a much broader view of what could constitute state action to establish de jure segregation.[204] Douglas asserted that "[t]here is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettoes."[205] Similarly, he noted that where "a 'neighborhood' or 'geographical' unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to 'the elite,' leaving the 'undesirables' to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants."[206] In other words, the existence of racial housing segregation would be no excuse for schools to be segregated.

By requiring the *Keyes* plaintiffs to establish intentional discrimination, the Court made it more difficult and more expensive to remedy segregation.[207] Implicit in the adoption of this rigid intent standard is the belief that White America

---

203. Compare *id.* at 208-12 (explaining that the authorities of other segregated schools within a school system must demonstrate that "this segregated schooling is not also the result of intentionally segregative acts" and that, "if respondent . . . cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools"), *with id.* at 219-24 (Powell, J., concurring in part and dissenting in part) (arguing that "we should abandon a distinction [between de jure and de facto segregation] which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application" and explaining that he "would hold, quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities . . . are sufficiently responsible to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system" (footnote omitted)), *and id.* at 216 (opinion of Douglas, J.) (arguing that the Court should eliminate the difference between de jure and de facto segregation and explaining that "where the school district is racially mixed and the races are segregated in separate schools, where black teachers are assigned almost exclusively to black schools, where the school board closed existing schools located in fringe areas and built new schools in black areas and in distant white areas, where the school board continued the 'neighborhood' school policy at the elementary level, these actions constitute state action").

204. *See id.* at 216 (opinion of Douglas, J.) ("When a State forces, aids, or abets, or helps create a racial 'neighborhood,' it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action."); *id.* at 228 (Powell, J., concurring in part and dissenting in part) ("The history of state-imposed segregation is more widespread in our country than the *de jure/de facto* distinction has traditionally cared to recognize.").

205. *Id.* at 216 (opinion of Douglas, J.).

206. *Id.*

207. Brown, *supra* note 152, at 1585-86.

should not be "punished" by having to integrate if it did not intentionally discriminate against people of color to their disadvantage. This is the zero-sum perspective of racial equality at work. This perspective sees racial integration as something that only benefits Black people and burdens the White population. Such a burden may be tolerated if it can be proven that the state was consciously and directly responsible for segregation. However, because modern segregation, like most current manifestations of systemic racial inequality, is caused by the confluence of countless instances of discrimination that permeate society, finding such a causal connection is difficult. If the Court had fully appreciated the perpetually convergent interests in integration and understood that it would benefit "both white and black students, then judges would not be perceived to be coercing in-kind donations from whites for the benefit of blacks."[208] The other Justices might then have been more willing to follow Justices Powell and Douglas's lead by "push[ing] the distinction between de jure and de facto segregation" to make it easier to achieve integration.[209]

In *Milliken v. Bradley*, the Supreme Court considered, for the first time, an interdistrict desegregation plan.[210] The trial court found that the Detroit public-school system was unconstitutionally racially segregated, but because all of the plans to desegregate Detroit were inadequate, the court adopted a plan that encompassed Detroit as well as fifty-three of its surrounding school districts.[211] The Supreme Court held that it was improper to impose a multidistrict remedy for single-district de jure segregation in the absence of findings that the other included districts had committed constitutional violations.[212]

Once again, the Court's rejection of the multidistrict remedy flows from an implicit failure to appreciate the perpetually convergent interests and instead view integration as a net burden upon White America. The necessary context for this case is, of course, that Detroit's student population was nearly two-thirds Black, while the state's population was overwhelmingly White.[213] While the district court found de jure segregation in the Detroit public-school system, White flight into the suburbs compounded the problem. The Court's opinion laments what Justice White's dissent called the "administrative inconvenience" of having to include the White suburbs in the desegregation plan, as if integration would

208. *Id.* at 1587.

209. *Id.*

210. 418 U.S. 717, 717-18 (1974).

211. *Id.*

212. *Id.* at 718-20.

213. *Id.* at 739; Bradley v. Milliken, 338 F. Supp. 582, 586 (E.D. Mich. 1971) (calculating that the Detroit Public Schools' student population was 63.8% Black).

provide nothing of value to the racially isolated suburban White students.[214] The holding in *Milliken* facilitated segregation through White flight while allowing states to wash their hands of the issue. The presence of this loophole prompted Justice Douglas to write in dissent that the decision not only provided a way for states to nullify *Brown* but also to fail to live up to even the standard in *Plessy*. He explained that "[t]oday's decision . . . means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the black schools are not only 'separate' but 'inferior.'"[215]

While the Court was abandoning the pursuit of school integration in primary and secondary schools, it began to scrutinize affirmative action in higher education. In doing both, the Court curtailed Black plaintiffs' ability to rely on the Equal Protection Clause as a tool to end racial caste while handing the Clause over to White plaintiffs as a weapon by which to challenge efforts to promote racial equality. This ironic contortion of the Equal Protection Clause, as demonstrated in the affirmative-action cases, was facilitated by the zero-sum paradigm implicitly canonized in *Brown*. Ultimately, *Brown*'s asymmetric conception of racial harm lent itself to arguments for a "colorblind" Constitution which, in turn, works to legitimize White privilege and entrench racial inequality.[216] The next Section discusses the rise and fall of affirmative action in the context of the perpetually convergent interests and the legacy of *Brown*.

C. Affirmative Action and Amorphous Concepts of Injury

The Supreme Court's affirmative-action cases provide telling insight into the mechanics of both the interest-convergence thesis generally and the perpetually convergent-interest thesis specifically. In these cases, the Court's analyses could be read to turn on its perception of the extent to which affirmative action benefitted White people under a given justification. In *Bakke*, Justice Powell rejected affirmative-action policies that would seek to remedy societal racial inequality because of the zero-sum perspective, which placed such racial equality at odds with White interests. Yet, both *Bakke* and *Grutter* condoned affirmative-action policies that would seek to promote diversity on college campuses because that diversity could be seen as a benefit to White students as well as minorities. In relying on the diversity rationale, the Court actually employed the perpetually

---

214. *Milliken*, 418 U.S. at 763 (White, J., dissenting). Kevin Brown suggests that if the Court had recognized the White interests in integration as well as the Black, the Court's limiting principle for desegregation remedies would have been convenience/administrability rather than the boundary lines of urban school districts. Brown, *supra* note 152, at 1589.

215. *Milliken*, 418 U.S. at 761 (Douglas, J., dissenting).

216. *See* Onwuachi-Willig, *supra* note 29, at 364; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-4 (1999).

convergent interests outlined in this Note, though incompletely, to create a doctrine that endured for nearly fifty years.

The Court's most recent case, *SFFA*, effectively ended affirmative action.[217] The central justification offered for the decision is that courts cannot effectively apply strict scrutiny to diversity-based affirmative-action policies because the benefits of diversity are too "amorphous" to measure. This is a deeply troubling and unprincipled justification. It seems to contradict the many instances, especially in education law, where considerations of concepts at least as amorphous and abstract as the benefits of diversity are prominent or even drive the Court's decisions. It also presents a steep obstacle to both the application of the perpetually convergent interests and the pursuit of racial equality more generally, which depend on the recognition of so-called amorphous concepts for their vindication. Furthermore, while the opinion couched the decision in concerns that courts could not adequately scrutinize affirmative-action policies, it is evident that underlying the decision was the Court's view of affirmative action through a zero-sum lens and its related failure to appreciate the educational benefits of diversity to White people. In other words, the Court was led to dismantle affirmative action due to its failure to recognize the perpetually convergent interests at stake.

1. *The Diversity Rationale in* Bakke *and* Grutter

The series of affirmative-action cases began in 1978 with *Regents of the University of California v. Bakke*, in which Alan Bakke, a White man who was rejected twice from U.C. Davis's medical school, challenged the constitutionality of an admissions policy that reserved for minority students sixteen out of the hundred available spots.[218] The Supreme Court produced a fractured plurality decision with several separate opinions.[219] Justice Powell's opinion became the deciding one, despite no other Justices joining him.[220] While Powell condoned limited race-consciousness in college admissions, he rejected the idea that remedying past societal discrimination could be a justification for affirmative action.[221] He explained that "[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings

217. *But see infra* note 246.

218. 438 U.S. 265, 275-77 (1978).

219. *See generally id.* (featuring several separate opinions and concurrences from many of the Justices).

220. *Id.*

221. *Id.* at 310.

of constitutional or statutory violations."[222] "Without such findings . . . , it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."[223] The opinion went on to note that "the purpose of helping certain groups whom the faculty . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[224]

This reasoning relies on the asymmetric, zero-sum view of racial equality. Justice Powell did not see remedying societal racial inequality as helping anyone other than Black people. And because some White applicants might face some disadvantage because of race-conscious admissions, Powell, like the Court in *Keyes* and *Milliken*, would not condone such a regime that "punishes" White people without a governmental finding of direct intentional discrimination. However, when considering the perpetually convergent interests, it is difficult to see how the remedial theory of affirmative action necessarily punishes White people. To the extent that a more educated minority population serves to remedy racial inequality, it also serves White spiritual and democratic interests. Indeed, even a White applicant who is rejected from a college that relied on affirmative action would benefit from the policy in this way.

The fact that Justice Powell did not see remedial affirmative action as producing benefits for White people is even more apparent considering that the version of affirmative action that he ultimately approved was one that he recognized would also benefit White students. He found it permissible for a university to consider race in admissions so long as such consideration was appropriately tailored to serve the compelling interest of attaining the benefits of a diverse educational environment.[225] In making his point, Powell invoked *Sweatt v. Painter*, a pre-*Brown* decision that required the integration of the University of Texas Law School in part because the segregated schooling denied Black law students access

---

222. *Id.* at 307.

223. *Id.* at 308-09.

224. *Id.* at 310.

225. *Id.* at 311-13. While Justice Powell explained the type of affirmative-action policy that he would condone, he ultimately decided in *Bakke* that the university's policy of reserving sixteen seats for racial minorities demonstrated an unconstitutional "quota" system that was not narrowly tailored enough to the goal of diversity. *Id.* at 315, 319-20. To Powell, diversity meant more than just racial diversity; a university needed to consider all the ways individual applicants could contribute to the diversity of a particular class and not insulate different applicants from competition with each other on the basis of race. *Id.* at 315-20. Other classifications that could contribute to an applicant's diversity include their geographic origins, talents, economic background, and work experience. *Id.* at 316-17.

to the "interplay of ideas and exchange of views" with other students from a racial group that made up the vast majority of the state population and the legal profession.[226]

Like in *Brown*, the Court in *Sweatt* said nothing about how White students' education might also suffer from missing out on the exchange of ideas with Black people. However, Justice Powell did not repeat that mistake. His reliance on the benefits of diversity to justify affirmative action assumed that White students' education would be improved by exposure to larger populations of students from underrepresented racial groups rather than the other way around. This pushes back against the implicit assumption of Black inferiority that accompanied many of the Court's previous race and education-law cases. While Powell's opinion is rightly criticized for its rejection of the remedial theory of affirmative action, its unprecedented acknowledgement that White people actually benefit from being in community with Black people deserves appreciation.

After *Bakke*, schools were on notice that they had to craft their race-conscious admissions policies with care, but it was not clear what parts of the Court's plurality decision were binding. Justice Powell's perspective had received no support from any of the other Justices on the Court, but nonetheless, schools nationwide modeled their admissions policies according to the standard set in his opinion.[227] The goal of achieving the educational benefits associated with a diverse student body became the benchmark for alleged constitutionality. However, it was not until *Grutter v. Bollinger* was decided in 2003 that the Supreme Court would provide some clarity regarding the status of Powell's opinion in *Bakke*.[228]

In *Grutter*, a White Michigan resident named Barbara Grutter was denied admission to the University of Michigan Law School.[229] She subsequently sued, alleging that her application was rejected because race was a "predominant factor" in admissions decisions, which gave minorities a significant advantage.[230] The Court disagreed and upheld the Law School's admissions policy as constitutional. Justice O'Connor, writing for a five-justice majority, adopted Justice Powell's position that diversity is a compelling state interest that can justify the consideration of race in admissions.[231]

Grutter also expounded on what it considered to be the educational benefits of diversity that justified race-consciousness, and in doing so, invoked both the spiritual and democratic interests. With respect to the former, it held that racial

226. 339 U.S. 629, 634 (1950).

227. Grutter v. Bollinger, 539 U.S. 306, 323 (2003).

228. *Id.*

229. *Id.* at 316.

230. *Id.* at 317 (internal quotation marks omitted).

231. *Id.* at 325.

diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"[232] The Court also made several statements that demonstrate its view that meaningful racial integration in colleges significantly promotes democracy. First, the Court proclaimed that education is "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."[233] Second, it explained that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[234] And third, the Court concluded that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[235] *Grutter* even brought a sense of balance to the hallowed line in *Brown* declaring that "education . . . is the very foundation of good citizenship."[236] While *Brown* used that line to justify why Black students would benefit from attending schools with White students, giving rise to the assumption of Black inferiority, *Grutter* wielded it to conclude that there is a compelling democratic value for White students to be able to attend schools with more minority students.

Bakke and *Grutter* prove that judicial recognition of White spiritual and democratic interests in policies that ostensibly promote racial equality is more than just a theory. It was the law for over forty years. After *Grutter* was decided, Derrick Bell hailed the opinion as a "definitive example" of his traditional theory of interest convergence.[237] Yet, in my view, he claims too much. All of Bell's previous illustrations of how the interest-convergence thesis has manifested are concerned with how a White material self-interest circumstantially converged with an outcome productive of racial justice. Yet, under the diversity rationale, the White interest is generative of racial equality *itself* and perpetually exists. This is particularly evident in the part of Justice O'Connor's opinion that called for affirmative-action policies to have an end-point and predicted that they would not be needed in twenty-five years: "[T]he deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, *a measure taken in the*

---

232. *Id.* at 330 (quoting Grutter v. Bollinger, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001)).

233. *Id.* at 331 (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

234. *Id.* at 332.

235. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also Grutter*, 539 U.S. at 332 ("In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.").

236. *Grutter*, 539 U.S. at 331 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

237. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003).

service of the goal of equality itself."[238] The specific White interests stated were interests in breaking down racial stereotypes, promoting understanding, and providing minorities with a pathway to leadership because doing so is inherently spiritually good for Whites and beneficial for the nation's democracy.[239] To be sure, *Grutter* also concluded that a diverse school "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals," which does fit squarely into Bell's traditional framework that is motivated by material self-interest.[240] But to claim that *Grutter* is a definitive example of Bell's framework is to ignore the many statements in the opinion that ground the decision in appeals to the spiritual and democratic interests and to equality itself. Rather, *Grutter* is only an example of Bell's traditional theory to the extent that the Court's motivation for promoting racial equality is still serving a White interest. But this White interest is categorically different from anything that Bell had previously been willing to employ in his theory. It is a perpetual interest.

While I do wish to emphasize how profound the Court's recognition of the White perpetually convergent interests here is, the diversity rationale is far from a satisfying model. A remedial theory of affirmative action, meaning an affirmative-action policy intended to remedy societal racial inequality, offers a more robust application of the perpetually convergent interests. First, unlike the diversity rationale, which only offers benefits to the individual students who attend a particular university and are exposed to that diversity, the remedial theory benefits all of society. Indeed, to the extent that a remedial theory of affirmative action promotes societal racial equality, even a rejected White applicant benefits spiritually and democratically.

Furthermore, the diversity rationale risks abandoning the Black interests at stake when it comes to educational attainment. As the *SFFA* brief challenging diversity as a compelling governmental interest accurately noted, "*Grutter* thus treats underrepresented minorities not as the beneficiaries of racial preferences,

---

238. *Grutter*, 539 U.S. at 342 (emphasis added) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989) (plurality opinion)). Justice Kavanaugh's concurrence in *SFFA* mischaracterizes the twenty-five-year prediction by Justice O'Connor as a precedential limitation on the duration of affirmative action rather than simply being aspirational in nature. *See SFFA*, 600 U.S. 181, 315-17 (Kavanaugh, J., concurring); *id.* at 369-70 (Sotomayor, J., dissenting) (refuting Justice Kavanaugh). This is especially curious because even if O'Connor's prediction was a sunset provision, it was contingent on attaining the goal of societal racial equality, which clearly has not occurred.

239. *Grutter*, 539 U.S. at 328-32.

240. *Id.* at 330 (citation omitted).

but as *instruments* to provide educational benefits for other, mostly white students."[241] Affirmative action based on a remedial theory is a much more balanced approach because racial equality is its explicit aim, and equality, as this Note has repeatedly argued, benefits everyone. This is not to say that the diversity rationale is without merit. Indeed, the benefits of diversity are intertwined in many ways with the pursuit of equality, and the two theories need not be mutually exclusive in their application. However, affirmative action justified solely on the basis of diversity treats minorities only as a means to an end, and any benefit to minorities in the form of educational opportunity is simply incidental. The solution, though, is not the elimination of affirmative action; it is the vindication of the remedial justification for it.

For a roadmap of what that could look like, we can turn to Justice Brennan's opinion in *Bakke*. Brennan's opinion, which was one vote shy of winning a majority, would have upheld U.C. Davis's race-based admissions program in full. It argued that "Davis' articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs" and that "racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions."[242] In other words, if Black and other minority students are disproportionately not qualifying for admission under race-neutral procedures because of the effects of past racial discrimination, schools can take into account that disadvantage when evaluating applicants so as to not compound upon that previous injustice. Five Justices seemed to acknowledge this possibility, because Justice Powell's opinion noted in footnote forty-three that "[r]acial classifications in admissions conceivably could serve a fifth purpose . . . : fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."[243] He stated that if "race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that [affirmative action is] no 'preference' at all."[244] Thus, through this lens, consideration of race in admissions is "not simply advanc[ing] less qualified applicants;

---

241. Brief for Petitioner at 53-54, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll. (*SFFA*), 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707). Through this lens, minority students are admitted for their ability to contribute to the diverse experiences of their White classmates and improve their school's standing among their peer institutions.

242. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

243. *Id.* at 306 n.43 (opinion of Powell, J.).

244. *Id.* While this comment arguably reads as dicta in Justice Powell's opinion, it is one of the only contentions that held a five-Justice majority. Considering the fact that *Grutter* refused to

rather, it compensates applicants, who it is uncontested are fully qualified to study . . . , for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination."[245]

In some ways, *Bakke* and *Grutter*'s consideration of the perpetually convergent interests can be seen as the flip side of *Brown*. Both sets of cases were concerned with the educational impact of racially discriminatory policies on students. Both sets of cases created landmark decisions that were considered to promote racial equality. And both sets of cases were flawed in that they did not fully vindicate the perpetually convergent interests in racial equality. *Brown*'s holding was based only on the consideration of segregation's *harm* to *Black* students, and *Bakke* and *Grutter*'s holdings were based only on an admissions policy's *benefit* to *White* students. Full application of the perpetually convergent interests requires the recognition of the full extent to which racial equality benefits everyone and inequality harms everyone. If *Bakke* and *Grutter* had fully adopted the perpetually convergent interests, affirmative action would have been on much more solid ground than it was when the Court took up *SFFA*.

Nonetheless, the diversity rationale represented a profound, though limited, rebuke of the dominant analytical paradigm, which repeatedly refused to meaningfully recognize that White people benefit from integration or efforts to promote racial equality. This feature of affirmative action has not been sufficiently appreciated, and thus, its loss after *SFFA* is not being adequately mourned. The next Section analyzes the *SFFA* decision in the context of the perpetually convergent interests.

2. Students for Fair Admissions v. Harvard

The 2023 decision in *SFFA* effectively ended affirmative action.[246] By doing so, it also rejected a nearly fifty-year-old doctrine that represented the Court's

---

weigh in on which aspects of the *Bakke* plurality are controlling, there is a good argument to be made that this conclusion should be given more weight.

245. *Id.* at 375-76 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

246. It should be noted that at the time of writing this Note, it is unclear how schools and lower courts will react to the decision. While having admissions practices based on race *qua* race is clearly out of bounds, it is unclear to what extent such a prohibition will actually result in any significant change in admissions outcomes. *SFFA* left intact a school's freedom to consider an applicant's essay discussing "how race affected his or her life, be it through discrimination, inspiration, or otherwise," yet advised schools that they may not "simply establish through application essays or other means the regime we hold unlawful today." *SFFA*, 600 U.S. at 230. To the extent that there are sufficient underrepresented minority applicants who will write about their racial background in a meaningful way, many schools may still ultimately end up

only significant recognition of the perpetually convergent interests. One of the main issues that the majority had with the diversity rationale was that the benefits of diversity, which schools pursued through affirmative action, could not be meaningfully subjected to judicial review because they were too "amorphous" to measure.[247] By taking aim at "amorphous" concepts generally, the opinion advances a theory that is contrary to precedent, that lacks a sufficient limiting principle to constrain its application, and that ignores the reality of racial inequality. Most concerningly, this aspect of the opinion could be used to frustrate future efforts to apply the perpetually convergent interests or to remedy systemic racial inequality.

SFFA consists of two consolidated cases, one against Harvard College and one against the University of North Carolina.[248] The issue for the Court was again whether affirmative action, under the diversity rationale, violates the Equal Protection Clause. In other words, this case was an attempt to relitigate *Grutter*. The Court had already done so in the 2016 case of *Fisher v. University of Texas* (*Fisher II*).[249] *Fisher II* upheld affirmative action, but the challengers in that case did not give up. They formed the organization Students for Fair Admissions, waited until there was some turnover on the Court, and tried again.[250] This time around, there were two notable differences. First, the challengers' claims included allegations that affirmative action harmed Asian applicants rather than only White applicants.[251] Second, and most importantly, a 6-3 conservative majority had emerged on the Court. With this majority, new ears were once again ready to hear old arguments. Indeed, most of the lines upon which the majority opinion was drawn had already been settled in *Grutter* and *Fisher II*. However,

---

with similar demographic breakdowns using means that the Court currently considers constitutional. I do not know how a court might be able to discern objectively whether a school is disguising an unlawful use of racial preference through the incredibly subjective and fact-intensive evaluation of applicants' essays. Perhaps a future wave of litigation will see the revival of a form of the now-ineffectual disparate-impact theory wielded against minorities.

247. *Id.* at 226.

248. *Id.* at 181.

249. 579 U.S. 365 (2016).

250. Cameron Langford, *Abigail Fisher Renews Push Against Affirmative Action Before the Fifth Circuit*, COURTHOUSE NEWS (Apr. 5, 2022), https://www.courthousenews.com/abigail-fisher-renews-push-against-affirmative-action-before-the-fifth-circuit [https://perma.cc/QLW7-4YWX].

251. Students for Fair Admissions. v. President & Fellows of Harv. Coll., 261 F. Supp. 3d 99, 103 (D. Mass. 2017) ("SFFA alleges that Harvard's policies invidiously discriminate against Asian-American applicants in particular."). While there are some colorable arguments that the college-admissions process demonstrated some bias against Asian applicants, the issue of anti-Asian discrimination felt like little more than a rhetorical tool for the conservative Justices who would have reached the same conclusions regardless.

despite rather transparently contradicting both *Grutter*'s reasoning and its holding, the *SFFA* majority curiously went to great lengths to appear faithful to *Grutter* and the rest of the Equal Protection Clause canon.

The Court starts with its attack on the "amorphous" nature of the benefits of diversity. The two universities in the case, which had clearly shaped their admissions programs to satisfy *Grutter*, identified essentially the same educational benefits of diversity which were lauded in that case.[252] While the Court does not outright reject *Grutter*'s holding that the benefits of diversity are compelling interests, it notably refers to these benefits as "commendable goals" rather than as compelling interests.[253] Regardless, the Court rendered the compelling-interest inquiry irrelevant by contending that it is impossible for a court to measure these benefits/goals even if they were compelling. To prove its point, the opinion simply asks a series of rhetorical questions: "How is a court to know whether leaders have been adequately 'train[ed]'; whether the exchange of ideas is 'robust'; or whether 'new knowledge' is being developed? . . . [H]ow is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?"[254]

These are reasonable questions to ask. Indeed, one might argue that despite the existence of affirmative-action policies since *Grutter*, colleges have not been admitting underrepresented students in high enough numbers to meaningfully achieve the educational benefits which they seek, such as breaking down racial stereotypes and promoting cross-racial understanding. However, the problem with using this measurability argument to invalidate affirmative action is that the Court had already considered these issues and did not find them to be insurmountable. Justice Powell acknowledged that diversity's educational benefits were difficult to quantify originally in *Bakke*:

> In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student

---

252. *See SFFA*, 600 U.S. at 214 ("Harvard identifies the following educational benefits that it is pursuing: (1) 'training future leaders in the public and private sectors'; (2) preparing graduates to 'adapt to an increasingly pluralistic society'; (3) 'better educating its students through diversity'; and (4) 'producing new knowledge stemming from diverse outlooks.' UNC points to similar benefits, namely, '(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.'" (citations omitted)).

253. *Id.*

254. *Id.* (citations omitted).

> workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.[255]

Nonetheless, Powell still found the diversity rationale to be amenable to the application of strict scrutiny. This is telling since the "amorphous" label is also rooted in Powell's opinion in *Bakke*. When he rejected the remedial theory of affirmative action, he did so in part because he characterized the goal of remedying the effects of societal discrimination as an effort to address "an amorphous concept of injury that may be ageless in its reach into the past."[256] Powell parroted this language in *Wygant v. Jackson Board of Education*, a 5-4 decision holding unconstitutional a school policy seeking to maintain a certain proportion of minority teachers during a period of layoffs.[257] The lesson here is that Powell's countenance of the diversity rationale indicates that he would have disagreed with the *SFFA* majority's conclusion that the educational benefits of diversity are too amorphous to measure.

The *SFFA* majority is further contradicted by precedent. Of course, *Grutter* itself did not find this measurability concern to be a barrier. And in *Fisher II*, the Court seemed to explicitly foreclose the *SFFA* majority's theory that the benefits of diversity are categorically incapable of measurement. It acknowledged that "asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or *amorphous*—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."[258] However, the Court nonetheless held that the affirmative-action program satisfied this requirement. The university had submitted an extensive record outlining its specific diversity-based goals and statistical and anecdotal evidence demonstrating how race-neutral means were insufficient to achieve these goals.[259] These cases make clear that the *SFFA* majority, far from faithfully applying precedent, directly contradicted precedent in expounding its theory.

Yet, the problematic nature of the majority's reasoning is deeper still. As Justice Sotomayor's dissent highlights, the Court has often "recognized as compelling plenty of interests that are equally or more amorphous."[260] Among other examples, she notes a couple of majority opinions authored by Chief Justice Roberts himself. First, there is *Williams-Yulee v. Florida Bar*, which recognized

---

255. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 n.48 (1978).

256. *Id.* at 307.

257. 476 U.S. 267, 276 (1986).

258. *Fisher II*, 579 U.S. 365, 366-67 (2016) (emphasis added).

259. *Id.* at 383-84.

260. *SFFA*, 600 U.S. 181, 358 (2023) (Sotomayor, J., dissenting).

the "'intangible' interest in preserving 'public confidence in judicial integrity,' an interest that 'does not easily reduce to precise definition.'"[261] Second, there is *Ramirez v. Collier*, which held that "'[m]aintaining solemnity and decorum in the execution chamber' is a 'compelling' interest."[262] Beyond the general examples that Sotomayor provided, as noted early in this Part, education law is uniquely and significantly concerned with what would be considered "amorphous concepts." The entire *Brown* decision, which the *SFFA* majority desperately seeks the mantle of, was premised on the notion that segregation made Black students feel inferior.[263] Such feelings are surely worthy of the label "amorphous." *Brown* further noted the importance of "intangible considerations" like being able to "'engage in discussions and exchange views with other students.'"[264] Indeed, in *Sweatt*, it was precisely the "qualities which are incapable of objective measurement but which make for greatness in a law school" that drove the Court to require the integration of the University of Texas Law School.[265]

That these concepts and ideals, which are sought after in part because of their amorphous nature, can somehow now provide justification for undermining policies that serve to resist racial subjugation is a cruel irony. Furthermore, the majority offers no principle for how courts are to discern between amorphous concepts that they can rely on and those that they cannot. While the majority presents its reasoning as a noble adherence to a principle that constrains their bias and promotes consistency, the above demonstrates how that is a superficial characterization. The majority contradicts precedent and advances a theory with no limiting principle in a way that makes clear that, despite its "lip service to . . . 'commendable' and 'worthy' racial diversity goals," "[r]acial integration in higher education is not sufficiently important to them."[266]

The majority's categorical rejection of amorphous concepts as sufficient bases for race-conscious policies might present a more significant barrier to racial equality than many expect. This is because modern societal racial inequality is not overwhelmingly the result of any particular direct and overt policies of discrimination. It is systemic, implicit, and subconscious and results from a confluence of countless sources from all corners of society that have compounded and adapted over time. While a tidy causal chain has been obscured, it should be

261. *Id.* (quoting Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447, 454 (2015)).

262. *Id.* (quoting Ramirez v. Collier, 595 U.S. 411, 432 (2022)).

263. *See supra* Section III.B.1.

264. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (quoting McLaurin v. Okla. State Regents, 339 U.S. 637, 641 (1950)).

265. *Fisher II*, 579 U.S. 365, 388 (2016) (quoting Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

266. *SFFA*, 600 U.S. at 358 (Sotomayor, J., dissenting) (citation omitted).

beyond debate that modern racial inequality is an injustice that is a part of the enduring legacy of slavery. The Court resists recognizing this legacy by labelling it too "amorphous." However, in doing so, the Court abdicates its responsibility to realize equal justice under the law. A judiciary that cannot appreciate the problem cannot hope to fix it.

As explained earlier in this Note, the "amorphous" label is rooted in Justice Powell's initial rejection of state action that seeks to remedy societal discrimination without tying it to direct and intentional discriminatory conduct. Despite Powell's position, he did not deny the reality that much of societal racial inequality is a downstream effect of past direct and intentional discrimination that has become obscured over time.[267] However, because it is impossible to determine precisely to what extent some particular racial disparity is the result of such discrimination, Powell was faced with a choice between two options: either allow a racial remedy that will potentially be somewhat overinclusive and "work against innocent [White] people," or deny a racial remedy altogether despite knowing that many people have been harmed due to "serious racial discrimination."[268] Powell chose the latter option, a value judgment that favors the constitutional rights of White people over Black. Evident in Powell's calculus is again this paradigm that assumes that White people are only punished by racial justice rather than also benefitted by it.

Justice Powell's reasoning—evidencing a failure to recognize the perpetually convergent interests—has stood the test of time in the Roberts Court. We see the "amorphous" label arise again in *Parents Involved in Community Schools v. Seattle School District No. 1*, which was a hybrid case presenting issues related both to school integration and affirmative action.[269] The Seattle school district allowed students to apply to any high school they wished to attend, but when a school received more interest than its capacity would allow, the district employed tiebreakers to sort out who would be able to attend the school.[270] In an attempt to maintain proportional racial representation in its schools, one of the tiebreakers

267. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) ("No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and overexpansive.").

268. *Id.*

269. 551 U.S. 701, 711 (2007). Justice Breyer's dissent in this case relied heavily on the democratic perpetually convergent interest to justify his defense of a school's voluntary efforts to obtain greater integration in primary and secondary schools. *Id.* at 838-40 (Breyer, J., dissenting). Justice Thomas explicitly rejected the democratic interest here: "no democratic element can support the integration interest." *Id.* at 770 (Thomas, J., concurring).

270. *Id.* at 711-13.

was a student's race.[271] The school district argued, in part, that it was seeking to promote integration, but Chief Justice Roberts, writing for a plurality, rejected this justification.[272]

Because no court had ever recognized that Seattle maintained de jure school segregation, Chief Justice Roberts saw no basis for a remedial integration plan.[273] Justice Thomas concurred that "the school boards have no interest in remedying the sundry consequences of prior segregation unrelated to schooling, such as 'housing patterns, employment practices, economic conditions, and social attitudes.'"[274] Thomas explained that "[g]eneral claims that past school segregation affected such varied societal trends are 'too amorphous a basis for imposing a racially classified remedy.'"[275] Thus, he seemed to wield the "amorphous" label in a similar way to Justice Powell. Yet, his reluctance to condone remedial measures based on societal racial inequality might be motivated less by the issues of causality and judicial restraint than his serious doubts that present segregation and, presumptively, societal racial inequality are even the result of past state-sponsored discrimination. Thomas noted that "the further we get from the era of state sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation."[276] Thomas also expressed a doubt that state-sanctioned integration is even beneficial in a way that echoed the *Roberts v. City of Boston* court's justification for maintaining segregation, noting that "it is far from apparent that coerced racial mixing has any educational benefits" and that "it is unclear whether increased interracial contact improves racial attitudes and relations."[277]

Justice Kennedy's opinion in *Parents Involved* pushed back on Justice Powell's and Justice Thomas's "amorphous" label. While he ultimately would not have condoned such direct remedial measures in that case, he challenged Chief Justice Roberts's adherence to a strict formalism that would foreclose race-conscious policies despite evidence of systemic racial inequality and de facto segregation.

---

271. *Id.*

272. *Id.* at 725-33 (plurality opinion).

273. *Id.* at 736-37.

274. *Id.* at 760 (Thomas, J., concurring).

275. *Id.*

276. *Id.* at 756. Justice Thomas curiously omits any suggestion of what other than racial discrimination might produce racial disparities.

277. *Id.* at 761, 769; *cf.* Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209-10 (1849) ("This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted.").

He noted that "[t]he distinction between government and private action, furthermore, can be *amorphous* both as a historical matter and as a matter of present-day finding of fact."[278] This suggests that the inability to directly trace the particular historical instances of racial discrimination to the present-day inequality should not necessarily lead to the presumption that the inequality was not the result of state action, foreclosing remedial action.

Nonetheless, Chief Justice Roberts expanded the scope of the "amorphous" concept argument in *SFFA*. By holding that the educational benefits of diversity are too amorphous to withstand constitutional scrutiny, the Court applied, for the first time, the amorphous critique to a race-conscious policy other than one aimed at remedying general societal racial inequality. In doing so, it invalidated the spiritual and democratic interests as applied to the diversity rationale. Rather than serving as a precedential building block for the perpetually convergent interests, *Grutter* is now only a proof of concept for the theory. And *SFFA* is a barrier to their future application.

However, there is hope for the perpetually convergent interests and racial equality yet. A primary goal for advocates should be to constrain the majority's reasoning here to the facts of this case. A limiting principle must surely be deployed to prevent the majority's reasoning from expanding to other contexts. Indeed, if we are ever to become a nation of equals, the judiciary must begin running toward amorphous concepts of injury rather than away. After all, justice is rarely served through an adherence to rigid mathematical formalism. Justice itself is an amorphous concept and requires amorphous ends to achieve it. The perpetually convergent interests provide a practical means to do so, and the next Part demonstrates how they are subtle and versatile enough to apply despite the *SFFA* decision, beyond the confines of affirmative action, education law, or even law itself.

IV. BEYOND EDUCATION LAW

While *SFFA* might have extinguished an entire doctrine built, to some extent, upon the perpetually convergent interests, the interests still offer significant promise in the fight for equality. Indeed, after *SFFA*, it is even more important that people adopt the paradigm offered by the perpetually convergent-interest framework. This Part illustrates how the interests can be deployed in subtle but meaningful ways and how they are relevant beyond the education-law context.

As a preliminary reflection on how *SFFA* affects the extent to which the judiciary is a productive venue to vindicate the perpetually convergent interests, it

278. *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

should be noted that the educational benefits of diversity are just one particular manifestation of the interests. The *SFFA* Court's apparent rejection of the benefits of diversity as sufficient to justify affirmative action does not mean that all potential invocations of the perpetually convergent interests will be invalidated as too amorphous for courts to consider. Indeed, because the Court did not offer a limiting principle to guide lower courts in how to determine when an interest is too amorphous to accommodate judicial scrutiny, the lower courts will have to sort the issue out on their own, and there will be opportunities to confine the Court's reasoning to the facts of *SFFA*. Accordingly, it is important that people understand how the perpetually convergent interests are implicated in the coming litigation and fight for courts to recognize the interests' merits.

Furthermore, many considerations of the perpetually convergent interests would not even implicate *SFFA*'s distaste for amorphous concepts because the interests need not be applied as a central feature of some landmark doctrinal framework like the diversity rationale. Rather, applying the perpetually convergent interests simply requires proponents of equality to consider the ways in which racial injustice might harm White spiritual and democratic interests and how racial justice might help them. This can be done in subtle and modest ways, like if the Court in *Brown* had simply included one paragraph explaining how segregation's harm to White as well as Black students justified desegregation. Similarly, subtle considerations of the perpetually convergent-interest framework can support racial equality beyond the context of education. Consider the following analyses of two cases that concern housing and family law. Like with education, a person's housing and familial circumstances are profoundly important to one's development both spiritually and civically, and racial disparities in either context have significant effects on the status of societal racial equality.

First, consider the potential application of the perpetually convergent interests to the housing context. Foundational precedent demonstrating how the Supreme Court has explicitly recognized White interests in housing equality already exists. In *Trafficante v. Metropolitan Life Insurance Co.*, the Court considered an allegation that the owner of a large apartment complex in San Francisco was discriminating against people of color in the rental of apartments.[279] The complaint alleged that discrimination was carried out by "making it known to [non-White applicants] that they would not be welcome at [the apartment complex], manipulating the waiting list for apartments, delaying action on [non-White] applications, using discriminatory acceptance standards, and the like."[280]

The two plaintiffs, who sued under the Civil Rights Act of 1968, were current tenants of the apartments. And notably, while one of the plaintiffs was Black, the

279. 409 U.S. 205, 206-08 (1972).

280. *Id.* at 208.

other was White. The question for the Supreme Court was whether these tenants had standing to sue, considering that they themselves were not denied housing. The plaintiffs claimed that they were harmed because

> (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto."[281]

In other words, the plaintiffs complained that discrimination against non-White applicants caused them to suffer a "loss of important benefits from interracial associations."[282] In interpreting whether the Civil Rights Act of 1968 granted standing to the plaintiffs, the Court looked to the Act's legislative history and noted that "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."[283] Ultimately, the Court unanimously held that the plaintiffs had standing, concluding that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is . . . 'the whole community.'"[284]

Though the opinion in *Trafficante* noted that one plaintiff was White and one was Black as if the information was material to the case, it did not distinguish between either plaintiff's standing to sue. Thus, this opinion both acknowledged the legal sufficiency of a White interest in the intangible benefits of integration and also implied that both White and Black people are similarly, if not equally, harmed by the denial of integrated housing. The plaintiffs' interests in integrated housing do not map perfectly onto the perpetually convergent interests identified in this Note, but they can certainly be seen through that lens. And their vindication shows that there is promising precedent to support the consideration of perpetually convergent interests in antidiscrimination law outside of education. The application of these interests to the housing context is particularly exciting,

281. *Id.* at 208.

282. *Id.* at 209-10.

283. *Id.* at 210.

284. *Id.* at 211 (citation omitted).

as racial disparities in housing is a major issue fueling racial inequality both directly and through its impact on other areas, such as school segregation, wealth development, and food deserts.[285]

While having precedent or an entire legal doctrine to lean on when invoking the perpetually convergent interests is helpful, it is far from necessary. To further demonstrate how subtle considerations of the perpetually convergent interests can promote racial equality without an established doctrinal framework and in areas of law beyond education, I offer below a curious retheorization of *Palmore v. Sidoti*.[286]

In 1980, Linda Palmore and Anthony Sidoti, a White couple, got divorced, and Linda obtained custody of their three-year-old daughter, Melanie.[287] A year later, Anthony sought custody, citing "changed conditions."[288] The changed condition that the Florida court found to be determinative was Linda's interracial relationship.[289] Following the divorce, Linda eventually began cohabiting with a Black man named Clarence Palmore, Jr., whom she later married.[290] Despite finding that there was "no issue as to either [parent's] devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent,"[291] the court still decided to take the child away from her mother and award custody to the father.[292] In reaching this conclusion, the court relied on its counselor's finding that "[t]he wife . . . has chosen for herself and for her child, a lifestyle unacceptable to the father *and to society*" and that "[t]he child . . . is, or at school age will be, subject to environmental pressures not of choice."[293] Thus, the court reasoned that due to the "social stigmatization [associated with interracial relationships] that [wa]s sure to come" if Melanie stayed with her mother,

---

285. *See* Anurima Bhargava, The Interdependence of Housing and School Segregation 1 (2017) (unpublished manuscript) (on file with author); Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation—How America's Housing System Undermines Wealth Building in Communities of Color*, CTR. FOR AM. PROGRESS 6-8 (Aug. 2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/08/StructuralRacismHousing.pdf [https://perma.cc/P857-ZMUD]; Min Li & Faxi Yuan, *Historical Redlining and Food Environments: A Study of 102 Urban Areas in the United States*, HEALTH & PLACE, May 2022, at 1, 8.

286. 466 U.S. 429 (1984).

287. *Id.* at 430.

288. *Id.*

289. *Id.* at 431.

290. *Id.* at 430.

291. *Id.*

292. *Id.* at 431.

293. *Id.* at 430-31.

it was in the child's best interests to award custody to the father.[294] Linda appealed, and when the case reached the U.S. Supreme Court in 1984, it was unanimously reversed on Equal Protection Clause grounds.[295]

The Court's treatment of the issue was satisfactory. It held that regardless of the real threat of stigmatization that a child being raised by interracial parents was likely to experience from the large parts of society which disapproved of such relationships, such private biases cannot justify denying someone's constitutional rights.[296] However, consider another way that the Court could have resolved the case that would have relied on a consideration of the perpetually convergent interests.

The custody determination at the trial court level turned on a question of what was in Melanie's "best interest."[297] Surely, whether a child would be subject to daily harassment and ridicule is at least "relevant" to understanding what her best interests are. Just as the safety of a potential custodial parent's neighborhood or the parent's access to educational and childcare resources are relevant considerations that bear on the question of a child's best interests (even if any disadvantage that derives from such realities is not the fault of the parent), so too are the disadvantages associated with being subjected to societal racial prejudices. Just because recognizing the potential harm to Melanie requires an unsavory consideration of race, ignoring the harm does not render it null. Thus, the question would become whether considering race in the context of determining where a child would best be raised is constitutional.

While the Court in *Palmore* did not apply the now-standard strict-scrutiny test, doing so retrospectively offers another way to justify the Court's decision and presents an opportunity to recognize a subtle but meaningful application of the perpetually convergent interests. The first question in strict-scrutiny analysis is whether pursuing the best interest of a child in a custody dispute is a compelling interest. It seems without question that the welfare of a child that cannot legally be responsible for themselves is a compelling interest. Next, we must ask whether the state action is narrowly tailored to the achievement of that interest. Here is where the perpetually convergent interests are relevant. The state action in question could be understood as the lower court's consideration of the societal stigma to a White child of having a Black stepfather. Thus, we ask whether that consideration of societal racial biases was narrowly tailored to discern the best interest of Melanie. The answer is no. As in *Brown*, the trial court's consideration

294. *Id.* at 431 (emphasis omitted).

295. *Id.* at 431-34.

296. *Id.* Though the Court does not say it explicitly, the constitutional right at issue was presumably Linda's right to raise her child.

297. *Id.* at 433.

of race was asymmetric, focusing only on the harms associated with Blackness, which again implicitly assumes Black inferiority. Yet, if the lower court in *Palmore* had also considered the *benefits* to Melanie of having a Black stepfather, its consideration of the effects of race need not have resulted in an unjust stripping of custody from her mother for being in an interracial relationship.

While the lower court may have appropriately recognized the hardship that Melanie could face living in an interracial family, it saw *only* the potential for negative outcomes resulting from being raised by a Black stepfather. But there are important benefits that arguably outweigh any detriments. Like schools, and arguably even more so, the family is an incredibly influential institution in a child's moral and cultural development. Thus, the perpetually convergent interests mentioned in the discussions of *Brown* and *Grutter* regarding the value of attending racially integrated schools also apply to the value of having a multiracial family. Just as school children would benefit from integrated schools, so too would young Melanie have benefitted from having a Black stepfather, especially in comparison to living in an all-White family with her biological father, whose contempt for Linda's relationship with a Black man evinces a racial prejudice that would likely leave an impression on Melanie. Being raised in a multiracial family might have provided Melanie with an opportunity to deeply understand someone with a racial background different from her own and to develop mutual respect for their equality. It would have also contributed to cross-cultural understanding and the challenging of stereotypes. To some extent, even the societal stigmatization that was seen solely as a harm by the trial court could have served to develop Melanie into a person who pushes back against racial inequality and who is therefore better suited to contribute to democracy.

If the lower court had seen the case through the lens of perpetually convergent interests, it could have realized that only considering the negative possibilities of having a Black stepfather was not narrowly tailored to the pursuit of Melanie's best interests. Furthermore, if the court had not conducted such a racially asymmetric evaluation, the interests of continuity and stability associated with Linda maintaining custody of her daughter might have been given the significance that they were due.[298] At the time of the case, Melanie had lived with her mother since birth, and her mother had already maintained sole custody after

298. In *Palmore*, the Women's Legal Defense Fund and the Now Legal Defense and Education Fund argued as amici that custodial continuity and stability should have been dispositive where, as here, both parents were deemed to be equally capable of raising their daughter. Brief Amici Curiae of the Women's Legal Def. Fund & the Now Legal Defense and Educ. Fund in Support of Petitioners at 10-14, *Palmore*, 466 U.S. 429 (No. 82-1734).

the divorce for about a year.[299] Even if the benefits of living in an interracial family did not overwhelmingly outweigh the potentially negative social pressures, parental continuity should surely have tipped the scales in Linda's favor.[300]

I do not present this retheorization of *Palmore* as an example of how I believe that case should necessarily or even ideally have been resolved.[301] Rather, it simply demonstrates how modest considerations of White perpetually convergent interests will tend to produce different judicial reasoning than the traditional asymmetric view of racial harm, as well as challenge the current paradigm that affirms Black inferiority and assumes racial equality is a zero-sum game.

CONCLUSION

In *The Fire Next Time*, James Baldwin wrote that "[i]n short, we, the black and the white, deeply need each other here if we are really to become a nation—if we are really, that is, to achieve our identity, our maturity, as men and women."[302] Yet, the discourse on racial equality that dominates both the law and society more generally fails to recognize this shared journey. It only considers how racial discrimination harms those who are discriminated against rather than how it harms all of society. Such an asymmetric perspective of racial harm fails to produce meaningful and sustained progress toward racial equality, and it often ironically assumes and affirms Black inferiority.

This Note has dedicated many pages to discussing how perpetually convergent interests might be utilized in courts by judges and lawyers to effectuate racial equality in their cases. This focus assumed that it might be easier for the ideas presented to gain traction in courts. Courts are necessarily interested in and tasked with pursuing lofty ideals of equality, democracy, and justice in a way that constrains improper biases that more easily permeate the more political branches and public discourse. Yet, this judicial emphasis was not intended to minimize the imperative of incorporating the perpetually convergent-interest framework into broader social movements. Especially in light of *SFFA*'s recent assault on the perpetually convergent interests, it is imperative that the interests be pursued

---

299. *Id.* at 10.

300. In fact, parental continuity ended up justifying a Texas court's decision to allow Melanie to remain in her father's custody even after the decision in *Palmore*. By the time that the Supreme Court had decided the case, Melanie had been living with her father for two years, and Linda ultimately did not regain custody. *Palmore*, 466 U.S. at 430-31.

301. Perhaps a better mode of analysis for this case would have been through a due-process challenge, premised on the marriage rights protected in *Loving v. Virginia*, 388 U.S. 1 (1967). There might even be another way to think about a claim under the Equal Protection Clause, but it is clear from the opinion that the Court did not provide a detailed rationale for its decision.

302. BALDWIN, *supra* note 1, at 111.

within *and* without the courts. Accordingly, proponents of racial equality must work to change public discourse, whether by simply acknowledging White spiritual and democratic interests where relevant in one's everyday life, or through community- or political-advocacy efforts applying the interests to the rhetoric around particular policy goals.

The perpetually convergent-interest framework offers both an idealistic and practical path toward racial equality that reflects the reality that we all have a deep inherent interest in an egalitarian society. This Note attempts to raise this paradigm out of obscurity so that its merits may be tested. It is incumbent upon us all to realize the perpetually convergent interests in racial equality. To do so only requires acknowledging that attaining such equality also entails "saving the White man's soul."