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DO THE RIGHT THING: UNDERSTANDING THE INTEREST-CONVERGENCE THESIS

Stephen M. Feldman*

INTRODUCTION

Professor Derrick Bell was one of the most influential constitutional scholars of the last fifty years. He helped create a genre of legal scholarship—critical race theory—and pioneered storytelling as a scholarly method. His insights spurred civil rights scholars as well as thinkers in other fields. One of his most important legacies—he died on October 5, 2011—is the interest-convergence thesis, which asserts that, historically, African Americans gained social justice primarily when their interests converged with the interests of the white majority.¹ Many scholars not only accept the validity of Bell’s thesis but also extend its application to other contexts.²

In a recently published article, *Rethinking the Interest-Convergence Thesis*, Professor Justin Driver calls this legacy into question.³ After acknowledging the prominence of Bell’s scholarship in general, and the significance of the interest-convergence thesis in particular, Driver vigorously criticizes the thesis. He argues that it suffers from “four analytical flaws”:⁴

First, the theory’s overly broad conceptualization of “black interests” and “white interests” obscures the intensely contested disputes regarding what those terms actually mean. Second, the interest-convergence theory incorrectly suggests that the racial status of blacks and whites over the

* Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming. I thank Richard Delgado, Sam Kalen, and Mark Tushnet for their comments on earlier drafts. I also would like to express my gratitude to the late Derrick Bell, an inspirational teacher and provocative scholar. In law school, I took his course, Constitutional Law and Minority Issues, and it still influences my teaching and scholarship.

¹ Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter *Dilemma*] (link).

² Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1484 (2005) (link); Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 63 (2006) (link); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64 (1988) (link). For instance, I have argued that religious minorities benefit from constitutional principles—such as the separation of church and state—when their interests correspond with Christian interests, which predominate in American society. STEPHEN M. FELDMAN, PLEASE DON’T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 273–75 (1997).

³ Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149 (2011) (link).

⁴ *Id.* at 156.

course of United States history is notable more for continuity than for change. Third, the interest-convergence theory accords insufficient agency to two groups of actors—black citizens and white judges—who have played, and continue to play, significant roles in shaping racial realities. Fourth, the interest-convergence theory cannot be refuted—and, thus, cannot be examined for its validity—because it accommodates racially egalitarian judicial decisions either by contending that they are necessary concessions in order to maintain white racism or by ignoring them altogether.⁵

This Essay defends the interest-convergence thesis from Driver's attack. It argues that the four analytical flaws he identifies only exist by dint of his fundamental misreading of the interest-convergence thesis. Driver misconstrues the thesis as future-oriented; to him, it supposedly presents a strategy for African Americans seeking societal change. As he explains, the thesis "principally contemplates what will be, rather than what has been."⁶ This characterization of the interest-convergence thesis is fundamentally incorrect. Bell presented the thesis as chiefly concerned with historical developments. As Bell stated in the 1980 edition of his casebook, *Race, Racism and American Law*, interest convergence presents a reasonable "reading of history."⁷

Part I of this Essay demonstrates how Driver errs so gravely. Specifically, he overlooks that Bell's career divides into three intellectual stages. By blurring these stages, Driver confuses separate concepts that Bell articulated at distinct points in his intellectual development. More specifically, Driver conflates the historical thesis—interest convergence—with a future-oriented thesis that Bell called "racial realism."⁸ Part II explains how Driver's initial misunderstanding of interest convergence leads him to argue erroneously that Bell's thesis suffers from these four analytical flaws.

I. BELL'S THREE INTELLECTUAL STAGES

Like many sophisticated thinkers, Bell modified his views over the course of his legal career. During the first stage, Bell served as a litigator with the Civil Rights Division of the U.S. Department of Justice and the NAACP Legal Defense and Education Fund, under the direction of Thurgood Marshall. Reflecting back on these times, Bell said, "I nurtured the

⁵ *Id.* at 156–57.

⁶ *Id.* at 161.

⁷ DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* § 1.12, at 39 (2d ed. 1980) [hereinafter *RACISM*].

⁸ Derrick A. Bell, Jr., *Racial Realism*, 24 *CONN. L. REV.* 363 (1992) [hereinafter *Realism*] (link).

notion that I might use legal skills in the fight to end racial discrimination.”⁹ He optimistically believed that court desegregation orders would significantly improve American society and the plight of African Americans.

During the second stage of his career and intellectual development, the middle-aged Bell moved into academia. He began his first full-time teaching position when he joined the Harvard Law School faculty in 1969. Pondering his litigation experiences in conjunction with his historical studies of desegregation, he grew increasingly cynical. As early as 1970, in his first law review article, he roughly sketched the historical themes that he would refine and elaborate over the next decade.¹⁰ By 1980, in the second edition of his casebook as well as in a Harvard Law Review article, he had honed these themes into discrete theses, including the interest-convergence thesis.¹¹ Bell articulated this thesis in the opening chapter of the casebook, which focused on American racism and history: “[I]t does not require an unreasonable reading of history to conclude that the degree of progress blacks have made away from slavery and toward equality has depended on whether allowing blacks more or less opportunity best served the interests and aims of white society.”¹² All of Bell’s examples of interest convergence in his casebook and law review articles were historical events, such as the issuance of the Emancipation Proclamation and the adoption of the Reconstruction amendments.¹³ To him, interest convergence described the past; it did not predict or provide a blueprint for the future.

Bell’s foremost illustration, and the centerpiece of the Harvard Law Review article, was the Supreme Court’s decision in *Brown v. Board of Education*.¹⁴ Bell emphasized that blacks had long been attacking the “separate but equal” doctrine, arguing that it was unconstitutional and immoral. Why, then, did the *Brown* Court suddenly decide to listen to these complaints? Bell answered: in 1954, the Court’s decision holding that racially segregated public schools violated equal protection corresponded with widespread white interests.¹⁵ Most importantly, the United States was locked in a Cold War struggle with the Soviet Union, and Jim Crow undermined the nation’s appeals for the allegiance of emerging Third World

⁹ DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 20 (2002) [hereinafter *ETHICAL*]; see also *THE DERRICK BELL READER* 4–6 (Richard Delgado & Jean Stefancic eds., 2005) [hereinafter *READER*] (describing Bell’s employment biography).

¹⁰ Derrick A. Bell, Jr., *School Litigation Strategies for the 1970’s: New Phases in the Continuing Quest for Quality Schools*, 1970 WIS. L. REV. 257; see *ETHICAL*, *supra* note 9, at 157–59 (explaining that Bell began questioning the effectiveness of desegregation litigation while working for the NAACP Legal Defense Fund).

¹¹ *RACISM*, *supra* note 7; *Dilemma*, *supra* note 1; see *RACISM*, *supra* note 7, § 1.9, at 29–30 (articulating the historical thesis of involuntary black sacrifice).

¹² *RACISM*, *supra* note 7, § 1.12, at 39; see *Dilemma*, *supra* note 1, at 523.

¹³ *RACISM*, *supra* note 7, §§ 1.9–1.11, at 29–38; Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 6–13 (1976).

¹⁴ 347 U.S. 483 (1954) (link).

¹⁵ *Dilemma*, *supra* note 1, at 523–26.

countries (often inhabited by people of color).¹⁶ *Brown*, in other words, lent credibility to the nation's claim that democracy was superior to Communism. Moreover, the Court's invalidation of Jim Crow appeared likely to spur economic development in the South and diffuse festering black frustration with the nation's failure to fulfill "the precepts of equality and freedom so heralded during World War II."¹⁷ To be sure, Bell never denied that moral principles personally motivate some whites. To the contrary, he explicitly stated that "[v]alues and morals (i.e., the American creed) do under certain conditions prompt and guide [white policy and] action [vis-à-vis blacks]."¹⁸ Yet, at the societal or macro level, such principles repeatedly proved insufficient to induce a "large segment of whites to action in unison against their perceived interests."¹⁹

Finally, during the third stage of his career and intellectual development—starting around the early 1990s—Bell succumbed to a growing pessimism that led to his theory of "racial realism."²⁰ "[T]he reality," Bell explained, "[is] that we 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."²¹ In his 1992 book, *Faces at the Bottom of the Well*, he elaborated: "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."²² Whereas interest convergence is a historical thesis, racial realism is oriented toward the future. Indeed, racial realism is forward-looking in two ways. First, it asserts that, with regard to racial justice, American society is unlikely to change significantly in the foreseeable future. Racism is, according to Bell, "a permanent part of the American landscape."²³ Second, racial realism presents a multifaceted strategy for dealing with a society that is infected with institutionalized racism. Bell thus insisted that realism is not a prescription for paralysis. Instead, realism can free African Americans from "'we shall overcome' thinking"—freeing them to plan and act unfettered by false promises of full racial equality and justice.²⁴ Bell thus encouraged blacks "to continue the fight against racism,"²⁵ but do-

¹⁶ *Id.* at 524.

¹⁷ *Id.*

¹⁸ RACISM, *supra* note 7, § 1.12, at 40.

¹⁹ *Id.*

²⁰ *Realism*, *supra* note 8.

²¹ Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 HOW. L.J. 79, 88 (1991) [hereinafter *Stay*].

²² DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992) [hereinafter *FACES*] (emphasis omitted).

²³ *Id.* at 92.

²⁴ *Stay*, *supra* note 21, at 90; *see also Realism*, *supra* note 8, at 373–74.

²⁵ *Stay*, *supra* note 21, at 91.

ing so would require humble reconsideration of prior methods. Instead of seeking “traditional, integration-oriented remedies,”²⁶ blacks should concentrate “more on tactics, actions, and even attitudes that challenge the continuing assumptions of white dominance.”²⁷ To do so, of course, might sometimes entail identifying corresponding interests between blacks and whites, but it might also involve many other tactics. Ultimately, Bell maintained that blacks could achieve “ethical success” by continuing to struggle for racial justice.²⁸ He adopted an existential position: the struggle itself is a “manifestation of our humanity.”²⁹

Interest convergence and racial realism are unequivocally distinct theses. Driver’s crucial mistake is his confusion of the historical with the future-oriented. When Driver claims that the interest-convergence thesis “principally contemplates what will be, rather than what has been,” he effectively confounds the second and third stages of Bell’s intellectual development.³⁰ To be sure, Bell’s eventual acceptance of racial realism arose largely from his understanding of history—including interest convergence—but Bell himself never collapsed the interest-convergence thesis into racial realism. In his last books, he continued to articulate these two as separate theses.³¹ Indeed, one can logically accept interest convergence without accepting racial realism. During his second stage, Bell himself clearly accepted interest convergence while still believing in the possibility of racial progress.³² Yet, Bell’s intellectual evolution—moving from interest convergence to realism—is unsurprising. While many whites (and some blacks) would vehemently disagree with Bell’s third-stage realism, evidence suggests that many blacks (and some whites) eventually became similarly pessimistic.³³

II. THE FLAWS IN DRIVER’S ANALYSIS

Driver asserts that Bell’s interest-convergence thesis suffers from four analytical flaws, but, due partly to his erroneous characterization of the thesis, Driver’s analysis is itself seriously flawed. Driver’s first critique centers on Bell’s distinction between black interests and white interests. To a

²⁶ *Id.* at 90.

²⁷ DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 9 (2004) [hereinafter *SILENT*].

²⁸ *ETHICAL*, *supra* note 9, at 172.

²⁹ *Stay*, *supra* note 21, at 92.

³⁰ Driver, *supra* note 3, at 161.

³¹ DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 21, § 2.15, at 66–69 (6th ed. 2008) [hereinafter *SIXTH*]; *SILENT*, *supra* note 27, at 9, 49.

³² *E.g.*, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 5 (1987) [hereinafter *SAVED*]; *Dilemma*, *supra* note 1, at 533.

³³ THOMAS J. SUGRUE, *SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH* 494–95, 534–40 (2008) (describing how blacks and whites have different perceptions of racial equality).

great degree, Driver questions “the idea of ‘interest,’” particularly as applied to societal groups, racial or otherwise.³⁴ “[P]eople often—usually, perhaps—make decisions based upon a narrow idea of what will be good for them,” Driver admits.³⁵ “But human beings—complex creatures that they are—sometimes have multiple motivations for reaching their decisions.”³⁶ People, in other words, sometimes act because of “honor, altruism, justice, and morality.”³⁷

Driver’s criticism of “interest” suffers from two weaknesses. First, and most important, the interest-convergence thesis is a historical proposition that describes societal or macro changes. It does not describe the subjective motivations or psychological attitudes of all individuals. Thus, many people might, in fact, be motivated by altruism or other values, but that does not necessarily detract from the accuracy of interest convergence as a historical thesis. Bell’s point is that, historically, societal instances of racial progress occurred when there was a convergence of black and white interests, regardless of the psychological motivations of individuals at these times. If Driver correctly understood the thesis as historically descriptive rather than a recommendation for future-oriented strategies, he would recognize that the variability of individual motivations is irrelevant.

Second, putting aside that rather large problem, Driver fails to acknowledge that the concept of “interest” is central to much of post-World War II intellectual thought.³⁸ Bell’s reliance on group interests fits harmoniously with contemporaneous theorizing. Economists, public choice theorists, and political scientists are thoroughly conversant with interests and interest groups (and the importance of self-interest). David Truman, for instance, was one of many political scientists who articulated a theory of pluralist (interest-group) democracy in finely detailed steps. He defined a “group” as a combination of individuals who share “certain common habits of response, which may be called norms.”³⁹ Group membership, in a sense, “exerts power” over individuals, so that “an individual’s group affiliations largely determine his attitudes, values, and the frames of reference in terms of which he interprets his experiences.”⁴⁰ For this reason, members of a group generally conform to the group’s norms and outlooks. At the macro level, “interests” are constituted by the “shared attitudes” of group mem-

³⁴ Driver, *supra* note 3, at 169.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 254–67 (1973) (describing the development of post-World War II political thought).

³⁹ DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 33 (2d ed. 1971).

⁴⁰ *Id.* at 505.

bers.⁴¹ Thus, an interest group “refers to any group that, on the basis of one or more shared attitudes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes.”⁴² Renowned constitutional scholars such as John Ely and Alexander Bickel built their theories of judicial review on the foundation of such widely accepted notions of pluralist democracy.⁴³ Yet, whether one agrees with Ely’s or Bickel’s theories or Truman’s precise definition is beside the point. The crux of the matter is that Bell’s invocations of the concepts of “interest” and “interest-group politics” are coherent and even conventional.

Bell, however, contributed an original insight. He questioned the operation of interest-group democracy in a society permeated by institutionalized racism: Might racism shape or distort the formation and perception of interests? Driver, in response, asserts that all blacks and all whites do not have the same respective interests. In this regard, Driver is, of course, correct. Neither blacks nor whites speak univocally, as Bell expressly recognized.⁴⁴ For instance, in his discussion of *Brown*, Bell differentiated the interests of “middle and upper class whites” from those of “poorer whites.”⁴⁵ Nevertheless, the existence of a multiplicity of both black and white interests does not render the notion of black and white interests incomprehensible. Driver himself admits that for much of American history—until “the end of Jim Crow”—the collective interest of African Americans in equality cannot be gainsaid.⁴⁶ And even when the nation was electing Barack Obama as the first black president, socioeconomic statistics demonstrated that African Americans remained far worse off overall than white Americans. Blacks earned on average nearly \$12,000 less per year than whites.⁴⁷ Whites were more likely to have college degrees and to be employed in management positions.⁴⁸ Black unemployment was nearly double that of white unemployment.⁴⁹ The difference in the median net worth of black and white households was astounding; as of 2002, black median net worth stood at \$5446 compared to \$87,056 for whites.⁵⁰ With such

⁴¹ *Id.* at 34.

⁴² *Id.* at 33.

⁴³ See STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM* 133–35 (2000).

⁴⁴ SAVED, *supra* note 32, at 48–50. See generally TOURÉ, *WHO’S AFRAID OF POST-BLACKNESS: WHAT IT MEANS TO BE BLACK NOW* (2011) (arguing blackness cannot be reduced to a single perspective) (link).

⁴⁵ *Dilemma*, *supra* note 11, at 523, 525.

⁴⁶ Driver, *supra* note 3, at 165–66.

⁴⁷ Mamadi Corra, *The State of Black America on the Heels of the Election of Barack Obama as the First African American President of the United States*, 33 W. J. BLACK STUD. 192, 199 (2009) (whites = \$52,959.33; blacks = \$41,039.82).

⁴⁸ *Id.* at 199–200 (college degrees: 35% to 27%; management: 45% to 40%).

⁴⁹ *Id.* at 198 tbl.3 (black = 4.11%; white = 2.3%).

⁵⁰ *Id.* at 208 tbl.9.

gross material inequality extant, it is not surprising that blacks were “more than six times as likely as whites to be incarcerated” in 2009.⁵¹ Given, in the words of historian and sociologist Thomas Sugrue, the “stark disparities between blacks and whites by every measure,” the recognition of a black interest in increasing substantive economic equality would be eminently reasonable.⁵²

Driver’s second critique of interest convergence maintains that the thesis “suggests that the racial status of blacks and whites over the course of United States history is notable more for continuity than for change.”⁵³ According to Driver, Bell “ignores considerable racial advancement.”⁵⁴ Driver’s analysis once again goes awry partly because he confuses interest convergence with racial realism. True, Bell’s realist thesis asserts that racism is a permanent component of American society, but the interest-convergence thesis explains exactly why and when racial justice is possible (because black and white interests sometimes coincide). That is, contrary to Driver’s argument, interest convergence is based on the possibility of achieving racial progress. In the conclusion to his Harvard Law Review article on *Brown* and interest convergence, Bell wrote: “The change in racial circumstances since 1954 rivals or surpasses all that occurred during the period that preceded [the first half of the twentieth century].”⁵⁵ As late as 1987, Bell asserted that “[t]angible progress [toward racial justice] has been made.”⁵⁶ Nevertheless, it is true that Bell added a corollary to the interest-convergence thesis; namely, he recognized that a convergence between black and white interests might be temporary. His Harvard article explained that post-*Brown* Supreme Court decisions “reflect a substantial and growing divergence in the interests of whites and blacks.”⁵⁷ And as Bell moved toward the third stage of his thinking, this corollary expanded in importance. He began to argue that the gains achieved when interests converged would often be lost afterward and that—in any event—such gains were often more formal than substantive, thus leaving the racial status quo intact.⁵⁸

Driver’s third critique asserts that Bell “accords insufficient agency to two groups of actors—black citizens and white judges—who have played, and continue to play, significant roles in shaping racial realities.”⁵⁹ Yet,

⁵¹ *Id.* at 209.

⁵² SUGRUE, *supra* note 33, at 540.

⁵³ Driver, *supra* note 3, at 156–57.

⁵⁴ *Id.* at 165.

⁵⁵ *Dilemma*, *supra* note 1, at 533.

⁵⁶ *SAVED*, *supra* note 32.

⁵⁷ *Dilemma*, *supra* note 1, at 528.

⁵⁸ *SAVED*, *supra* note 32, at 22; *SIXTH*, *supra* note 31, § 2.2, at 21.

⁵⁹ Driver, *supra* note 3, at 157. Driver seems intent on resurrecting the image of the Supreme Court Justice as a moral crusader. See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011) (link).

again, Driver's misunderstanding of the interest-convergence thesis as future-oriented leads him astray. The thesis describes a pattern that has emerged repeatedly throughout American history. It does not describe the motivations and actions of individual blacks and whites. Driver therefore criticizes the interest-convergence thesis for being bad at something it does not claim to do. Even so, Bell explicitly stated that morality motivated some whites—judges as well as other citizens—to act in pursuit of racial justice.⁶⁰ Moreover, Bell consistently emphasized throughout his career the importance of black agency. He maintained that blacks have pressured or forced whites to accommodate calls for racial justice and that they should continue to do so in the future.⁶¹ In his casebook, Bell devoted a chapter to civil rights protests,⁶² “the self-help methods blacks have utilized to gain access to opportunities closed or limited by reason of race.”⁶³ He quoted approvingly from Federal Judge A. Leon Higginbotham: “[T]he major impetus for the Civil Rights Acts of 1957, 1960, 1964 and 1965, which promised more equal access to the opportunities of our society, resulted from the determination, the spirit and the nonviolent commitment of the many [blacks] who continually challenge[d] the constitutionality of racial discrimination.”⁶⁴ During his third stage, Bell elaborated this view as an aspect of the strategies emanating from racial realism. He argued that blacks should seek to “forge fortuity,” or in other words, they should exert pressure, through protests or otherwise, until whites recognize that “the cost [of racial injustice] was too high.”⁶⁵ To be clear, Bell did not reduce the strategy of forcing fortuity to the mere crass assertion of self-interest. Other tactics might sometimes prove fruitful. For example, he recognized that, depending on the circumstances, blacks might successfully promote racial justice by advocating for the enforcement of principles or values that would protect both whites and blacks.⁶⁶ Ultimately, then, Driver's third criticism—that Bell's interest-convergence thesis accords insufficient agency to black citizens and white judges—is wrongheaded in two fundamental ways. First, it emphasizes a factor that is irrelevant to the historical accuracy of in-

⁶⁰ RACISM, *supra* note 7, § 1.12, at 40.

⁶¹ *Id.* ch. 6, at 279–362.

⁶² *Id.*

⁶³ *Id.* § 6.1, at 279.

⁶⁴ *Id.* § 6.2, at 280–81 (quoting NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY: FINAL REPORT 115 (1969) (commission on civil disobedience, additional statement of Judge Higginbotham)).

⁶⁵ SILENT, *supra* note 27, at 190.

⁶⁶ *Id.* at 191 (explaining how a black lawyer persuaded an all-white Alabama jury to acquit Martin Luther King, Jr. by invoking a principle of fair taxes); see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 238–61 (2003) (arguing that Jewish organizations fared better in religious freedom litigation when they emphasized principles instead of interests, which accentuated similarities to—rather than differences from—the Christian majority) (link).

terest convergence. Second, it disregards that Bell expressly addressed the question of agency elsewhere in his writings.

Driver's fourth critique is that the interest-convergence thesis, as stated, cannot be "refuted" or "falsified."⁶⁷ Therefore, its "validity cannot be assessed."⁶⁸ Once more, Driver's description of interest convergence as future-oriented leads him astray. In this instance, he imposes a standard that few historical theses could satisfy. Empirical research can be either quantitative or qualitative. Quantitative research explores relationships and actions that can be reduced to numeric data—often by formulating testable models or hypotheses—while qualitative research explores relationships, actions, and events that must be interpreted.⁶⁹ For many, falsifiability is a prerequisite for valid quantitative research in both the natural and social sciences.⁷⁰ Thus, if interest convergence were a forward-looking thesis that purportedly predicted future behavior, it might reasonably be held to a standard of falsifiability. But interest convergence is historical, and like most historical research it is empirical in the qualitative sense. Such research is generally not falsifiable because testing conditions are not repeatable. A historian, for instance, cannot repeat the Civil War to test a hypothesis about its causes. Yet, historical research can still be empirically valid if the historian provides an illuminating narrative of the events that is persuasively based on the evidence.⁷¹ Unless one is prepared to reject historical research in toto, one must evaluate it on these grounds. In the case of the interest-convergence thesis, Bell gave numerous persuasive examples, and other researchers have elaborated specific applications of the thesis.⁷² The legal historian Mary Dudziak provided one of the most notable elaborations in her book expanding on the connections between the Cold War and the civil rights movement.⁷³ The fact that Dudziak and so many other scholars have appropriated interest convergence and applied it to their

⁶⁷ Driver, *supra* note 3, at 157, 181.

⁶⁸ *Id.* at 165.

⁶⁹ MICHAEL G. ROSKIN ET AL., *POLITICAL SCIENCE: AN INTRODUCTION* 12 (9th ed. 2006); *Glossary of Key Terms*, COLO. ST. UNIV., <http://writing.colostate.edu/guides/research/glossary> (last visited Feb. 1, 2012) (link).

⁷⁰ *E.g.*, JEFFREY A. SEGAL ET AL., *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 20–21 (2005). The falsifiability thesis, conceptualized by Karl Popper, is itself controversial. See Susan Haack, *Federal Philosophy of Science: A Deconstruction—And a Reconstruction*, 5 N.Y.U. J.L. & LIBERTY 394, 394–97 (2010) (link).

⁷¹ GEORG G. IGGERS, *HISTORIOGRAPHY IN THE TWENTIETH CENTURY: FROM SCIENTIFIC OBJECTIVITY TO THE POSTMODERN CHALLENGE* 97–100, 139–40 (1997); Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 926, 940 (Peter Cane & Herbert M. Kritzer eds., 2010); Ellie Fossey et al., *Understanding and Evaluating Qualitative Research*, 36 AUSTL. & N.Z. J. PSYCHIATRY 717 (2002) (link).

⁷² RACISM, *supra* note 7, §§ 1.9–1.11, at 29–38. Although Thomas Sugrue does not expressly invoke the interest-convergence thesis, much of his magisterial history of northern desegregation resonates with it. SUGRUE, *supra* note 33, at 540–41.

⁷³ MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

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own studies attests to the persuasiveness of Bell's interpretation of history. The interest-convergence thesis is not only illuminating, it is elegantly simple and intuitively appealing.

CONCLUSION: DO THE RIGHT THING⁷⁴

Driver's initial misunderstanding of interest convergence as a future-oriented thesis leads him to multiple errors. He not only mistakenly attributes four supposed analytical flaws to Bell, but he also misses the profundity of Bell's perspective of history. As a historical thesis, interest convergence is especially provocative in two interrelated ways. First, it contravenes much of the moralizing that accompanies civil rights histories, the proclamations of the American creed, and the nation's progress toward its fulfillment.⁷⁵ Second, it suggests an ironic pattern in American history—a pattern that does not follow or mirror the major historical actors' declarations of purposes and reasons. In this way, the interest-convergence thesis resembles many other intriguing historical theses.⁷⁶ Gordon Wood's history of the American Revolution, for example, is so arresting partly because he showed how the Revolution unleashed social forces of liberty and equality that long continued to change the nation in unexpected ways, regardless of the declared intentions of the revolutionaries and constitutional framers.⁷⁷ In a similar fashion, Bell discerns historical movement—or lack of movement—that partly defies the declarations of the leading actors. In particular, Chief Justice Earl Warren's unanimous *Brown* opinion emphasized that the facts of the case forced the Court to reexamine the "separate but equal" doctrine.⁷⁸ From there, Warren reasoned that separate schools harmed black students and were thus inherently unequal and unconstitutional.⁷⁹ Although the justices recognized that *Brown* was a momentous case, the Court's opinion suggested otherwise. A complainant had come to the Court with a concrete case or controversy, and the Court needed to clear it from the docket. A straightforward, logical argument accomplished this task. The Court merely had to enforce a simple principle of equality. But Bell cuts under the surface of the *Brown* opinion to reveal other forces at work.

The analogy between Wood and Bell, however, only goes so far. Whereas Wood stressed ideology, Bell emphasized certain enduring socie-

⁷⁴ DO THE RIGHT THING (Universal Studios 1989).

⁷⁵ Cf. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 4 (1944) (discussing the American creed).

⁷⁶ Cf. MICHAEL KRAUS & DAVIS D. JOYCE, THE WRITING OF AMERICAN HISTORY 155, 296 (rev. ed. 1985) (discussing irony in historical writing).

⁷⁷ GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815 (2009); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

⁷⁸ Chief Justice Warren reasoned that the Court had held in earlier cases that racially separate educational facilities were, in fact, unequal. In *Brown*, however, the lower courts had found the schools to "have been equalized." *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (link).

⁷⁹ *Id.* at 493–95.

tal institutions, especially racism. Perhaps because of this institutional focus, Bell uncovered more continuity than change. But he certainly was not alone in concluding that American history contains more continuity than one might expect.⁸⁰ With regard to the substance of their respective theses, Wood and Bell sit in paradoxical tension. Wood maintained that the force of liberty rendered American society increasingly free. Bell, in a sense, added an asterisk to this thesis, excepting African Americans. Finally, Wood is a historian through and through, while Bell was not. Partly for this reason, Wood richly details his historical narratives, while Bell was not compelled to describe events as comprehensively—the interest-convergence thesis provides a broad lens for examining race relations in American society. Thus, while Bell might have thinly depicted his historical illustrations, his questioning of *Brown*, in particular, resonates with other detailed studies, not only by Dudziak but also—though less obviously so—by Gerald Rosenberg and Michael Klarman.⁸¹ While Bell focused on the causes of *Brown*, Rosenberg and Klarman focused on its effects. Either way, the gist of their arguments was that *Brown* was not what it appeared to be. Bell would add that neither are many other historical events that revolve around racial justice.

Driver seriously diminishes Bell's contributions by describing the interest-convergence thesis as future-oriented. Scholars can use interest convergence as a tool—a broad lens—to help explain historical developments related to social justice, whether focused on African Americans, other racial minorities, religious minorities, or similarly marginalized groups. As such, interest convergence is not a universal maxim, but it is a historical pattern that appears repeatedly throughout American history, no more, no less. Indeed, interest convergence is neither an assertion of permanent social landscapes nor a strategy for the future. When Driver misinterprets it in this manner, he is led to conclude that it will inculcate “passivity in its adherents, [who will sit and wait] for moments of ‘racial fortuity.’”⁸² But Bell clearly did not manifest such an attitude. Instead, Bell argued that blacks should actively seek to “forge fortuity.”⁸³ Toward the end of his life, deep into the third stage of his intellectual development, Bell wrote an autobiography entitled *Ethical Ambition*.⁸⁴ He emphasized the importance of trying to live with “integrity,”⁸⁵ and that one must continually struggle to do the

⁸⁰ CLAUDE S. FISCHER, *MADE IN AMERICA: A SOCIAL HISTORY OF AMERICAN CULTURE AND CHARACTER* (2010) (emphasizing continuity in American character and culture).

⁸¹ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

⁸² Driver, *supra* note 3, at 190.

⁸³ SILENT, *supra* note 27, at 190.

⁸⁴ ETHICAL, *supra* note 9.

⁸⁵ *Id.* at 5.

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right thing to fulfill one's "ethical ambition."⁸⁶ Such sentiments do not represent the musings of an individual who would either reject morality or accept passivity. Ultimately, Driver not only mischaracterized the interest-convergence thesis but also Bell's entire career.⁸⁷

⁸⁶ *Id.* at 9.

⁸⁷ Bell did not always satisfy this standard of ethical ambition. His tepid denunciation of anti-Semitism was disappointing, to say the least. See *FACES*, *supra* note 22, at 120–22; DERRICK BELL, *Shadowboxing: Blacks, Jews, and Games Scapegoats Play*, in *AFROLANTICA LEGACIES* 81 (1998), reprinted in *READER*, *supra* note 9, at 238, 241–45.