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# The Shadows and the Fire: Three Puzzles for Civil Rights Scholars: An Essay in Honor of Derrick Bell

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# THE SHADOWS AND THE FIRE: THREE PUZZLES FOR CIVIL RIGHTS SCHOLARS

## AN ESSAY IN HONOR OF DERRICK BELL

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## INTRODUCTION: EXPLAINING A TRILOGY

During a conference commemorating the 1964 Civil Rights Act, a member of the audience asked one of the speakers, a prominent legal historian, what situational factors might have prompted Congress to enact this landmark law when it did.[1] None of the participants had addressed this question, even though it echoed one that Derrick Bell had asked years earlier in connection with *Brown v. Board of Education.*[2] After Bell's groundbreaking article appeared in *Harvard Law Review* positing a materialist interpretation for that decision—and especially after historical research confirmed it years later—interest convergence emerged as a powerful tool for scholars seeking to understand the ebb and flow of racial events.[3]

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*John J. Sparkman Chair of Law, University of Alabama. J.D., U.C. Berkeley School of Law (Boalt Hall), 1974. Thanks to Jean Stefancic for comments and suggestions. My title borrows from Plato's metaphor of the cave in which Socrates demonstrates the relation between appearance—the shadows—and reality in the form of a fire in a cave which casts reflections on a wall outside. An observer sees the play of shadows and believes he is seeing what is real when, in fact, he merely sees the reflection of a light source inside the cave. THE REPUBLIC: THE COMPLETE AND UNABRIDGED JOWETT TRANSLATION, BOOK VII (1991). This article posits that civil right scholars need to strive, as Bell did, to understand what is taking place inside the cave. For my own metaphor—of a child on a road trip—*see* note 20 *infra*.

[1] Symposium, *The Ghosts of 1964: Race and Gender Inequity Fifty Years* Later, 6 ALA. C.R.&C.L. L. REV.(forthcoming 2014).

[2] 347 U.S. 483 (1954).

[3] In Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980) [hereinafter *Interest-Convergence Dilemma*], Bell posited that the decision arrived because of a momentary convergence of white and black interests, rather than the inexorable march of precedent or a fresh moral insight on the part of the Supreme Court. Interest convergence is a form of materialist analysis which seeks to explain the shifting tides of racial history by reference to underlying conditions such as labor needs, international competition,

Yet few, if any, seem to have applied this principle to the 1964 Civil Rights Act, which arrived only ten years after the *Brown* decision.[4] This oversight invites attention, for the civil rights community had been imploring Congress for years to enact a broad statute forbidding discrimination, with little success.[5] Sympathetic legislators would propose such legislation from time to time, only to see it wither for lack of support.[6] When one such bill did pass in the 1870s, the Supreme Court struck it down as exceeding Congress's authority.[7] Yet in 1964, the skies opened when Congress enacted a wide-ranging statute prohibiting discrimination on the basis of race, color, religion, sex, or national origin in many areas.[8] When it withstood Supreme Court

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and the search for profit. *See infra* Part I, discussing his signature proposition and subsequent research confirming it.

[4] To wit, 1964, ten years after the landmark *Brown* decision. *See infra* Part IIB, outlining the standard account, which explains the statute's arrival as a result of street protests, impassioned oratory, and a crisis of conscience among elite whites.

[5] *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 145 (2d ed. 1980) [hereinafter RACE, RACISM]; A. LEON HIGGINBOTHAM JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS—THE COLONIAL PERIOD (1978) [hereinafter MATTER OF COLOR] (discussing the period leading up to the 1964 Act, including black demands for federal protection); A. LEON HIGGINBOTHAM JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS (1996) (discussing how the legal system contributed to ten racial "precepts" that relegate African Americans to second-class citizenship).

[6] *See* MATTER OF COLOR, *supra* note 5; Robert Schenkkan, *LBJ's Second Great Battle: Enforcing the Civil Rights Act*, SEATTLE TIMES, July 3, 2014, at A13 (noting the history of failure to enact a civil rights act). *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 802 (3d ed. 1996) (observing that the decision rendered the clause "a practical nullity" within five years of its ratification). *See also* The Slaughter-House Cases, 83 U.S. 36 (1872) (interpreting the Fourteenth Amendment's Privileges and Immunities Clause so narrowly as to deprive it of much use as a source of civil rights protection).

[7] *See* The Civil Rights Cases, 109 U.S. 3, 26 (1883) (ruling that the Civil Rights Act of 1875 was unconstitutional because it lay beyond Congress's powers under the Thirteenth and Fourteenth Amendments). A 1957 statute, the 1957 Civil Rights Act, had weak enforcement powers. *See* RACE, RACISM, *supra* note 5, at 147; GAVIN WRIGHT, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH 185-86 (2013) [hereinafter SHARING THE PRIZE].

[8] To wit, public accommodations, education, and employment. *See* RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 147, 621, 731, 836 (Juan Perea et al. eds., 2d ed. 2007) (discussing the Act and the sectors that fall under it and a companion measure enacted in 1968).

review,[9] many states enacted their own measures, expanding the scope of civil rights protection even further.[10]

Why did all this happen just then? The standard answer, the abovementioned historian explained, is that domestic activism, including street protests,[11] coming on the heels of the assassination of a beloved president (with others soon to follow[12]) set the stage for decisive action. Before then, the times were not right. The country's thinking, especially in high circles, had not advanced sufficiently. Desegregating schools was as far as the country was prepared to go; further soul-searching and activism were needed before the nation was ready to expand *Brown's* mandate to other areas. Sixties-era activism would provide that impetus, along with sober reflection in high places.

Perhaps sensing my reservations, the historian asked whether I thought this explanation was sufficient. I said I doubted it and that international considerations must have played a part as well, just as they did with *Brown.* I promised to look into the question. This essay is my effort to make good on that promise.

As we shall see, popular unrest and governmental soul-searching were only two of the reasons Congress took action in 1964. Bell had shown years earlier that "idealist" concerns, having to do with ideas, thoughts, public sentiment, and crises of conscience, rarely tell the full story.[13] With *Brown,*

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[9] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 243 (1964) (finding the Act constitutional).

[10] *See, e.g.*, Unruh Civil Rights Act CAL. CIV. CODE § 51 (Deering 2014). Enacted a few years earlier than the federal statue, the Act prohibits discrimination based on sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation. It applies to all businesses including hotels, motels, restaurants, theaters, hospitals, barber shops, housing establishments, and retail operations.

[11] For example, Martin Luther King's planned Good Friday and Easter Sunday demonstrations in Birmingham. *See* Walker v. Birmingham, 388 U.S. 307 (1967); RACE AND RACES, *supra* note 8, at 168-71 (discussing the civil rights movement).

[12] To wit, those of John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr.

[13] Idealist approaches explain the march of history through powerful ideas, insights, argumentation, and the search for justice. Materialist reasons emphasize colonial expansion, geopolitical jockeying, the search for profits, and psychic gains for those on the winning side. *See* Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and Equal Protection,* 89 GEO. L.J. 2279 (2001). Bell subsequently expanded his materialist view to the full sweep of black history in his casebook, RACE, RACISM, *supra* note 5 (discussing slavery, Jim

Bell showed, Cold War appearances and fear of domestic disturbance ("material" factors) played even more decisive roles.[14] In particular, idealist concerns could not easily explain why the decision arrived when it did, nor its fate, months and years later, in the face of white resistance.[15]

By the same token, I posit that sixties-era activism and late-arriving insights in high places do not fully account for the 1964 Civil Rights Act, much less its demise 25 years later with a series of Supreme Court decisions that robbed it of much of its force.[16]

Parsimony suggests that we seek explanations for events that are both simple and fecund.[17] This essay suggests such an explanation for the 1964 legislation: namely, economic and status competition with the former Soviet Union, including the space race. What emerges is an interpretation that draws on some of the same considerations that enabled Bell to explain *Brown*, but enlists the specific set that roiled the world ten years later.

Part I reviews Bell's interpretation of *Brown v. Board of Education* as an interest-convergence case. Part II provides an overview of the 1964 Act and the standard account for its arrival. Part III questions this account and shows that international events, particularly economic and scientific competition with the Soviet Union, played an even more significant role in motivating Congress to take action when it did. Moreover, these other, more tangible considerations explain why the Act came to an end a few decades later with a series of Supreme Court decisions that robbed it of much of its efficacy.

This essay continues a trilogy devoted to pursuing and expanding Derrick Bell's legacy. In the first article, I identified strands in Bell's scholarship in the period just preceding his death.[18] These show that Bell was concerned with law's violence and was moving in the direction of a broad

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Crow, the civil rights era, schools and education, the justice system, the black family, and many other topics).

[14] See *Interest-Convergence Dilemma*, *supra* note 3, at 524-25.

[15] See Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002) [hereinafter *Rise and Fall*] (showing how interest convergence explains not only civil rights advances but retrenchments).

[16] *See infra* notes 66, 101-02 and accompanying; SHARING THE PRIZE, supra note 7, at 23 (noting that the Act lasted, in effect, for "perhaps 15 years").

[17] By fecund, I mean an explanation that helps explain a wide range of phenomena. *See* Paul Vincent Spade, *William of Occam*, STANFORD ENCY. PHIL. (July 2011), at http://plato.stanford.edu/entries/ockham/ (explaining that one should not multiply entities beyond necessity).

[18] Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435 (2014).

synthesis explaining how and why law sometimes reinforces oppression, with the racial kind just one of many.

The present article, the second in the trilogy, shows how Bell, had he lived, might have applied interest-convergence to the 1964 Civil Rights Act. Having applied that principle to the judicial branch (in his *Brown v. Board of Education* article) and, as I do here (channeling him), to the legislative branch, the next step will apply critical analysis to the executive branch. Accordingly, a future article, the third in the series, will address why Barack Obama won election to the presidency in 2008, becoming the first African American to do so in over 200 years of U.S. history. In that article, I will show that the executive branch "got wisdom" when it turned colorblind in 2008 because this development was necessary for globalization to succeed, for the U.S. to press for environmental limits in the developing world, and for corporate capitalism to advance to the next level.[19]

The trilogy, then, examines the three branches of government, the judiciary, Congress, and the presidency, in light of material factors and interests, showing that, in the racial arena at least, we like to pretend that we

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[19] That is, a president of mixed parentage and cosmopolitan upbringing could help America advance vital geopolitical, economic and strategic objectives. *See* Richard Delgado, *Why Obama? An Interest-Convergence Explanation of the Nation's First Black President,* 33 LAW & INEQUALITY 345 (2015). [hereinafter *Why Obama?*]. With credibility in the eyes of emerging countries and oil-rich sheiks, such a leader could enable the tentacles of American business to extend into new regions. A multiracial-looking president could more readily secure cooperation from African and Asian nations in the campaign against radical Islam. *See* Mark Landler, *Obama Warns U.S. Faces Diffuse Terrorism Threats: Tells West Point Cadets That Critics Misread His Cautious Response to World Crises*, N.Y. TIMES, May 29, 2014, at A1 ("We need partners to fight terrorists alongside us."); Eric Schmitt, *U.S. Terrorism Strategy Increasingly Involves Proxies to Fight Battles*, N.Y. TIMES, May 30, 2014, at A8 (noting that his administration will set aside a "Counterterrorism Partnerships Fund to 'facilitate partner countries on the front lines.'"). Moreover, the United States—as a developed country with a high standard of living—desires to promote environmental measures, including clean air and water, worldwide. This will necessitate convincing developing nations to forgo the smokestack industries many believe they need to advance rapidly and to realize that climate change is a serious danger requiring a multinational response. A president like Obama with a multiracial parentage could more readily advocate for America's position abroad than one with a patrician background and family who immigrated on the Mayflower. *See Why Obama?,* supra; Paul Krugman, *The Climate Domino*, SEATTLE TIMES, June 7, 2014, at A9 (noting the need for a multinational response to global climate change).

act according to principles and high ideals, but in reality what calls the tune is national self-interest and the ambitions of elite groups.[20]

## I. BROWN V. BOARD OF EDUCATION AND THE INTEREST-CONVERGENCE DILEMMA

In Brown v. Board of Education *and the Interest-Convergence Dilemma*,[21] Bell addressed a question that his colleague Herbert Wechsler had posed in a classic article. Published a short time after the *Brown* decision, *Toward Neutral Principles of Constitutional Law*[22] challenged the civil rights community to provide a justification for sacrificing (as Wechsler saw it) the rights of whites in favor of those of blacks.[23] When the Supreme Court upheld the right of black people to associate with whites over that of whites not to associate with them, it provided no neutral reason for this preference.[24] Why should the right of the one group receive priority over that of the other?

According to Wechsler, the Supreme Court never gave such a reason.[25] Bell, however, did. For him, the justification for *Brown*'s ruling lay, simply, in a momentary coincidence that enabled both elite whites and ordinary blacks to gain from a ruling striking down segregation: interest convergence.[26] White elites in the State Department and elsewhere benefited in their Cold War competition with the forces of godless communism because the decision enabled the United States to demonstrate to the uncommitted

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[20] Calls the tune, that is, for many breakthrough events, such as *Brown v. Board of Education*, the 1964 Civil Rights Act, and the election of the nation's first black president. With these, we can easily adopt comforting theories of causation that assign a wide scope for personal control and agency. In this respect, we resemble those children whose parents give them a plastic steering wheel during long automobile trips. The child, sitting in the back seat, can pretend that by turning the wheel, he or she is directing the car. This amuses the child and gives the youngster a stake in the trip. But it is, of course, the parents who are directing the car, deciding how far to drive that day, and determining where to stop for the night. *See* Richard Delgado, *Rodrigo's Roundelay:* Hernandez v. Texas *and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 57 (2006) (discussing this similarity).

[21] *Interest-Convergence Dilemma, supra* note 3.

[22] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[23] *Id.*

[24] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[25] Wechsler, *supra* note 22, at 22, 26, 32.

[26] *Interest-Convergence Dilemma, supra* note 3, at 518-25.

Third World, much of which was black, brown, and Asian, that it cared deeply about racial equality.[27]

In the years preceding *Brown*, the Soviet Union had scored propaganda victories each time the world press splashed headlines of American racial violence, occurring especially in the South.[28] Each such story revealed the hollowness of the U.S. commitment to democracy and human rights and showed how this country was also about burly sheriffs, police dogs, whips, and lynching parties.[29] We were in danger of losing the ideological war with our Cold War adversary.[30]

It was time, then, for America's establishment to arrange a victory for African Americans, which the Supreme Court obligingly did in the form of the 1954 *Brown* decision.[31] A second reason, according to Bell, was domestic, but still material in nature. When *Brown* came down, U.S. servicemen and women of color had been returning from World War II as well as the Korean War, having risked their lives fighting totalitarian enemies in the name of freedom and democracy.[32] Many had experienced, for the first time, a relatively nonracist environment, where an alert minority youth who obeyed orders and performed with alacrity could move up the ranks, even achieving a commission.[33] These veterans chafed against returning meekly to jobs of shining shoes and deferring to whites.[34] For the first time in years, the possibility of racial unrest loomed.[35] A dramatic Supreme Court decision

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[27] *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) [hereinafter COLD WAR CIVIL RIGHTS]; Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) [hereinafter *Desegregation as a Cold War Imperative*] (confirming Bell's hypothesis).

[28] *See Desegregation as a Cold War Imperative*, *supra* note 27, at 80-82; Richard Delgado, *Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change*, 87 OR. L. REV. 1259, 1269 (2008) (discussing the role of international publicity).

[29] *Desegregation as a Cold War Imperative*, *supra* note 27, at 111-12.

[30] *Id.* at 80-82.

[31] To wit, in the form of a landmark decision declaring segregated schools for white and black children unconstitutional.

[32] BELL, *supra* note 3, at 524-25.

[33] Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1907 (2012).

[34] *Id.*

[35] *Id.*

would go far to reassure black and Latino veterans that the country had their interests at heart.[36]

Bell's article scandalized his liberal colleagues, who saw it as an unwarranted slight against a courageous Supreme Court that was at last doing the right thing.[37] Some of the criticism abated when, a few years later, historian Mary Dudziak documented what Bell had merely posited in his Harvard article.[38] Based on archival material and documents gleaned through Freedom of Information Act requests, she showed that Bell's hypothesis was entirely correct. When the Supreme Court handed down the *Brown* decision, the Department of State had been secretly beseeching the Justice Department to throw its weight behind the NAACP's campaign to reverse segregation, and for the very reasons Bell posited.[39]

*Brown*'s subsequent career further vindicated Bell's hypothesis. Once the celebrations died down, its ringing mandate subsided.[40] The South mounted real resistance.[41] Some school districts closed rather than desegregate.[42] In the North, parents moved to the suburbs in what came to be known as "white flight."[43] The Supreme Court abetted this trend when it struck down metropolitan-wide relief a few years later.[44] Today, sixty years after *Brown*, the nation's schools are nearly as segregated as they were when the case came down.[45]

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[36] *See id.*

[37] *See id.* at 1906.

[38] COLD WAR CIVIL RIGHTS, *supra* note 27; *Desegregation as a Cold War Imperative*, *supra* note 27.

[39] *Desegregation as a Cold War Imperative, supra* note 27, at 113-15, 118-19.

[40] On the perils of triumphalist discourse, see Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 88 COLUM. L. REV. 1622 (1986).

[41] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 53-58, 74, 78, 90-100 (2d ed. 2008).

[42] Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1003 (1994).

[43] Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 56 n.19 (1992).

[44] Milliken v. Bradley, 418 U.S. 717 (1994) (disapproving broad regional measures, such as busing that crossed district lines, to remedy school segregation).

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

The same material factors that explained the initial decision also explain the retreat from it.[46] Once the country gained the propaganda victory that the decision represented, school desegregation would bring few rewards. So long as Southern sheriffs kept their batons and cattle prods out of sight, the elite establishment could relax its vigilance, secure in the knowledge that the world press would not follow the slow erosion in school integration that ensued.

By 1964, however, the nation faced a different situation. Black frustration was rising over the slow pace of progress.[47] The civil rights movement that sprang up in the late 1950s with peaceful sit-ins and boycotts of segregated lunch counters had taken on a harder edge, with the Student Non-Violent Coordinating Committee and, a little later, the Black Panthers prepared to challenge local authority more frontally.[48] And our competition with the Soviet Union had taken on a different character.[49]

## II. THE 1964 ACT AND ITS SETTING

### A. THE ACT AND ITS SPONSORS

Despite his initial resistance to the idea,[50] President John F. Kennedy proposed a wide-ranging civil rights bill in mid-1963, a few months before his assassination in Dallas.[51] His proposal, which came in a national speech, arrived on the heels of major civil rights protests in Birmingham, Alabama, and earnest conferences with civil rights leaders and his own Cabinet.[52] During World War II, A. Philip Randolph had threatened a march on Washington as a protest against racial discrimination.[53] In response, President

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[46] *See id.* at 4-5 (noting the role of inadequate funding and racial segregation in many large school districts).

[47] *Rise and Fall*, *supra* note 15, at 380.

[48] *Id.*

[49] *See id.* at 374.

[50] *E.g.*, Gerald N. Rosenberg, *The 1964 Civil Right Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L. J. 1147, 1148-49 (2004).

[51] Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts, and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 961-64, 973 n.302 (2005).

[52] *Id.* at 973 n.302.

[53] *See* HERBERT GARFINKEL, WHEN NEGROES MARCH: THE MARCH ON WASHINGTON IN THE ORGANIZATIONAL POLITICS FOR FEPC 53-61 (1959).

Franklin Roosevelt signed the nation's first executive order prohibiting discrimination in wartime industries.[54]

For the first time, large numbers of African Americans were threatening the normal functioning of American society.[55] Some were advocating nonviolent resistance[56] under the Southern Christian Leadership Conference and Martin Luther King, Jr., Ralph Abernathy, and Fred Shuttlesworth.[57] A successful bus boycott in Montgomery, Alabama, and challenges to segregation in Birmingham riveted national attention on events in that region.[58] The Freedom Riders and student demonstrations around the country had added new voices and numbers to the growing movement.[59]

After negotiation with the Republicans and consultation with his own advisors, President Kennedy proposed a skeletal bill shortly after his 1963 speech.[60] A number of Republican congressmen offered amendments designed to weaken it even further, but the Democrats insisted on changes adding protection against discrimination in employment, voting, and a number of other areas.[61] While Congress was deliberating, an assassin's bullets killed Kennedy, Lyndon Baines Johnson stepped into the presidency, and pressure for a major civil rights bill increased.[62] After a vigorous debate in the House and an even more fevered one in the Senate featuring filibusters by Strom Thurmond and Robert Byrd[63] and an effort to derail the bill by

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[54] *Id.* at 60-61; ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 46, 51, 83, 136, 157-58, 291 (1984) (discussing A. Philip Randolph's role).

[55] MORRIS, *supra* note 54, at xi.

[56] *See* MARTIN LUTHER KING, JR., *Letter from a Birmingham Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 289 (1986) (outlining the theory of nonviolent resistance).

[57] MORRIS, *supra* note 54, at 83.

[58] *See, e.g.*, HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY 1954-1980, at 144 (Eric Foner ed, Am. Century Series 1981).

[59] *See* CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S 1-2 (1981).

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

[61] *Id. See also* SHARING THE PRIZE, *supra* note 7, at 14. The Voting Rights Act, which covered voting alone, arrived about one year later. *Id.* at 183.

[62] *Id. See also O'Donnell, supra note 60.*

[63] These may have been the longest filibusters in U.S. history. *See* Schenkkan, *supra* note 6, at A13.

adding women as a protected category,[64] the law passed by substantial majorities in both houses.[65]

### B. EXPLAINING THE 1964 ACT: THE STANDARD ACCOUNT

With a buildup and enactment not greatly different from those that accompany any major piece of social legislation,[66] most initial commentary centered on the Act's likely impact on the country's future. What little analysis sought to explain its arrival did so in terms of the times and the role of great men who struggled with their conscience and finally did the right thing.[67]

These explanations, centering on the role of popular demand and courageous leaders, have not changed much today. Nearly a half century later, a major civil rights casebook attributed the Act to black activism, beginning with A. Philip Randolph's threatened march on the capital years earlier.[68] A prominent historian of civil rights, Aldon D. Morris, writing in 1984, assigned credit to the development of nonviolent protest by Martin

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[64] *See* Rosenberg, *supra* note 50, at 1151-53; Schenkkan, *supra* note 6 ("Women had [received] special protection under the new law, not out of any moral imperative but as a poison-pill amendment introduced by Virginia Rep. Howard W. 'Judge' Smith, who hoped that Northern senators sensitive to union concerns would not support a bill that granted women equal rights."). Women's rights, and some women's careers, have flourished since the Act went into effect. *See* Dorothy Brown, *Should Black Women Lean In: What Sheryl Sandberg Doesn't Understand*, 6 Ala. C.R.-C. L. L. Rev. (forthcoming 2014). Although their protection is still incomplete. *See* Trina Jones, *The Civil Rights Act at 50: An Examination of Title VII's Ebb and Flow*, 6 Ala. C.R.-C.L. L. Rev. (forthcoming 2014).

[65] *See* O'Donnell, *supra* note 60.

[66] I.e., the usual editorials and speeches pro and con, congressional maneuvering, and a host of parliamentary maneuvers aimed at derailing its passage through Congress. *See generally* O'Donnell, *supra* note 60.

[67] *See* RACE AND RACES, *supra* note 8, at 163-64 (explaining the Act as the product of a valiant civil rights movement); Rosenberg, *supra* note 50, at 1148 ("The Act owes its existence to the civil rights movement of the early 1960s that created a political and moral force that moved Congress and the courts."); Schenkkan, *supra* note 6 ("The Civil Rights Act was the culmination of decades of bitter struggle and very real sacrifice. Only 11 days before Johnson signed the act, three young Freedom Summer volunteers disappeared in Mississippi. The bodies of James Chaney, Michael Schwerner, and Andrew Goodman would not be recovered for another month.").

[68] *See* RACE AND RACES, *supra* note 8, at 161-62.

Luther King, Jr.[69] A law professor at Georgetown attributed the Act to protests resulting from "years of organizing by some 85 local affiliates of the Southern Christian Leadership Conference" and the "integrated legion of Freedom Riders . . . young activists in the Freedom Summer [and] the more than 250,000 demonstrators in the March on Washington, a quarter of whom were white."[70] Books like Vincent Harding's *There Is a River*[71] and John Egerton's *Speak Now Against the Day*[72] emphasize the role of ordinary people, some black, some white, who demonstrated bravery in the face of danger.

Courageous leaders who struggled with their conscience and ended up doing the right thing also come in for praise. A collection of essays devoted to the passage of the Civil Rights Act highlights the roles of presidents, including John F. Kennedy and Lyndon Johnson, and depicts their struggles with their conscience, or with refractory Southern politicians.[73] A

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[69] MORRIS, *supra* note 54, at xi, 37, 83, 87, 91.

[70] Sheryll Cashin, *Justice for Blacks and Whites*, N.Y. TIMES, July 2, 2014, at A25. *See also* Sheryll Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology through Interest-Convergence,* 79 ST. JOHN'S L. REV. 253, 264 (2014) (assigning credit to the Birmingham protests and the courageous leadership of Martin Luther King, Jr.). Even materialists such as Derrick Bell sometimes succumb to the temptation to speak this way. *See* Derrick Bell, *Challenges of Relearning* Brown*: Applying the Lessons of* Brown *to the Twenty-First Century*, 29 N.Y.U. REV. L. & SOC. CHANGE 633, 637 (2005) (attributing the 1964 Act to "the courage of thousands . . . of black people and their white allies who refused to be intimidated by segregationist violence and disorder"). Ordinarily he preferred materialist interpretations of racial events. *See Interest-Convergence Dilemma*, *supra* note 3; *The Freedom of Employment Act*, THE NATION, May 23, 1994, at 708 (noting that severe contractions in civil rights promises are often products of changes in the economic structure of society).

[71] *See generally* VINCENT HARDING, THERE IS A RIVER: THE BLACK STRUGGLE FOR FREEDOM IN AMERICA (1993) (likening the civil rights movement to a river that can be stopped momentarily but will break free in time).

[72] *See generally* JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH (1995) (describing the struggle of non-elite southerners, some white and some black, for racial equality). *See* Gregory Parks et al., *Organizational Complexity and the Quest for Civil Rights*, 6 ALA. C.R. & C.L. L. REV. (forthcoming 2014) (discussing the role of black fraternities and sororities in advancing black causes).

[73] *See* Robert D. Loevy, *Introduction* to THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE ACT THAT ENDED RACIAL SEGREGATION 1 (Robert D. Loevy ed. 1997) (describing the role of these presidents and others). *See also* RACE, RACISM, *supra* note 5, at 145, 147 (describing the role of Truman, Eisenhower, and Lyndon Johnson).

famous presidential historian attributed the Act's enactment to Johnson's skill and determination coming on the heels of pressure from black leaders such as Roy Wilkins and Whitney Young, as well as the public at large.[74] As she put it: "The country responded with empathy and understanding. More and more people realized something had to be done."[75]

A book reviewer in The New York Times echoed her sentiments. Reviewing two recent books about the Act, Kevin Boyle wrote: "Drafted in the midst of a crisis created by the courage of children, pushed through the Senate past the defenders of an indefensible social order, it marked one of those extraordinary moments when the promise and practice of equality align and democracy is affirmed."[76] One of the books, written by an editor of Vanity Fair, is entitled "An Idea Whose Time Has Come: Two Presidents, Two Parties, and the Battle for the Civil Rights Act of 1964."[77] These are, of course, pristine examples of idealist interpretations of history, but many others take the same approach.

## III. QUESTIONING THE STANDARD ACCOUNT: THE ROLE OF ECONOMIC COMPETITION AND THE SPACE RACE

Ideas—both the ones sweeping the nation and the ones in the hearts and minds of national leaders—unquestionably played major roles in advancing the civil rights agenda in the early sixties, including the 1964 Civil Rights Act.[78] The build-up to the Act was full of bravery, personal sacrifice, and struggle. But, as with *Brown v. Board of Education*, national self-interest entered into the picture as well.[79] Moreover, these more tangible factors,

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[74] *See* Kenneth Cooper, *Conversation with Doris Kearns Goodwin,* AARP (Jun. 2014), http://www.aarp.org/politics-society/history/info-2014/doris-kearns-goodwin-interview.html.

[75] *Id.*

[76] Kevin Boyle, *All the Way; 'An Idea Whose Time Had Come' and 'The Bill of the Century'*, N.Y. TIMES, May 18, 2014, at 13.

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

[78] *See supra* notes 66-74 and accompanying text (describing activism during this period).

[79] For example, presidential historian Doris Kearns Goodwin also mentioned the material needs of the citizenry as a possible cause: "You had huge monopolies swallowing up small businesses. You had a huge gap between the rich and the poor and the middle class struggling to survive. . . . Suddenly, the country was talking about these problems." *See* Cooper, *supra* note 74.

unlike their idealist counterparts, help explain why the Act came down when it did[80] but lost force about 25 years later,[81] so that today it offers scant protection against discrimination.

### A. Economic Competition with the Soviet Union

Blacks and their sympathizers had been agitating for major civil rights legislation for decades and achieving, at most, very narrow victories. Yet, in 1964, Congress relented and granted them a remarkable boon.[82] One could, of course, attribute the Act's arrival to even more fervent wishing and hoping, and more inspired advocacy, including, perhaps, the newly theorized nonviolent kind.[83] In short, the breakthrough came, according to this view, because the civil rights community was doing what it had been doing for nearly a century, but with more energy, more impressive theorists and leaders, and in an organized fashion.[84] By the same token, one could seek to explain the breakthrough in terms of the audience.[85] Liberals in Congress and the White House, in this view, were more receptive than those who came

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[80] Viz, in 1964.

[81] That is, beginning around 1989. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995) (contracting the range of affirmative action); Richmond v. J.A. Croson, Co., 488 U.S. 469 (1989). *See also* Mobile v. Bolden, 446 U.S. 55 (1980) (establishing a more stringent test for violations of voting-rights laws); Washington v. Davis, 426 U.S. 229 (1976) (establishing a more stringent test (intent) for employment discrimination). For a discussion of conservative backlash against the Act, see Anthony Cook, *Democracy and Coercion: Race and the Neo-Conservative Backlash*, 6 ALA. C.R.-C. L. L. REV. (forthcoming 2015); SHARING THE Prize, *supra* note 7, at xii (noting that many of the gains of the civil rights movement have endured, while others today are in jeopardy), 175-80, 220-21 (noting that many of the gains from the Act began tailing off around this time), 261 (noting that reductions in the rate of black poverty ended in the 1980s), 261 (noting that gains in black voter registration, black voting, and black political representation ended a few years later).

[82] That is, the 1964 Civil Rights Act.

[83] *See supra* notes 53-60 and accompanying text.

[84] This is essentially the standard view. *See supra* Part IIA. *But see* SHARING THE PRIZE, *supra* note 7, at 81-82 (refuting this standard view and noting, on the contrary, that the early sit-ins, boycotts, and demonstrations of the period immediately prior to the 1964 Civil Rights Act—evincing the newly refreshed vigor—failed). National action—especially legislation—coming just a few years later, coupled with federal enforcement and motivated by anti-Soviet concerns, proved the key. *See infra* text and notes immediately.

[85] That is, not those who spoke, beseeched, and raised their voices, but those on the other side—the ones who heard and took action.

earlier. Educated at Harvard and other elite institutions, they were more attuned to civil rights pleas.[86] Or perhaps, desiring re-election, they were merely acceding to society's wishes.

This form of argument is precisely what Derrick Bell rejected in connection with *Brown v. Board of Education*, for reasons that now strike most civil rights scholars as largely correct. It behooves us, then, to consider the possibility that the arrival, ten years later, of the 1964 Civil Rights Act also had roots in material circumstances, particularly Cold War imperatives.

It is this set of factors that goes far to explain the Act's arrival and exit. Insistent advocacy and empathic leaders only get one so far, either in the effort to understand civil rights history or in ordinary life. Otherwise, African Americans would have made great progress under Obama (a lifelong liberal and fellow person of color), which they have not.[87] Latinos, who have been agitating for immigration reform, with marches, civil disobedience, and unending protests, would have made strides as well.[88] What does make a critical difference? Derrick Bell suggested a few places we should look.

With the Civil Rights Act of 1964, many of the same factors that Bell identified as paving the way for *Brown v. Board of Education*[89] were in effect ten years later but with a few subtle shifts. For example, the same veterans of color, whose role Bell highlighted, still had not been fully integrated into postwar society.[90] The Cold War with the Soviet Union, however, had in the

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[86] This, too, is a major part of the standard view, *see supra* Part IIA.

[87] *See Ben Jealous: Black Americans 'Are Doing Far Worse Under Obama Administration*,' YOUR BLACK WORLD, http://www.yourblackworld.net/2013/01/black-news/ben-jealous-black-americans-are-doing-far-worse-under-obama-admin/ (last visited July 13, 2014) (noting that the president sometimes appears to be leaning backward not to favor black causes); Ryan Lizza, *The Obama Memos: The Making of a Post-Post-Partisan Presidency*, THE NEW YORKER, (Jan. 30, 2012), http://www.newyorker.com/reporting/2012/01/30/120130fa_fact_lizza?currentPage=all (noting that the President can be ruthless toward liberal pieties).

[88] Susan Cornwell, *U.S. Republican Leaders to Outline Immigration Framework: Boehner*, REUTERS (Jan. 28 2014).

[89] These factors included Cold War competition with the Soviets and large numbers of veterans of color itching for something to do. *See infra* text and notes immediately. *See also* SHARING THE PRIZE, *supra* note 7, at 23 (noting that the two civil rights acts, the 1964 version and the voting rights act that came soon afterward, were "made possible by a unique and fleeting conjunction of circumstances").

[90] *See generally* COLD WAR CIVIL RIGHTS, *supra* note 27.

interim become even more heated, besetting the thoughts and concerns of the average citizen.[91]

In short, competition with the Soviet Union had now entered a new stage.[92] During the period immediately preceding *Brown*, competition between the two countries centered on appearances and ideology.[93] Each side was vying to appear more attractive in the eyes of the uncommitted Third World, most of which was black, brown, or Asian.[94] America's racial policies, which at that time included brutality, segregation, and Jim Crow laws, were an acute embarrassment.[95] When a photogenic event—such as a beating of a young black man, or a group of burly white Southern police officers dragging away a group of well-dressed college students who had been peacefully sitting-in in a segregated restaurant—appeared splashed on the front pages of newspapers in capitals across the world, our Cold War rivals won propaganda victories.[96] Considerations such as these prompted white elites to engineer a well-deserved victory for the NAACP lawyers in *Brown*.[97]

By the late 1950s, however, competition between the two superpowers had entered a different phase.[98] The few uncommitted nations that were prepared to join one camp or the other based merely on appearances and ideology—idealist considerations—had already done so.[99] The new competitive arena was economic development. Many postcolonial societies were eager to advance rapidly, industrialize, and exploit their natural resources and human capital. Colonialism, tribal wars, diseases, and other disadvantages had left them far behind Europe and the U.S.[100]

Which model—free-market democracy or central planning and managed economies—would bring them the rapid gains they needed to fill hungry mouths and stave off unrest? The United States then boasted the world's number-one economy, with an enviable standard of living.[101] But the Soviet Union had seemingly come out of nowhere, successfully completing

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[91] *See id.* at 11.

[92] *See Desegregation as a Cold War Imperative*, *supra* note 27, at 73-75.

[93] *Id.*

[94] *Four Reservations*, *supra* note 37, at 1908.

[95] *Desegregation as a Cold War Imperative*, *supra* note 27, at 110.

[96] COLD WAR CIVIL RIGHTS, *supra* note 27, at 49.

[97] *See supra* notes 27-38 and accompanying text.

[98] *Desegregation as a Cold War Imperative*, *supra* note 27, at 73.

[99] *Id.*

[100] See JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES (1997) for a description of some of them.

[101] ANGUS MADDISON, THE WORLD ECONOMY: A MILLENNIAL PERSPECTIVE 131 (2001).

one five-year plan after another and developing its agriculture, factories, and infrastructure in impressive fashion.[102] Beginning from near-feudal conditions only a half-century earlier and enduring setbacks in the form of two world wars that visited famine, destruction, and many millions of deaths, the Soviets, by dint of careful planning and coordinated effort, had made impressive gains.[103] Its citizens were by and large happy and well fed, even if they often had to stand in long lines for bread and potatoes. The Russians invited Third World students to attend their world-class universities[104] and delegations of unionists and ordinary citizens to visit their factories and cities to admire their counterparts' housing, material possessions, and access to high culture, opera and ballet.[105]

It was time for America to show that it, too, could mobilize its entire citizenry and integrate everyone into the workforce. It could enable them to live in decent houses (even Levittown) and attend decent schools regardless of the color of their skin. The South, particularly, seemed stuck in a time warp, with segregated cities, schools, and workplaces impeding the region's social and economic progress.[106] The country needed a boost in morale and a

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[102] *See* R.W. DAVIES, SOVIET ECONOMIC DEVELOPMENT FROM LENIN TO KHRUSHCHEV (1998) (describing how central planning enabled the country to evolve from an agrarian society with a subsistence economy to a major industrialized power). *See also* ROBERT C. ALLEN, FARM TO FACTORY: A REINTERPRETATION OF THE SOVIET INDUSTRIAL REVOLUTIONS 153 (2003) (deeming the Soviet program largely successful).

[103] DAVIES, *supra* note 102, at 4; ALLEN, *supra* note 102.

[104] This was particularly true for Asian and African countries and students. *See* JAMES PECK, WASHINGTON'S CHINA: THE NATIONAL SECURITY WORLD, THE COLD WAR, AND THE ORIGINS OF GLOBALISM 47 (2006); Guy Pandji, *Russia's Return to Africa—The Scholarship Dimension*, NORRAG (Apr. 2011), http://www.norrag.org/en/publications/norrag-news/online-version/the-geopolitics-of-overseas-scholarships-awards-old-and-new-providers-east-west-north-south/detail/russias-return-to-africa-the-scholarship-dimension.html.

[105] The Soviet economy grew faster than that of the U.S. during the period 1950 to 1960. *See MADDISON, supra* note 101, at *274-75*, 298. By 1970, it was about 60 percent the size of its American counterpart. *See* MARK HARRISON, ACCOUNTING FOR WAR: SOVIET PRODUCTION, EMPLOYMENT, AND THE DEFENSE BURDEN 145 (1996).

[106] SHARING THE PRIZE, *supra* note 7 (showing how black activism and federal action—and not slow, inevitable economic modernization or population growth—transformed the South from a backward region to one with a vibrant economy and an integrated workforce). Management, local attitudes, and the feelings of white workers all combined to mire the South in a discriminatory pattern of maintaining

renewed commitment to a common struggle. It needed an enlarged, integrated workforce and Army. The South needed pressure from above—specifically, from Washington—to dislodge itself from the miasma in which it found itself.[107]

In such an atmosphere, the Act passed relatively easily.[108] And the hoped-for gains ensued. The post-war economy soared, especially in the South.[109] Unemployment and poverty, particularly among blacks, dropped.[110] Black students' school attendance, graduation rate, and scores on standardized tests improved.[111] Housing markets desegregated slightly.[112]

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all-white workforces even when this was detrimental to a company's profitability. *E.g.*, *id.* at 33-34, 53-57, 101, 124.

[107] *Id.* at 65 (noting that "The vast majority of white southerners had a vision of economic progress in which blacks had no more than a subordinate role" and that during the 1950s, urban businesses across a wide range hired no blacks as clerks, bank tellers, firefighters, automobile mechanics or anything else), 101 (noting that prior to this time, many southern businessmen found themselves "locked into a low-level equilibrium," even if "they did not see it that way themselves"), 92-104 (noting that federal pressure provided the key to change across a host of industries and services). *See also* Kathleen O'Toole, *Economist Says Civil Rights Movement was Economic Success*, STANFORD NEWS SERVICE (Jan. 26, 2000), http://news.stanford.edu/pr/00/000126CivilRightsEcon.html (noting that even modern businessmen in the South were worried about maintaining white patronage). Only coercion, emanating from above, could show white supervisors that desegregation was tolerable, and the owners that their customers would not flee if a black or two were working in the store as clerks. *See* SHARING THE PRIZE, *supra* note 7, at 106-14, 262.

[108] SHARING THE PRIZE, *supra* note 7, at 22-25.

[109] *Id.* at 27-29.

[110] *See id.* at 16-17 (noting that prior to the Act, segregation was practiced not just in rural backwaters, but had "originated. . . in urban settings, in an attempt by leaders who considered themselves progressive to adapt the racial order to the modern world"). *See also id.* at 26, 106-15, 240-49, 234-35 (noting that in the wake of the Act, poverty, unemployment, and other indicators of black misery improved).

[111] *See* SHARING THE PRIZE, *supra* note 7, at 26, 128, 150-66, 260 (noting that school desegregation arrived, but more slowly than it did with employment and public accommodations); *Impact of the Civil Rights Laws* U.S. DEPARTMENT OF EDUCATION, OFFICE OF CIVIL RIGHTS (1999), at http://www2.ed.gov/about/offices/list/ocr/docs/impact.html; Schenkkan, *supra* note 6.

[112] WRIGHT, *supra* note 7, at 30. *See* O'Toole, *supra* note 107 (noting both a regional and national trend in this direction); Al Brophy, *The Civil Rights Act of 1964 and the Law of Property*, 6 ALA. C.R. & C.L. L. REV. (forthcoming 2014)

Many stores, hotels, and businesses that formerly did not serve blacks began doing so.[113] Southern sheriffs shielded their batons—at least while the press was looking. Colleges and universities relaxed barriers to black and Jewish students and, within a few years, adopted affirmative action, which produced even more gains.[114] All these measures, predictably, yielded more minorities in the professions, Congress, corporate suites, and among the officer ranks in the military.[115]

In the face of serious competition from the Soviet Union's planned economy, the United States was showing a little muscle of its own.[116] The 1964 Civil Rights Act was a prime instrument of this economic revival. In particular, as Gavin Wright convincingly shows, a centralized show of force was the only measure that could dislodge the South from a host of economically and socially backward folkways, habits, and presuppositions that were holding it back.[117]

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(noting that this trend was in effect even before the Act arrived because of common law doctrines such as an innkeeper's duty to shelter travelers).

[113] SHARING THE PRIZE, *supra* note 7, at 259. Prior to this time both craft and unskilled white workers felt certain that the repression of black economic opportunities operated to their advantage and should not be relaxed. Most whites in the South believed in economic progress, to be sure—but of a form that would continue to relegate blacks to a subordinate role. *Id.* at 65, 77, 90-104.

[114] *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 98 (2005); Malcolm Gladwell, *Getting In: The Social Logic of Ivy League Admission*, THE NEW YORKER (Oct. 10, 2005), http://www.newyorker.com/archive/2005/10/10/051010crat_atlarge?currentPage=all (discussing a period during the first half of the twentieth century when many elite colleges limited the number of Jewish students admitted).

[115] HARDING, *supra* note71.

[116] ROSENBERG, *supra* note 41, at 162-69.

[117] SHARING THE PRIZE, *supra* note 7, at 2, 25, 32-150 (describing racism's "iron grip" on the region in the days before the civil rights revolution). Civil rights laws disrupted trends that showed no signs of abating and turned the South in a direction in which it would never have faced without outside force. *Id.* at 74-138. A dirt-poor region made rapid advances in literacy, economic development, education, and wealth disparities. *Id.* African Americans gained entry to jobs formerly denied them, including some of the most desirable. *Id.* at 116-26, 129-35. Many returned home from the North, where they had moved to escape racial oppression. *Id.* at 142-46, 249. Whites and blacks alike benefited; black gains did not come at the expense of whites. *Id.* at xi, 9, 26-30, 146-213. But the South had

## B. THE SPACE RACE

The intelligence establishment had known for some time that the Soviets were on the verge of a major breakthrough in the area of space.[118] When Sputnik showed the world in 1957 that the Russians were indeed outstripping the West in this area,[119] American political leaders were taken aback.[120] The Russians actually seemed to have edged into the lead. What would all those Third World countries, who were closely comparing the two systems and deciding which one to emulate, think?

Within a few years, national leaders produced the 1964 Civil Rights Act, which, in turn, provided a shot-in-the-arm to the economy by enabling blacks to find more productive work than shining shoes and picking cotton.[121] With a labor force now potentially ten percent larger, the economy grew, demonstrating to uncommitted onlookers that the West had a few aces up its sleeve.[122] One of those aces was a multiracial workforce with workers playing their parts, producing and buying cars, TV sets, and other consumer goods that kept the economy humming.[123]

The Act also boosted the military by enabling it to fill its ranks with recruits of color, thus allowing the United States to field a larger army in Indochina and elsewhere,[124] all the while its scientific establishment labored mightily to bring the U.S. up to par with the Soviet Union in the space race. It did so, of course, with an American satellite in 1958 and, years later, a

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to be forced by the federal government to act, in effect, in its own economic self-interest. *Id.* at 75, 110.

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

[119] *See id.* (noting that the satellite, which the Soviets launched on October 4, 1957, prompted frantic concern among both ordinary citizens and national leaders). *See also* PAUL DICKSON, SPUTNIK: THE SHOCK OF THE CENTURY (2001).

[120] Dickson, *supra* note 118 (deeming the impact "enormous and unprecedented").

[121] E.g., O'Toole, *supra* note 107, at 101, 258-66.

[122] SHARING THE PRIZE, *supra* note 7, at 101-02, 259-60; O'Toole, *supra* note 107.

[123] *See, e.g.*, Paul Tough, *Who Gets to Graduate*, N.Y. TIMES MAG. (May 15, 2014), http://www.nytimes.com /2014/05/18/magazine/who-gets-to-graduate.html (noting that American competitiveness depends on full mobilization of the workforce).

[124] The U.S. during this period was engaged in two proxy wars with the communist camp, namely Korea, 1950 to 1953, and Vietnam, 1955 to 1975.

manned flight to the moon.[125] These accomplishments mitigated embarrassment over being overshadowed by the Soviet Union in space and the military, while the price of competing with the U.S. cost the Russians dearly, ultimately bankrupting its economy.[126] When, years later, the Soviet intelligence establishment learned that President Ronald Reagan was secretly preparing to launch an expensive "star wars" program that would negate the Soviets' missile force, the Soviets admitted defeat.[127] Despite having advanced from a backward, near-feudal culture to a modern industrialized one in just two generations, they could not match the West's combined might. The Berlin Wall fell in November 1989.[128] The Soviet Union began breaking apart.[129] And the world was free from the specter of international communism. A few Third World countries, such as Cuba, hung onto the socialist ideal, but the game was largely over.[130]

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[125] On the U.S. space effort during this period, see *45 Moments in N.A.S.A History —History*, NASA http://www.nasa.gov/externalflash/NASA45/textonly/history.html (last visited Sept. 1, 2014).

[126] By the end of the arms race with the United States, the Soviet Union was devoting nearly one third of its total output to the military. *See* ROBERT STRAYER, WHY DID THE SOVIET UNION COLLAPSE 127-30 (1998).

[127] *See* Michael A. Lev, *Friends, Foes Recall Victorious Cold Warrior*, CHI. TRIB. (June 6, 2004), http://articles.chicagotribune.com/2004-06-06/news/0406060270_1_soviet-economy-soviet-officials-soviet-union; Benjamin B. Fischer, *A Cold War Conundrum: The 1983 Soviet War Scare*, CIA, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/a-cold-war-conundrum/source.html (last updated Jul. 7, 2008) (noting that President Reagan leaked the information that the U.S. was increasing its budget for the military and was considering developing a Star Wars antiballistic missile system that would guard the country from Soviet missiles, and a neutron bomb that would negate the Soviets' advantage in number of tanks).

[128] Jeffery Delviscio et al., *The Berlin Wall: 20 Years Later*, N.Y. TIMES (Nov. 6, 2009), http://www.nytimes.com/interactive/2009/11/09/world/europe/20091109-berlinwallthennow.html.

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

[130] *See generally After the Soviet Collapse: A Globe Redrawn*, THE ECONOMIST (Nov. 5, 2009), http://www.economist.com/node/14793737.

The West won. In 1954, with *Brown v. Board of Education*, it had gained a remarkable victory in the war of appearances.[131] And it would soon win the war of economic competition, with the Civil Rights Act piling on pressure, by continuing to inflict defeat after defeat on the Soviet economy for 25 years until it cried uncle.[132]

But the story of might and accomplishment has a dark side. When the Soviets, their economy and empire in tatters, finally admitted defeat in 1989, the Civil Rights Act and other gains of the sixties were no longer needed. Without overseas competition, the U.S. economy no longer needed blacks so badly, either as cannon fodder or for their labor. A conservative Supreme Court obliged by gutting the Act with a series of decisions that rendered it toothless.[133] Retreats on affirmative action soon followed.[134] Today, black participation in the workforce is low, with almost as many black men languishing in prison as attending college.[135] The nation's public schools are nearly as segregated as they were in the days of formal segregation.[136]

The racial situation in the United States has reverted, both quantitatively and in terms of discourse, to one reminiscent of much earlier times.[137] And with Latinos, it is worse than it has been for some time.[138] But economic leadership and the space race were not only background features "in the air" that led to the 1964 Act by a kind of cultural osmosis. Instead, policymakers wrote and spoke of them specifically and by name, both then and later.

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[131] *See* text and notes 26-36 supra.

[132] *See Desegregation as a Cold War Imperative*, *supra* note 27, at 61.

[133] *See supra* note 81 and accompanying text.

[134] *See* Regents of University of California v. Bakke, 438 U.S. 265 (1978); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

[135] *See* Adam Gopnik, *The Caging of America*, THE NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=all (noting the high rate of incarceration of minority men).

[136] *See* UCLA CIVIL RIGHTS PROJECT, *supra* note 45.

[137] As happened earlier, these regressions are beginning to attract the world's attention. *See* Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1905-09 (2012).

[138] *See, e.g.*, Delgado, *supra* note 20, at 26 n.15; Jasmine Gonzales Rose, *Language Rights under the Civil Rights Act of 1964: The Case for Juror Language Accommodation*, 6 ALA. C.R.-C.L. L. REV. (forthcoming 2014) (noting that Titles VI and VII afford poor protection for language rights).

### C. IDENTIFYING NATIONAL SELF-INTEREST AS A DETERMINANT OF THE 1964 CIVIL RIGHTS ACT

A few influential figures specifically identified economic or scientific competition with foreign adversaries as having enabled Congress to enact the 1964 Civil Rights Act. For example, Joseph Stiglitz, reflecting on the postwar period, asked:

> So why has America chosen these inequality-enhancing policies [deregulation and a low corporate income tax]? Part of the answer is that as World War II faded into memory, so too did the solidarity it had engendered. As America triumphed in the Cold War, there didn't seem to be a viable competitor to our economic model. Without this international competition, we no longer had to show that our system could deliver for most of our citizens.[139]

Other writers credit economic incentives and the search for profits even more expressly. Historian Gavin Wright, for example, highlights the financial underpinnings of much of the civil rights movement, including the 1964 statute, noting that without it the South would not have developed as rapidly as it did.[140] Earlier, Lyndon Baines Johnson reportedly supported the Act not merely because it was the right thing to do but out of the belief that "racial discrimination was . . . damaging the economy of his beloved South and that the area would have to abandon its racist attitudes to gain economic prosperity."[141] For Wright, the Civil Rights Act not only benefited the South, "expanding economic opportunity *was an important motivation for* the . . . movement from its earliest days."[142]

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[139] Joseph Stiglitz, *Inequality Is Not Inevitable*, N.Y. TIMES (Jun. 27, 2014, 6:16 p.m.), http://opinionator.blogs.nytimes.com/2014/06/27/inequality-is-not-inevitable/?_php=true&_type=blogs&_r=0.

[140] SHARING THE PRIZE, *supra* note 7, at 4, 6, 11, 13-15, 19-23, 84, 156-63, 97-101, 116-21; O'Toole, *supra* note 107.

[141] *See Lyndon Johnson*, HISTORY LEARNING SITE (2005), http://www.historylearningsite.co.uk/Lyndon_Baines_Johnso n.htm.

[142] GAVIN WRIGHT, THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION, IN TOWARD THE MEETING OF THE WATERS: THE CIVIL RIGHTS MOVEMENT IN SOUTH CAROLINA 383, 383 (Winfred O. Moore, Jr., and Orville Vernon Burton eds., 2007) (emphasis added).

## CONCLUSION

Derrick Bell wrote that if you want to understand the zigs and zags of racial history, you need to pay attention to interest convergence. Racial progress for blacks came, he wrote, when such progress also lay in the best interest of elite whites. When it ceased to be so, retrenchment and reversal of fortune would set in.

Examining the passage of the 1964 Civil Rights Act and its eventual demise 25 years later, one sees a similar path. One could, of course, insist that the primary drivers were idealist in nature: When things improved it was because we wished them so (and marched and demonstrated and preached and prayed) and because good-natured men and women in high places finally relented and agreed to do the right thing. Then, when things predictably deteriorated a little later, one would look for the same sort of explanation and find it in some supposed loss of faith, lack of energy, or bad luck with leaders.

But this way of interpreting events is strained and cannot explain anomalies such as the deterioration of Latino fortunes at a time of fervent marching, speech-making, and importuning. It also cannot explain the end of the civil rights era at a time when the community of color needed and stridently demanded new programs, better education, a continuation of affirmative action, and relief from racial profiling and excessive incarceration.[143]

Material considerations can explain these turns of fortune. They can help explain why the 1964 Act arrived when it did and went into retreat when it did. They can explain why African American fortunes across many fronts waxed in the mid- and late 1960s, when the Soviet economy was threatening to outshine ours in the eyes of the developing world. They can explain why this country discarded blacks and black programs in the eighties, with the Reagan revolution, Star Wars, and the fall of the Berlin Wall. As Derrick Bell once told us, racial justice may from time to time "count[] among the interests" that courts and policymakers deem important.[144] But when it does, a search inside the cave is apt to discover a fire—elite white self-interest—that is responsible for the activity outside. And when the interests of whites and blacks do not align, "as with abolition, the number who will act on morality alone [will generally be] insufficient to bring about the desired . . . reform."[145]

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[144] *Interest-Convergence Dilemma*, *supra* note 3, at 523.
[145] *Id.* at 525.