
**LEARNING FROM HISTORY:
PREDICTING THE DEVELOPMENT OF
CLASS-BASED INTEREST CONVERGENCE**

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INTRODUCTION

As the Critical Race Theory movement nears fifty years of age,¹ the reach and breadth of the project continues to expand ambitiously. While the experiences of Black Americans in the United States may have been one of the most central influences to the development of this theory,² Critical Race Theory has both

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¹ See Richard Delgado & Jean Stefancic, *Critical Race Theory: Past, Present, and Future*, 51 CURRENT LEGAL PROBS. 467, 467 (1998) (discussing origins of Critical Race Theory in the 1970s and its development).

² See Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 348 (2006).

contributed to and learned from critical legal movements focused on feminism, Latino/a/x people, Asian Americans, queer people, Native Americans, and even Whiteness.³ However, even as studies of race, ethnicity, gender, and sexuality became entwined within Critical Race Theory, the study and analysis of the U.S. class system was largely not undertaken under the Critical Race Theory umbrella until relatively recently.⁴

One of the key insights of critical race scholars is the theory of “interest-convergence” first proposed by Derrick Bell.⁵ Bell scrutinized court decisions dealing with the rights of racial minorities, most significantly *Brown v. Board of Education*,⁶ asserting that, rather than being based solely on lofty egalitarian ideals, the results in these cases that were positive for Black people were only possible because they were also in the interest of middle- and upper-class Whites.⁷ Of particular note is Bell’s observation that, by granting rights to Black Americans and affirming the principle of equality, these decisions would bolster anti-communist sentiment domestically and internationally.⁸

Initially observed in the context of the Black/White binary,⁹ a more generalized interest convergence theory posits that the interests of a dominant group or culture determine whether a minority or subordinate group will be successful in their struggle for advancement.¹⁰ The theory has been applied in diverse contexts, from the criminalization of wage theft,¹¹ to Puerto Rican U.S.

³ *Id.* at 333, 338, 377.

⁴ *See id.* at 377-79 (asserting, in this 2006 article, that Critical Race Theory scholarship had not produced a systematic analysis of class and proposing a new “ClassCrits” movement).

⁵ *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“[T]his principle of ‘interest convergence’ provides: The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites. . . . [T]he fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for [B]lacks where the remedy sought threatens the superior societal status of middle and upper class [W]hites.”).

⁶ 347 U.S. 483 (1954).

⁷ *Id.*

⁸ *Id.* at 524.

⁹ *See generally* Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997) (using notions and properties of paradigms to explore leading works on race and the “Black/White Binary Paradigm” of race).

¹⁰ Kevin Terry, Note, *Community Dreams and Nightmares: Arizona, Ethnic Studies, and the Continued Relevance of Derrick Bell’s Interest-Convergence Thesis*, 88 N.Y.U. L. REV. 1483, 1490 (2013) (citing Derrick A. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 6 (1976)).

¹¹ *See* Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1498-99 (2021) (examining the driving forces behind the criminalization of wage theft).

citizenship,¹² and to animal rights.¹³ Although a few writers have applied the theory in specific economic contexts,¹⁴ there has not yet been significant analysis on how interest convergence could apply to the benefit of the broad class interests of the poor and working class. This paper begins that conversation.

The significant reduction of poverty in China, along with the country's significant investments in the infrastructure of poor countries in other parts of the world, provides an opportunity for a class-based interest convergence between the poor and the elite in the United States, echoing the racial interest convergence in the 1950s and 60s motivated by the threat of the Soviet Union.

Part I of this paper reviews interest-convergence theory in more depth, particularly how the specter of the Soviet Union influenced American civil rights gains. This section suggests two primary reasons why a class-based interest convergence has received relatively little attention: one predominately international, the other domestic.

Part II first digs further into these two explanations and then discusses the rise of China on the global stage and the U.S. response to this perceived threat before examining the increase of populist class-forward movement and rhetoric in the United States over the past twenty to twenty-five years. Finally, this section ends by observing how a class-based interest convergence could take shape within the next few years of law and politics in the United States. This includes a dive into equal protection analysis and why racial categorizations generally receive strict scrutiny from the courts while economic categorizations need only survive a rational basis test.

Part III recognizes that the race-oriented interest convergence has been unsuccessful in important ways when it comes to uplifting members of the racial group whose interests are supposedly being advanced. This section also suggests strategies for safeguarding class-based interest convergence against the same pitfalls.

I. CLASS DISMISSED?: THE LACK OF A CLASS-BASED INTEREST-CONVERGENCE THEORY

Professor Derrick Bell first explicitly identified the interest-convergence dilemma in 1980, writing that “[t]he interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites.”¹⁵ Bell noted that Black people challenged the validity of school

¹² See Charles R. Venator-Santiago, *Interest Convergence and the Extension of U.S. Citizenship to Puerto Rico*, 9 U. MIA. RACE & SOC. JUST. L. REV. 111, 120-23 (2019).

¹³ See Joseph Lubinski, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, 4 J.L. SOC'Y 377, 403-13 (2003).

¹⁴ See, e.g., Patience A. Crowder, *(Sub)Urban Poverty and Regional Interest Convergence*, 98 MARQ. L. REV. 763 (2014) (suggesting that interests of local governments may converge to help fight poverty in the region).

¹⁵ Bell, *supra* note 5, at 523. Bell had expressed the same general thoughts several years prior, identifying certain events in American history—such as the abolition of slavery in the

segregation policies for 100 years prior to the *Brown* decision and that these legal challenges had consistently been brushed back not by orders desegregating schools but instead by orders requiring that the segregated facilities be made equal.¹⁶ Then, Bell identified three main ways in which *Brown* was to the advantage of a significant portion of Whites in power.

First, the United States' reputation abroad depended much on the treatment of Black people at home.¹⁷ As the United States battled with Communist countries to gain influence over developing nations, most of which were Brown, Black, or Asian, the prevalence of harsh segregation at home damaged the United States' credibility.¹⁸ Second, Black veterans who had fought in World War II were disillusioned and angry coming back home to face discrimination and violent attacks, so much so that their willingness to join the hypothetical next war against a Communist threat was in doubt.¹⁹ Finally, some Whites saw segregation as a barrier to the industrialization of the South, which would in turn lead to greater profits.²⁰

The first reason has received perhaps the most attention, particularly recently. This attention is probably due to both the novelty of relating *Brown* directly to foreign—as opposed to domestic—policy and because Mary Dudziak advanced the first of Bell's three reasons quite strongly when she elaborated on and confirmed the theory twenty years after Bell's original work.²¹ The font of primary documents she relies upon “inexorably converge” on the idea that the United States needed to make a major public shift on race relations to bolster its

North and the Emancipation Proclamation—as having occurred largely due to the interests of White people in power at the time of the events. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 158 (2011) (citing Derrick A. Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME L. REV. 5, 6-8 (1976)).

¹⁶ Bell, *supra* note 5, at 523-24. The separate facilities were, of course, often not equal in practice, court orders notwithstanding. See generally ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 68-86 (1990) (demonstrating the racial inequality in school resources during “Separate-but-Equal” which led to racial differences in educational outcomes).

¹⁷ Bell, *supra* note 5, at 524.

¹⁸ Bell, *supra* note 5, at 524.

¹⁹ *Id.* at 524-25. Racist postwar violence in the United States against Black former servicemembers was partially due to a deep-seated fear among some White people that the Black soldiers' exposure to desegregation in the military and to less-segregated locations abroad would make them less accepting of their second-class status in the United States. See Alexis Clark, *Returning from War, Returning to Racism*, N.Y. TIMES MAG. (Sept. 8, 2020), <https://www.nytimes.com/2020/07/30/magazine/black-soldiers-wwii-racism.html>.

²⁰ Bell, *supra* note 5, at 525.

²¹ See generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (examining the international impact of American race discrimination cases during the Cold War and demonstrating how domestic civil rights crises became international ones, tying civil rights reform to U.S. foreign relations).

declining global reputation in the midst of a smoldering Cold War.²² After World War II, sustaining the image of American democracy was seen as incredibly important, as it was believed that not doing so would threaten world peace and assist the Soviets in their quest for global domination.²³ Soviet propaganda distributed in India decried not only the American treatment of Black people, but the imperialist destruction of the Native American population as well.²⁴ Even the press in non-Soviet-allied European countries harshly criticized the treatment of Black people in the United States.²⁵

The United States attempted to counteract this international public relations nightmare with propaganda of its own.²⁶ American democracy was painted as the vehicle for national reconciliation of racial issues, a form of government able to cleanse the sins of the past and make possible racial redemption.²⁷ The State Department sponsored trips abroad for African Americans to speak against communism and about the expansion of rights they were enjoying in the United States.²⁸ In contrast, Black Americans like Paul Robeson and W. E. B. DuBois who had less positive things to say about race relations in the United States found their ability to travel overseas substantially restricted and even their passports denied.²⁹ Nevertheless, the drumbeat of mistreatment of people of color in the United States continued to limit the gains the United States could make in nonwhite nations abroad.³⁰

President Truman's order to desegregate the armed forces in 1948 was perhaps motivated by Truman's moral convictions, but also likely political interests, a recognition that doing so could blunt Soviet propaganda, and significant worry that Black Americans would not enlist or protest in other ways.³¹ While anti-communist sentiment bottled up civil rights legislation in Congress, Truman's Justice Department filed amicus briefs not only in *Brown*,

²² 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, 373-74 (2002) (reviewing DUDZIAK, *supra* note 21).

²³ See DUDZIAK, *supra* note 21, at 27.

²⁴ *Id.* at 33-34 (including articles which suggested that U.S. treatment of African Americans “resembles the story of India under British domination”).

²⁵ *Id.* at 35 (describing widespread European reporting and an analysis of “more than five hundred clippings from the press of ten European Countries,” all of which decried U.S. treatment of Black Americans).

²⁶ See *id.* 47-78 (describing the “countless efforts by the U.S. government to tell its side of the story of race in America”).

²⁷ See *id.* at 49.

²⁸ *Id.* at 56.

²⁹ *Id.* at 61-63. Some, like Josephine Baker, were banned from the United States entirely. *Id.* at 75-76.

³⁰ See *id.* at 77-78 (“In spite of U.S. efforts to tell a progressive story about race in America, the counternarrative of racial oppression continued to make headlines.”).

³¹ See *id.* at 83-87 (relaying a letter sent to Truman from citizens worried about Soviet propaganda taking advantage of the United States' military segregation).

but in four prior civil rights cases before the Supreme Court.³² These briefs, the first of their kind in which the government intervened in a case that it was not a party to and where the sole purpose was the vindication of rights guaranteed by the Fifth and Fourteenth Amendments, argued explicitly that racial discrimination at home hampered U.S. foreign affairs.³³ The briefs presented Soviet propaganda and statements made at United Nations meetings as evidence of the detrimental effect that race relations in the United States had in international relations, arguing that rulings upholding segregation or discrimination would embolden foreign “foes of democracy.”³⁴ The Court ruled for the party supported by the briefs in all five cases, including *Brown*.³⁵ The Justice Department’s brief in *Brown* in support of a desegregation ruling explicitly stated that “[r]acial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.”³⁶

Legislators in Congress also appealed to national security in attempts to pass antidiscrimination legislation.³⁷ Senator William Benton argued that Communist propaganda “twisted and distorted” U.S. race relations and that a bill combatting racial discrimination in defense contractor employment was essential to national security.³⁸ However, President Truman’s poor relationship with Congress, the fact that several pro-segregation Southern Democrats were key committee chairs, and the argument from some that passage of the bill was actually what Communists wanted all doomed the bill to failure.³⁹

While there may not be direct evidence that the Court openly discussed the effect that an anti-segregation decision would have in *Brown*, the circumstantial evidence is fairly overwhelming.⁴⁰ In particular, Chief Justice Warren and Justice Douglas both were well aware of the impact that domestic discrimination had on opinions of the United States abroad and believed the Cold War to be a “war of ideas.”⁴¹ Chief Justice Warren especially believed that the judiciary was

³² *Id.* at 89-102. These cases were *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Henderson v. United States*, 339 U.S. 816 (1950), *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950), and *Sweatt v. Painter*, 339 U.S. 629 (1950).

³³ Dudziak, *supra* note 21, at 91-102.

³⁴ *Id.* (quoting Memorandum for the United States as Amicus Curiae at 11-13, *McLaurin*, 339 U.S. 637 (1950) (No. 34), and *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 44))

³⁵ *Id.*

³⁶ Brief for the United States as Amicus Curiae at 31-32, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10).

³⁷ DUDZIAK, *supra* note 21, at 88.

³⁸ *Id.*

³⁹ *See id.* at 82, 88-90.

⁴⁰ *See id.* at 104.

⁴¹ *Id.* at 104-05 (“[Douglas] wrote that goodwill between peoples was ultimately of most importance to the Cold War struggle for the allegiance of other nations.”).

called to uphold the ideals of American justice.⁴² Immediately following the *Brown* decision, American propaganda outlets began sending the news to Eastern Europe, and in the years ahead, the international perspective toward U.S. government changed for the better.⁴³

Tracing this history shows how the development of a racial interest-convergence, one which first yielded some favorable court decisions and followed with the passage of the Civil Rights Act of 1964,⁴⁴ was dependent on two factors that have not seemed to operate in the same way with class. First, there was a significant foreign adversary well-positioned to exploit the United States' civil rights weak point.⁴⁵ Second, there was an easily identifiable and easily magnifiable minority interest at stake.

These factors mirror two reasons that a class-based interest-convergence has not yet taken shape or been successful in the United States. Until recently, there has been a lack of an international competitor able to make the United States look bad on the global stage by emphasizing the lack of care the United States gives its underclass. Additionally, the United States has lacked a broad working- or lower-class consciousness.⁴⁶ However, both of these barriers may be dissipating. The rise of China as an emerging global superpower that can be seen as improving the lives of the poor within its own borders and investing in the growth of other nations provides a potential analog to Cold-War-era Soviet Union; and the emergence of certain class-oriented movements within the United States has the potential to play the role that the Civil Rights movement played in the 1950s and 1960s, providing the opportunity for a new class-based interest convergence.

⁴² *Id.* at 106 (noting that “Warren told the judges of the Fourth Circuit of Appeals in June of 1954 that the world needed ‘a sense of justice instead of a sense of might’”).

⁴³ *See id.* at 107, 112-13. For the view that an important case for Latino justice, decided at nearly the same time as *Brown*, was decided for similar internationalist concerns regarding the spread of Communism in Latin America, see Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23 (2006).

⁴⁴ Dudziak, *supra* note 21, at 183, 209-13.

⁴⁵ *See Tell Me More, How 'Communism' Brought Racial Equality to the South*, NPR (Feb. 16, 2010), <https://www.npr.org/templates/story/story.php?storyId=123771194&t=1629023638227> [<https://perma.cc/HSS2-DRH8>] (interviewing historian Robin Kelley about the Communist Party in Alabama organizing for African-American self-determination). Professor Kelley is the author of *Hammer and Hoe*, a 1990 discussion of a commune of Black farmworkers in Alabama who sought to advance their interests through collective action.

⁴⁶ The author suspects there are more reasons still, including a major one involving the intersection of class, capitalism, and economic power, a topic too large for the scope of this paper.

II. TRACING THE EMERGING PARALLELS

A. *China's Poverty Reduction and Influence Expansion Create Urgent Incentives for U.S. Elite Actors*

It is necessary to caveat this conversation about China by noting that the current economic climate in the nation is a still-evolving situation, with significant causation assertions that are disputed. It is also necessary to note that despite the author's best efforts, it is largely impossible to know for certain whether the facts being delivered by certain news sources are delivering the whole truth. And, of course, the private motives and fears of advisors and decision makers within the U.S. government with regard to China are currently largely unknowable. Finally, the abuse and mistreatment of China's Uyghur Muslim minority, including their exclusion from many anti-poverty programs, must be and is acknowledged as something that complicates claims of poverty elimination.⁴⁷

The Chinese government has claimed success in "eradicating" absolute poverty, declaring that it has raised nearly 99 million people out of extreme poverty in the last eight years.⁴⁸ Within the past thirty years the number is even more impressive, as China has gone from 750 million people to less than 10 million people living below the international extreme poverty line.⁴⁹ There is some controversy regarding the definition of "extreme poverty" in China, as the country uses a poverty threshold of \$2.25 per day in purchasing power parity, while the World Bank recommends a poverty line of \$3.20 per day or even \$5.50 per day for nations of China's wealth level.⁵⁰ Further, some sources doubt the truth of the overall claim.⁵¹

⁴⁷ See Elizabeth Lee, *Poverty & Oppression: The Uyghur Muslims in Xinjiang, China*, BORGAN PROJECT (Nov. 2, 2020), <https://borgenproject.org/uyghur-muslims-in-xinjiang/> [<https://perma.cc/VF3S-QFGC>].

⁴⁸ Li Xin, *Can China's Anti-Poverty Model Be Copied Elsewhere?*, CGTN (Apr. 1, 2021, 11:26 AM), <https://news.cgtn.com/news/2021-04-01/Can-China-s-anti-poverty-model-be-copied-elsewhere—Z6h1ehyU0w/index.html> [<https://perma.cc/WSE4-UXJU>]. The infrastructure required for this achievement ranged from a nationwide database that identifies people in need to a system of door-to-door support. *Id.*

⁴⁹ Jack Goodman, *Has China Lifted 100 Million People out of Poverty?*, BBC NEWS (Feb. 28, 2021), <https://www.bbc.com/news/56213271> [<https://perma.cc/QJW4-DS3T>].

⁵⁰ *Id.*; Indermit Gill, *Deep-Sixing Poverty in China*, BROOKINGS (Jan. 25, 2021), <https://www.brookings.edu/blog/future-development/2021/01/25/deep-sixing-poverty-in-china/> [<https://perma.cc/KZ23-R2WM>].

⁵¹ See, e.g., Gill, *supra* note 50 (calling Chinese use of lower poverty benchmark "the very definition of underachievement"); Gao Feng, *China Claims It Has Eliminated Poverty But Is That True?*, VOA (Mar. 3, 2021, 12:57 AM), <https://www.voanews.com/east-asia-pacific/voa-news-china/china-claims-it-has-eliminated-poverty-true> [<https://perma.cc/6FAY-DEEV>] (interviewing an activist in China who claims the Chinese government pressures families into confirming that they received more assistance than they actually did). The corresponding definition of "poverty" in the United States and other high-

This remarkable (if debated) reduction in poverty is occurring at the same time that China is rapidly broadening its reach in important areas of the globe. For example, China's ongoing Belt and Road Initiative is an enormous infrastructure development project by which China is expanding its influence throughout Asia and into parts of Europe and Africa.⁵² The initiative includes the building of massive networks of highways, railways, and pipelines through Asia, port development, and the creation of various "special economic zones."⁵³ Further, China is now the largest trading partner with many countries in Latin America and Africa and is the top trading partner with South America collectively.⁵⁴ Since 2005, China has provided over \$150 billion in loans to Latin American nations, overtaking the annual U.S. lending to those countries.⁵⁵ In 2015, China pledged \$250 billion in investment in Latin America over ten years and, in 2018, successfully pressured Panama, the Dominican Republic, and El Salvador to switch diplomatic recognition from Taiwan to China.⁵⁶ China became the top trading partner to Africa in 2009 and increased investments in Africa by more than 500% in the last fifteen years.⁵⁷ China intends to loan more than \$1 trillion in Africa by 2025 and has over 10,000 firms on the continent with the potential to generate \$440 billion by that same year.⁵⁸ Even as some

income countries is significantly higher at \$21.70 per day. Eric L. Dixon & Indermit S. Gill, *Poverty in China as Its Economy Nears High Income* 12 (Duke Glob. Working Paper, Paper No. 34, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796432 [<https://perma.cc/QJN2-TWXP>].

⁵² See Andrew Chatzky & James McBride, *China's Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELS. (Jan. 28, 2020, 7:00 AM) <https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative> [<https://perma.cc/T875-ANNZ>].

⁵³ *Id.*

⁵⁴ *China's Growing Influence: What's At Stake?*, U.S. GLOB. LEADERSHIP COAL. (Apr. 2021), <https://www.usglc.org/chinas-growing-influence-is-america-getting-left-behind/> [<https://perma.cc/3K8C-TCYY>]; Ciara Nugent & Charlie Campbell, *The U.S. and China Are Battling for Influence in Latin America, and the Pandemic Has Raised the Stakes*, TIME (Feb. 4, 2021, 6:07 AM), <https://time.com/5936037/us-china-latin-america-influence/>.

⁵⁵ U.S. GLOB. LEADERSHIP COAL., *supra* note 54 (observing 90% of China's investment in Latin America has been directed to four countries: Venezuela, Brazil, Ecuador, and Argentina). See also Paola Zuleta, *How Latin America Can Make the Most of the US-China Competition*, DIPLOMAT (Dec. 16, 2020), <https://thediplomat.com/2020/12/how-latin-america-can-make-the-most-of-the-us-china-competition/> [<https://perma.cc/M2QA-4RBL>] ("China's reach in influence in Latin America has . . . widened considerably, and this has geopolitical ramifications now that China now has greater economic influence in the region than any previous contender for global leadership.").

⁵⁶ Megha Rajagopalan, *China's Xi Woos Latin America with \$250 Billion Investments*, REUTERS (Jan. 7, 2015, 9:46 PM), <https://www.reuters.com/article/us-china-latam-idUSKBN0KH06Q20150108> [<https://perma.cc/9CVN-Y5RG>]; see also Zuleta, *supra* note 55; U.S. GLOB. LEADERSHIP COAL., *supra* note 54.

⁵⁷ U.S. GLOB. LEADERSHIP COAL., *supra* note 54.

⁵⁸ *Id.*

Chinese investment slowed in these parts of the world amid the COVID-19 pandemic and loan repayment uncertainty, the pandemic has provided an opportunity to build soft power by helping supply personal protective equipment (PPE), something Chinese President Xi Jinping calls “mask diplomacy.”⁵⁹ China is similarly practicing “vaccine diplomacy” by leveraging political power and providing vaccines.⁶⁰

The United States has not simply sat by the wayside as China works to grow its influence in other parts of the globe. For example, the Trans-Pacific Partnership was a negotiated trade deal between the United States and several Pacific and East Asian nations during President Obama’s second term intended to blunt Chinese influence in the region by pressuring China to either make necessary economic reforms or be left out.⁶¹ China failed to make economic

⁵⁹ See *Loans From China to Latin America Dry Up, As Region’s Governments Take Pandemic Hit*, NBC NEWS (Feb. 22, 2021, 10:51 AM), <https://www.nbcnews.com/news/latino/loans-china-latin-america-dry-region-s-governments-take-pandemic-n1258508> [<https://perma.cc/8MQG-2HDY>] (observing that, although China’s lending in Latin America slowed during the pandemic, China donated more than \$215 million in supplies); Alain Faujas, *China May Scale Back Investment in Africa, Says New Report*, AFR. REP. (Nov. 24, 2020, 12:47 PM), <https://www.theafricareport.com/51202/china-may-scale-back-investment-in-africa-says-new-report/> [<https://perma.cc/RYE6-43F8>]; Earl Carr, *The US Versus Chinese Investment in Africa*, FORBES (Sept. 4, 2020, 8:32 AM), <https://www.forbes.com/sites/earlcarr/2020/09/04/the-us-versus-chinese-investment-in-africa/?sh=1d38ff7a65d4> [<https://perma.cc/77J7-EM84>] (recounting Chinese relief efforts in Africa).

⁶⁰ See Yanzhong Huang, *Vaccine Diplomacy Is Paying Off for China*, FOREIGN AFFS. (Mar. 11, 2021), <https://www.foreignaffairs.com/articles/china/2021-03-11/vaccine-diplomacy-paying-china> (explaining that China is exporting vaccines to almost 100 countries, while noting that China itself rejects term “vaccine diplomacy”). China has been accused by some of using vaccine exports to obtain diplomatic concessions from other nations. See Josh Rogin, Opinion, *The United States Can’t Ignore China’s Vaccine Diplomacy in Latin America*, WASH. POST. (Apr. 22, 2021, 4:58 PM), https://www.washingtonpost.com/opinions/global-opinions/the-united-states-cant-ignore-chinas-vaccine-diplomacy-in-latin-america/2021/04/22/64f7f12c-a390-11eb-a774-7b47ceb36ee8_story.html (alleging, among other things, that Paraguay was pressured to drop diplomatic recognition of Taiwan in exchange for vaccines). At the same time, at least one American company has been accused of similar activities. Madlen Davies, Rosa Furneaux, Iván Ruiz & Jill Langlois, *‘Held to Ransom’: Pfizer Demands Governments Gamble with State Assets to Secure Vaccine Deal*, MAIL & GUARDIAN (Feb. 23, 2021), <https://mg.co.za/health/2021-02-23-held-to-ransom-pfizer-demands-governments-gamble-with-state-assets-to-secure-vaccine-deal/> (explaining that Pfizer required Latin American nations to put up sovereign assets, like embassy buildings and military bases, as guarantees against any future litigation as part of exchange for providing vaccines).

⁶¹ Katsuji Nakazawa, *Analysis: Xi Jinping’s Embrace of TPP Is 8-Year Revenge on Obama*, NIKKEI ASIA (Nov. 26, 2020, 2:30 PM), <https://asia.nikkei.com/Editor-s-Picks/China-up-close/Analysis-Xi-Jinping-s-embrace-of-TPP-is-8-year-revenge-on-Obama>.

reform and was initially left out of the trade deal.⁶² In 2017, President Trump withdrew from the deal, and now China is potentially looking to join in the United States' place.⁶³

The United States has made several other missteps that may be significant and from which it may need to rebuild its international image. First, Donald Trump's presidency saw a significant deterioration of the U.S.-China relationship, stemming from various accusations (whether or not based in fact) of unfair trade practices, intellectual property theft, and civil rights abuses that President Trump threw at the Asian nation, as well as a trade war that threatened China's food security.⁶⁴ At the same time, it seems the United States' relationships with both Latin America and Africa were shoved to the wayside, viewed mostly or entirely through the lens of how they could be leveraged in the context of the U.S.-China relationship.⁶⁵ Finally, insinuations that African nations were "shithole countries,"⁶⁶ that even legal immigrants from Latin America are likely unwelcome rapists or criminals,⁶⁷ and that China or the Chinese were somehow to blame for the coronavirus,⁶⁸ did no favors regarding sentiment toward the United States in those respective nations.

Returning to the initial caveat, the truthfulness of specific assertions may be somewhat less important for interest-convergence purposes. Assuming that a primary goal from the perspective of the United States will be to counteract any perception of Chinese superiority, it is in fact the *perception* of superiority that troubles U.S. decisionmakers. If China is perceived as outpacing the United States when it comes to lifting its own people out of poverty or the ability and willingness to invest in other countries' citizenry and infrastructure, that perception will have an impact regardless of whether it is true. Chinese media's

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Nugent & Campbell, *supra* note 54 (likening the competition between the United States and China to "a new cold war," in which "[i]t's not yet clear where the 'silk curtain' will fall in Latin America"); Carr, *supra* note 59 (asserting that the Trump Administration's approach in Africa was more reactive, striving to counter China's commercial, security, and geopolitical influence in the continent).

⁶⁶ Ibram X. Kendi, *The Day Shithole Entered the Presidential Lexicon*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/shithole-countries/580054/> [<https://perma.cc/9MGB-2KL9>].

⁶⁷ Mia Bristol, *U.S. Immigration and the Trump Asylum Ban*, U. PITT. PANORAMAS (Oct. 16, 2019), <https://www.panoramas.pitt.edu/news-and-politics/us-immigration-and-trump-asylum-ban> [<https://perma.cc/M984-458A>].

⁶⁸ Sally Ho, *Trump Faced Issues with Asian Americans Even Before Virus*, AP NEWS (July 9, 2020), <https://apnews.com/article/4b9c7f519a3951a6d34bbe91dd4f4be21>.

description of the nation's "victory" over extreme poverty as a potential model for other nations shows that China is well aware of the powers of perception.⁶⁹

B. *Class in Session: Occupy Wall Street, BLM, Bernie Sanders, and the Populist Rise*

Bill Fletcher, Jr., once asked: "What factors account for the surprisingly low level of class consciousness in the U.S. working class?"⁷⁰ While the question undoubtedly has many possible answers, many thinkers identify racial classification and strife as a major historical barrier.⁷¹ "[R]ace and settlerism *deformed* class struggle in the United States," Fletcher suggests.⁷² This fusion of race and capitalism exacerbated the crabs-in-a-barrel problem inherent to the working class under capitalism, ensuring that people in the working class have "multiple interests, often-contradictory interests that are affected by race, ethnicity, gender, and empire."⁷³ These divisions are no accident; White supremacy and racialism is incentivized by the market and encouraged, as are other exploitable divisions, by ruling class interests.⁷⁴

The Occupy Wall Street protests ["Occupy"] at the beginning of the last decade are sometimes cast as the formative efforts of the critiques to capitalism

⁶⁹ Frida Lindberg, *China's Poverty Eradication: Through the Lens of Chinese Media*, INST. FOR SEC. & DEV. POL'Y (Dec. 17, 2020), <https://www.isdp.eu/chinas-poverty-eradication-through-the-lens-of-chinese-media/> [<https://perma.cc/SD2A-Q89L>].

⁷⁰ Bill Fletcher, Jr., *How Race Enters Class in the United States*, in *WHAT'S CLASS GOT TO DO WITH IT?: AMERICAN SOCIETY IN THE TWENTY-FIRST CENTURY* 35, 35 (Michael Zweig ed., 2004).

⁷¹ *See id.*; BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* 116-17 (2000); CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 202 (Univ. N.C. Press 2000) (1983).

⁷² Fletcher, Jr., *supra* note 70, at 37-39 (describing settlerism as the combination of Whiteness and being a settler that defined those who were "civilized" in opposition to those who were not).

⁷³ *Id.* at 37-38.

⁷⁴ HOOKS, *supra* note 71, at 117 ("Ruling class interests have a stake in reinforcing a politics of [W]hite supremacy, which continues to try to socialize [W]hite working-class and poor people to blame their economic plight on [B]lack people or people of color globally."); ROBINSON, *supra* note 71, at 204-05; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 42 (Rev. ed. 2020). Trump strategist Steve Bannon believed that the Democratic Party's focus on racial divisions in American society would help Republicans if they kept their focus on economic nationalism. *See* Robert Kuttner, *Steve Bannon, Unrepentant*, AM. PROSPECT (Aug. 16, 2017), <https://prospect.org/power/steve-bannon-unrepentant/> [<https://perma.cc/7T5T-ZG5U>]. Russian attempts to inflame racial discontent in the United States provide a geopolitical analogy for a powerful actor sowing discord to keep a rival divided. Julian E. Barnes & Adam Goldman, *Russia Trying to Stoke U.S. Racial Tensions Before Election, Officials Say*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2020/03/10/us/politics/russian-interference-race.html>.

that animate today's political left,⁷⁵ but the seeds of Occupy were sown at the Seattle World Trade Organization protests at the turn of the century.⁷⁶ The unity between the labor movement and environmentalists provided a fresh radical critique of the neoliberal world order of the prior twenty years.⁷⁷ Although the September 11th attacks and subsequent events shifted the burgeoning lefty movement away from anti-capitalism, the class critique would come back to the forefront with the Occupy movement ten years later.⁷⁸

Occupy Wall Street sparked offshoots and kindred spirits as well, though the movement was (somewhat rightfully) derided as “so damn [W]hite.”⁷⁹ Shortly after Occupy had run its course, the Black Lives Matter movement began critiquing the establishment from a very different angle.⁸⁰ And “[i]f it wasn't for Occupy Wall Street, Black Lives Matter as a movement and the overall Movement for Black Lives, we wouldn't be having the conversations around race and capital that we are right now.”⁸¹ While radical race- and class-oriented critiques of the existing social and economic orders became more commonplace, merging the two remains difficult. Bernie Sanders's insurgent 2016 presidential campaign adopted strength and space from Occupy, bringing in the labor

⁷⁵ Emily Stewart, *We Are (Still) the 99 Percent*, Vox (Apr. 30, 2019, 9:00 AM), <https://www.vox.com/the-highlight/2019/4/23/18284303/occupy-wall-street-bernie-sanders-dsa-socialism> [<https://perma.cc/32XX-KYC3>] (“In the long run, Occupy invigorated ideas and people that influence today's American left and Democratic politics.”).

⁷⁶ Daniel Denvir, *Today's Socialist Revival Began on the Streets of Seattle 20 Years Ago*, JACOBIN (Nov. 30, 2019), <https://jacobinmag.com/2019/11/seattle-world-trade-organization-protests-socialism> [<https://perma.cc/CV2D-2GJ2>] (“Today's left revival in the United States began that Tuesday morning, when radical protestors . . . linked themselves together at strategic intersections and successfully blocked delegates from entering the [World Trade Organization].”).

⁷⁷ *See id.*

⁷⁸ *Id.* The Tea Party, a right-wing movement in contrast to Occupy's leftist bent, offered similar-sounding critiques that the government was putting a thumb on the scale in favor of people who did not need or deserve the help. Jeremy W. Peters, *The Tea Party Didn't Get What It Wanted, but It Did Unleash the Politics of Anger*, N.Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/28/us/politics/tea-party-trump.html>. The movement was made up largely of people who identified as “workers” or “working-class,” and although the movement tended to argue against government intervention and was largely identified by nativist tendencies, certain elements of the class critique were still present. Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSPS. ON POL. 25, 32-35 (2011).

⁷⁹ Stewart, *supra* note 75.

⁸⁰ *See id.*

⁸¹ *Id.* (quoting Occupy activist and Working Families Party strategist Nelini Stamp).

movement as well,⁸² but still had trouble with the racial message.⁸³ Sanders's 2020 campaign had some of the same race-oriented struggles but did make significant inroads with Latino voters.⁸⁴

The surprising popularity of both Sanders and Trump in 2016 spoke to a growing hunger for populism on both sides of the electorate.⁸⁵ Both candidates identified economic issues supported by conventional wisdom in both parties that did little to no good for the poor or working-class voter.⁸⁶ For example, Trump and Sanders both campaigned against trade deals, like the North American Free Trade Agreement ("NAFTA") and the Trans-Pacific Partnership, that are widely viewed to contribute to manufacturing job losses in the United States.⁸⁷ Trump's openly racially antagonist campaign won the battle and the war that year, but the economic populism of the more inclusive (if still insufficient) Sanders movement shows potential for the creation of working-class unity. The COVID-19 pandemic has supplied more fuel, as the poverty rate has increased significantly to 11.2% because of the economic downturn caused by the pandemic.⁸⁸ Some groups who were already in a disadvantaged position now exhibit substantially higher poverty rates; in February 2021, the rate for people with no more than a high school education was 21.8% and the rate for

⁸² Rand Wilson & Dan DiMaggio, *Labor for Bernie Activists Take the Political Revolution into Their Unions*, LABOR NOTES (Mar. 17, 2016), <https://labornotes.org/2016/03/labor-bernie-activists-take-political-revolution-their-unions> [https://perma.cc/CP6Z-NVCZ].

⁸³ Stewart, *supra* note 75.

⁸⁴ Meagan Day, *How Bernie Won a Landslide of Latino Voters: An Interview with Belén Sisa*, JACOBIN (Apr. 28, 2020), <https://www.jacobinmag.com/2020/04/belen-sisa-bernie-sanders-latino-voters> [https://perma.cc/WVK4-AQ9B] (observing Sanders won 53% of Latino voters in Nevada, 49% in California, and 39% in Texas during the Democratic primaries for the 2020 presidential election).

⁸⁵ James Surowiecki, *Economic Populism At the Primaries*, NEW YORKER (Feb. 14, 2016), <https://www.newyorker.com/magazine/2016/02/22/trump-sanders-and-the-american-worker>.

⁸⁶ *Id.*

⁸⁷ Will Doran, *Donald Trump Says He and Bernie Sanders Are 'Very Similar' on Trade*, POLITIFACT (July 27, 2016), <https://www.politifact.com/factchecks/2016/jul/27/donald-trump/donald-trump-says-he-and-bernie-sanders-are-very-s/> [https://perma.cc/YU7R-DPW4]. While Sanders and Trump may have had fairly similar rhetoric regarding NAFTA, Sanders was the only major 2020 presidential candidate to oppose Trump's re-negotiated agreement on the grounds that it would not prevent much outsourcing and did not include enough environmental protections. *See* Press Release, Bernie Sanders, U.S. Sen. for Vermont, Sanders Opposes Trump's USMCA: Full Statement (Jan. 15, 2020), <https://www.sanders.senate.gov/press-releases/sanders-opposes-trumps-usmca-full-statement/> [https://perma.cc/KZM2-4UP5].

⁸⁸ Tami Luhby, *US Poverty Is Still High, But Stimulus Is Stopping It from Getting Worse*, CNN (Mar. 25, 2021, 10:26 PM), <https://www.cnn.com/2021/03/23/politics/poverty-federal-relief-stimulus/index.html> [https://perma.cc/R9XF-6EVE] ("Poverty has soared during the coronavirus pandemic, but it would have been even worse without successive federal relief packages last year.").

Black people was 21%.⁸⁹ The economic recovery from the pandemic has been said to be “K-shaped,” an economist’s term describing the way that some people were able to bounce back relatively quickly while many others are still in free fall, much like the upward and downward strokes of the letter “K.”⁹⁰

C. *Show and Tell: What Could Class Interest-Convergence Look Like?*

If, as considered above, the United States is entering a limited period when the interests of poor people are converging with the interests of those in control of the U.S. government, then potential policy changes range from the minor to the truly transformative.

Thinking big, poor people could become a protected class under the U.S. Constitution, and so-called poverty law may make a comeback. After some positive signs in the 1960s, the Supreme Court effectively “deconstitutionalized” poverty law, declining to provide poor people with the same measures of constitutional protection offered to other disadvantaged classes.⁹¹ In particular, in 1970 the Supreme Court did an abrupt about-face from the progressive holdings of the previous decade in *Dandridge v. Williams*,⁹² a case that upheld Maryland’s maximum family welfare limit.⁹³ Many scholars believe the Supreme Court has since declared that the poor are not a suspect class for purposes of the Fourteenth Amendment’s Equal Protection Clause.⁹⁴ Overturning this belief would subject laws that discriminate on the basis of class to either strict scrutiny (if the class is suspect) or intermediate scrutiny (if the class is quasi-suspect).⁹⁵ To survive strict scrutiny, a classification on the basis of a suspect class must be justified by a compelling governmental interest and be necessary to accomplish a legitimate governmental purpose, whereas to survive intermediate scrutiny, a classification on the basis of a quasi-suspect class must serve an important governmental objective and be substantially related to that objective.⁹⁶

⁸⁹ *Id.*

⁹⁰ “K-Shaped” Economic Recovery Shows Pandemic’s Uneven Impact, Even a Year Later, CBS NEWS (Mar. 10, 2021, 6:59 AM), <https://www.cbsnews.com/news/economy-k-shaped-recovery-covid-pandemic-impact-uneven/> [<https://perma.cc/9QVL-NH97>].

⁹¹ Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 629-30 (2008).

⁹² 397 U.S. 471 (1970).

⁹³ *Id.* at 487; *see also* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA, at xvi-xviii, 41-47 (2020) (discussing the case and its impact on American poverty law).

⁹⁴ *Cf.* Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 407 (2010) (rebuking a general opinion that the Supreme Court has held that the poor are neither quasi-suspect nor suspect class under Equal Protection Clause, arguing that in fact the question has not yet been officially settled).

⁹⁵ *Id.* at 410.

⁹⁶ *Id.*

Several factors go into the determination of whether a group is considered a suspect class. Factors include whether the characteristic defining the group is immutable, whether there exists a continuing antipathy or prejudice toward the group in legislation, whether the group is politically powerless, and whether there are legitimate reasons to treat members of the group differently than other persons.⁹⁷ Arguably, the poor meet many of these criteria. The American Dream once thought accessible to all (or at least most) is, in reality, fairly out of reach for many poor people, making upward mobility instead almost a pipe dream and increasing poverty's immutability.⁹⁸ Many laws currently discriminate against the poor,⁹⁹ and poor people have either very little or no political power.¹⁰⁰

The currently conservative Supreme Court might not be willing to go so far as to declare the poor to be a suspect class. Many of the same rationales that would justify a finding that the poor are a suspect class also justifies legislation prohibiting discrimination against the poor.¹⁰¹ Legislative prohibition would be more wide-ranging than a suspect class declaration. An antidiscrimination statute can apply to any private actor, while Fourteenth Amendment-based equal protection would protect the poor only from government actions.¹⁰² Furthermore, antidiscrimination statutes, depending on the language, are not subject to the discriminatory intent requirement of Fourteenth Amendment liability.¹⁰³

⁹⁷ *Id.* at 420.

⁹⁸ Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 122 (2009). *See also* Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 879 (2007) (reviewing MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005); CHARLES MURRAY, *IN OUR HANDS: A PLAN TO REPLACE THE WELFARE STATE* (2006)).

⁹⁹ *Dispelling Myths About Poverty*, EQUAL JUSTICE UNDER LAW, <https://equaljusticeunderlaw.org/poverty-myths> [<https://perma.cc/Y5EJ-NMBN>] (last visited Oct. 12, 2021) (listing laws that prevent prison visitation given outstanding parking tickets, that force someone to move because of their mobile home value, and that keep persons in prison due to inability to afford bail as examples).

¹⁰⁰ MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1* (2012) (arguing that not only do the poor have little to no power, but that typically “the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn’t adopt.”); Barnes & Chemerinsky, *supra* note 98, at 121-22.

¹⁰¹ *See* Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1290-99 (2018).

¹⁰² *Id.* at 1290-91.

¹⁰³ *Id.* at 1291-92. The Supreme Court established the discriminatory intent requirement in 1976 in a case that found unobjectionable the promotion policies of a police department that were based on a written personnel test that excluded higher numbers of Black applicants. *Washington v. Davis*, 426 U.S. 229, 245-49 (1976).

If overarching discrimination protections are still a bridge too far, there are individual rights or issues that, if won, could have significant positive impact upon the poor. The institution of a “civil Gideon,” for example, providing a civil right to counsel either for all civil cases or at least for those where basic human needs are at stake, would ensure that the poor are able to have their interests represented in court while potentially saving money overall.¹⁰⁴ As of 2009, compared to a nation’s gross domestic product, the United States spent significantly less on public civil legal assistance than many other advanced nations like Germany, the U.K., and Canada.¹⁰⁵

Other legislative proposals that benefit both the poor or working class and the elite vis-à-vis China may find easier paths through Congress. We could see a stricter, more advantageous overhaul of NAFTA (what is now the United States-Mexico-Canada Agreement (“USMCA”)) that protects or creates more manufacturing jobs, for instance. Certain sectors of the U.S. economy are somewhat dependent on foreign manufacturing, including manufacturing from China.¹⁰⁶ An agreement that creates more manufacturing jobs in the United States could be welcomed by the political left and right in the U.S. working class while also being a victory for U.S. corporations and others concerned with China’s strong manufacturing position.

The most likely interest-convergence issue today may follow the same pattern as the Soviet Union influencing race relations in the United States. As China continues attempting to expand its influence into Latin America, Africa, South Asia, and perhaps even elsewhere, the elimination of extreme poverty inside China and its infrastructure investments in other nations threaten to put

¹⁰⁴ See Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J.C.R. & C.L. 63, 84-88 (2020); see also Myriam Gilles & Gary Friedman, *Examining the Case for Socialized Law*, 129 YALE L.J. 2078, 2080 (2020) (reviewing FREDERICK WILMOT-SMITH, *EQUAL JUSTICE: FAIR LEGAL SYSTEMS IN AN UNFAIR WORLD* (2019)) (noting that the United States is today more open to broad, socialistic measures aimed at abetting poverty than it has been in recent times).

¹⁰⁵ Earl Johnson, Jr., *Justice for America’s Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393, 424 (2009) (showing that for every \$10,000 of gross domestic product, the United States spends \$0.65 on public civil legal aid, while Germany spends \$2.25, Canada spends \$2.80, and the four combined nations of the U.K. spend over \$7.00).

¹⁰⁶ See, e.g., Ana Swanson, *Coronavirus Spurs U.S. Efforts to End China’s Chokehold on Drugs*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/business/economy/coronavirus-china-trump-drugs.html> (criticizing reliance on China in pharmaceutical sector); Raj Varadarajan, Antonio Varas, Marc Gilbert, Michael McAdoo, Fang Ruan & Gary Wang, *What’s at Stake If the US and China Really Decouple*, BOS. CONSULTING GRP. (Oct. 20, 2020), <https://www.bcg.com/publications/2020/high-stakes-of-decoupling-us-and-china> [<https://perma.cc/YY4G-KH8G>] (identifying apparel, furniture, machinery, motor vehicles, and several electronics sectors as economically dependent on hard-to-replace Chinese manufacturing).

the United States on the back foot on issues relating to poverty. Can the United States continue to claim that democracy is a superior form of government to the more autocratic Chinese form if China begins to show better practical results at home and abroad? The embarrassment of the United States' COVID-19 response has helped to deepen these doubts.¹⁰⁷ Perhaps the class-focused interest convergence will come in the form of a significantly strengthened welfare state, a universal basic income, or even—combining the issues of poverty and infrastructure—a jobs guarantee. The Biden presidency, although still nascent and bogged down by cross-party alliances of ideological and institutional conservatives,¹⁰⁸ has begun to show promise with multi-billion dollar anti-poverty measures.¹⁰⁹

III. AVOIDING THE FALSE PROMISE OF INTEREST CONVERGENCE

A significant number of authors and thinkers have observed, predicted, or suggested the interest convergence concept within and without the context of race. The theory is often proposed as a method by which a minority or disempowered group may be able to win or bolster a fight for their rights or interests; a suggestion that the minority group at issue may find it easier to advance their own interests because a powerful group can also realize an advantage by doing so.¹¹⁰ Putting these suggestions into practice by developing a detailed legislative or judicial strategy to take advantage of interest-convergence requires grappling with the racial realism that Bell expressed.¹¹¹

¹⁰⁷ See Patrick Mendis & Joey Wang, *China Is Touting Its Totalitarianism Taming of the Coronavirus Over U.S. Democratic Failure*, NAT'L INT. (Jan. 10, 2021), <https://nationalinterest.org/feature/china-touting-its-totalitarianism-taming-coronavirus-over-us-democratic-failure-176076> [<https://perma.cc/ND8U-UF46>].

¹⁰⁸ See Michelle Goldberg, *Sinema and Manchin's Nihilistic Bipartisanship*, N.Y. TIMES (June 4, 2021), <https://www.nytimes.com/2021/06/04/opinion/sinema-manchin-senate.html>.

¹⁰⁹ See Annie Linskey, *How Biden Quietly Created a Huge Social Program*, WASH. POST (Mar. 22, 2021, 6:00 AM), https://www.washingtonpost.com/politics/biden-child-poverty/2021/03/21/40cc3a82-8677-11eb-bfdf-4d36dab83a6d_story.html. But see Seth Ackerman, *Biden's COVID Relief Bill Is the Biggest Anti-Poverty Program in . . . Months*, JACOBIN (Mar. 19, 2021), <https://www.jacobinmag.com/2021/03/joe-biden-relief-bill-child-benefit-anti-poverty> [<https://perma.cc/AU8Y-KCDN>] (comparing President Biden's COVID relief bill to Former President Trump's COVID relief package from the previous year).

¹¹⁰ See, e.g., Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501, 1505 (2004) (“[B]ecause employer sponsored pension plans exclude a majority of Whites and people of color, according to Professor Derrick Bell's interest-convergence thesis, this may be a unique opportunity to effectuate pension reform.”); Stephanie M. Weinstein, *A Needed Image Makeover: Interest Convergence and the United States' War on Terror*, 11 ROGER WILLIAMS U. L. REV. 403, 428-29 (2006) (“Countless examples demonstrate how the United States is finding a convergence of majority and minority interests and is thus allowing minority groups to experience small gains.”).

¹¹¹ See Bell, *supra* note 5; see also DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM 9 (2004) (“History as well

A. *The Promise and Tragedy of Brown v. Board*

It was clear to Bell while naming the phenomenon of interest convergence twenty-five years after *Brown* that “school desegregation has in large part failed,” as he noted that “most [B]lack children attend public schools that are both racially isolated and inferior.”¹¹² Some might call Bell’s later work pessimistic or even fatalistic, as he pronounced, “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 [W]hite dominance.”¹¹³ Perhaps Bell predicted the later decision in *Parents Involved in Community Schools v. Seattle School District No. 1*¹¹⁴ fifteen years later. In *Parents Involved*, Justice Roberts for the Court found “integration positive” public school student assignment plans using race as one criteria for determining what school a student should attend unconstitutional because “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹¹⁵ Bell noted:

[A] judge may advocate the importance of racial equality while arriving at a decision detrimental to [B]lack Americans. . . . By reasoning that race-conscious policies derogate the meaning of racial equality, a judge can manipulate the law and arrive at an outcome based upon her worldview, to the detriment of [B]lacks seeking enrollment.¹¹⁶

This observation illustrates a judicial “retrenchment” away from the convergence of interests that once prevailed, restricting the gains made by the minority group during the interest-convergence.¹¹⁷ Bell would later wonder if

as current events call for realism in our racial dealings. Traditional statements of freedom and justice for all, the usual fare on celebratory occasions, serve to mask continuing manifestations of inequality that beset and divide people along lines of color and class.”); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) [hereinafter Bell, *Racial Realism*]; Derrick Bell, *A Simple Dialogue: The Potential Value of Losing Brown v. Board*, in THE UNFINISHED AGENDA OF BROWN V. BOARD OF EDUCATION 63 (James Anderson & Dara N. Byrne eds., 2004) [hereinafter Bell, *Simple Dialogue*].

¹¹² Bell, *supra* note 5, at 518-19; *see also* Tifanei Ressi-Moyer, Pilar Gonzalez Morales & Jaqueline Aranda Osorno, *Movement Lawyering During a Crisis: How the Legal System Exploits the Labor of Activists and Undermines Movements*, 24 CUNY L. REV. 91, 96-98 (2021) (noting specific ways that desegregation set back the cause of Black public-school education throughout the South).

¹¹³ Bell, *Racial Realism*, *supra* note 111, at 373-74.

¹¹⁴ 551 U.S. 701 (2007).

¹¹⁵ *Id.* at 712, 748.

¹¹⁶ Bell, *Racial Realism*, *supra* note 111, at 376.

¹¹⁷ *See* Lahny R. Silva, *Ringling the Bell: The Right to Counsel and the Interest Convergence Dilemma*, 82 MO. L. REV. 133, 155 (2017) (“Interest convergence understands that eras of convergence are short-lived and followed by a retrenchment manifesting itself in restrictive interpretations of reformist policies aimed at enforcing civil liberties.”).

Black schoolchildren would be better off if the Court had ruled against desegregating schools in *Brown*, theorizing both that the Court might have more vigorously enforced the second prong of “separate but equal” and that the Black mobilization to support Black schools could have been powerful.¹¹⁸ Following the *Parents Involved* decision, Bell would label *Brown* an “obsolete precedent;” an “important historical artifact[] without current substantive significance.”¹¹⁹

Today, one may regard the *Brown* decision as a failure on two fronts. First, although the opinion found that “separate educational facilities are inherently unequal,”¹²⁰ by some measures Black students are just as segregated as they were before *Brown* and the 1964 Civil Rights Act went into effect.¹²¹ About half of all school children attend districts that are racially concentrated—half of whom attend schools that are either over 75% White or over 75% nonwhite.¹²² Housing patterns and racial sorting between municipalities have helped to at least partially reverse gains made in the 1960s and 70s, with the percentage of Black students in schools that have a population of at least 90% minority students rising in every region of the country since the 1980s.¹²³

¹¹⁸ Bell, *Simple Dialogue*, *supra* note 111, at 74-76.

¹¹⁹ Derrick Bell, *Racial Equality: Progressives' Passion for the Unattainable*, 94 VA. L. REV. 495, 498 (2008) (book review).

¹²⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

¹²¹ Matthew Green, *Why Are American Public Schools Still So Segregated?*, KQED (Feb. 7, 2018), <https://www.kqed.org/lowdown/30098/why-have-americas-public-schools-gotten-more-racially-segregated> [<https://perma.cc/4MAL-G5FB>] (collecting data and finding schools have gotten “steadily more segregated in recent decades”).

¹²² EDBUILD, \$23 BILLION, at 2 (2019), <https://edbuild.org/content/23-billion/full-report.pdf> [<https://perma.cc/R42K-M8GQ>] (“There are a similar number of students attending racially concentrated school districts as there are in more diverse systems. Of those students in racially concentrated systems, about half attend school in a district that is more than 75% nonwhite . . . and half are enrolled in districts that are more than 75% [W]hite . . .”).

¹²³ See Alvin Chang, *The Data Proves That School Segregation Is Getting Worse*, VOX (Mar. 5, 2018), <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data> [<https://perma.cc/SJ5C-RWRV>] (graphing percentage of Black students in schools that are 90% to 100% minority over time). Contrary to what may be a common belief or stereotype, by this measure segregation is less common in the South than in every other region of the country, while segregation in the Northeast is even more common than it was in the 1960s. See *id.* Latino children are possibly even more racially impacted—attending schools that are dominantly minority-enrollment—than are Black schoolchildren. ERICA FRANKENBERG, JONGYEON EE, JENNIFER B. AYSUCUE & GARY ORFIELD, UCLA C.R. PROJECT, HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER *BROWN* (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-our-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> [<https://perma.cc/R5SG-BH7L>] (showing that the average Latino student attends schools with lower proportions of White students than average Black student do, and that those schools have a higher proportion of Latino students than the average Black student’s school’s proportion of Black students).

The second failure of *Brown* is, in a way, a sad confirmation of its proclamation that separate schools are not equal schools. The American method of financing public education with local property taxes ensures that schools located in areas where poor children live are poorly funded while schools located where wealthy children live are funded lavishly.¹²⁴ Parents and activists have sought, with limited success, an enduring legal solution to this inequitable system since their hopes that the Supreme Court might find it unconstitutional were dashed in 1973.¹²⁵ The average revenue of a school district that is over 75% White is \$2,226 more per pupil than the average revenue of a school district that is over 75% nonwhite.¹²⁶ Additionally, there is a significant link between racial school segregation and academic achievement gaps, driven largely by this racial difference in school poverty.¹²⁷

This failure to realize a racially equal education system can be explained within the confines of interest-convergence theory by noting that the interest of elite actors in question was not the achievement of racial equality itself. It was being able to send the *signal* of racial equality. Dudziak notes that by around 1966, the Vietnam War had significantly eclipsed domestic race relations in the United States as the defining feature of international viewpoints of the United States.¹²⁸ Five years later, the Supreme Court's new conservative Chief Justice noted the "reconciliation of competing values"¹²⁹ in desegregation cases, and shortly after that the Court began limiting federal power to mandate desegregation.¹³⁰ The international usefulness of active desegregation efforts had worn off, and the stage was set for retrenchment.

¹²⁴ *Inequality in Public School Funding: Key Issues & Solutions for Closing the Gap*, AM. UNIV. SCH. OF EDUC. ONLINE PROGRAM BLOG (Sept. 10, 2020), <https://soeonline.american.edu/blog/inequality-in-public-school-funding> [https://perma.cc/KR3F-LG8R].

¹²⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); see Lauren Nicole Gillespie, Note, *The Fourth Wave of Educational Finance Litigation: Pursuing a Federal Right to an Adequate Education*, 95 CORNELL L. REV. 989, 993-1006 (2010); The Integrated Schools Podcast, *Educational Justice Through Reparations with Justin Hansford*, INTEGRATED SCHOOLS: FAMILIES CHOOSING INTEGRATION (Feb. 5, 2020), <https://integratedschools.org/podcast/hansford/> [https://perma.cc/B4J7-9FKB].

¹²⁶ \$23 BILLION, *supra* note 122, at app. A.

¹²⁷ sean f. reardon, Ericka S. Weathers, Erin M. Fahle, Heewon Jang & Demetra Kalogrides, *Is Separate Still Unequal? New Evidence on School Segregation and Racial Academic Achievement Gaps* 33 (Stanford Ctr. for Educ. Pol'y Analysis, Working Paper No. 19-06, 2019), <https://edopportunity.org/papers/wp19-06-v092019.pdf> [https://perma.cc/2WZH-M7EN].

¹²⁸ DUDZIAK, *supra* note 21, at 242.

¹²⁹ Bell, *supra* note 5, at 526 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971)).

¹³⁰ *Id.* (first citing *Milliken v. Bradley*, 418 U.S. 717 (1974); and then citing *Dayton Bd. of Educ. V. Brinkman (Dayton I)*, 433 U.S. 406 (1977)).

B. *Keeping It Classy: Guarding Against Splintering and Retrenchment*

If the class interest-convergence theorized above does come to pass, the groups that benefit will need to take steps to make the eventual obsolescence, erosion, or loss of their new-found gains less likely. Bell's sorrowful "what-could-have-beens" provide some guidance. In *A Simple Dialogue*, Bell sketches out an alternative history based on the Court ruling against the Black plaintiffs in *Brown*, concluding that a loss may have energized the Black struggle and redoubled efforts to support Black schools.¹³¹ Assuming class-based interest convergence leads to a win or two, the lesson in *Simple Dialogue* is to keep the pedal to the metal and continue pushing for more. Without taking care to do so, success breeds complacency which breeds retrenchment.

This lesson to keep the pressure up is echoed in Dudziak's recounting of how and why the military came to be desegregated.¹³² Military desegregation was driven not only by concerns about perception abroad but also by the continuing pressure and threat of a Black boycott or mass protest.¹³³ When the largest threats to powerful interests are eliminated, the interest that they have that happens to align with the interests of the marginalized can sometimes disappear. A credible promise of continued civil disobedience or other mass action that would go against the powerful interests is a potential method for keeping the interests of the powerful in line with those of the minority group.

CONCLUSION

Finally, the lesson of conservative judicial retrenchment in the 1970s and afterward is also a lesson of political power. The Court that began ruling against desegregation methods in 1974¹³⁴ and against equal protection for poor families in *Dandridge*¹³⁵ was not the same one that had ruled for desegregation in 1954¹³⁶ and indicated signs of protecting the impoverished in the 1960s.¹³⁷ The body had undergone a deliberate political transformation, partially introduced by one of the very justices sitting on that 1974 court.¹³⁸ Presidential candidate Richard Nixon openly railed against the perceived liberal excesses of the 1950s and 60s Warren court and pledged to appoint conservative judges to overturn some of those decisions.¹³⁹ After winning the election and already having replaced two

¹³¹ Bell, *Simple Dialogue*, *supra* note 111, at 75-76.

¹³² DUDZIAK, *supra* note 21, at 83-87.

¹³³ *Id.* (describing how A. Philip Randolph organized the "Committee Against Jim Crow in Military Service" that he promised would engage in civil disobedience including draft nonregistration if the military was not desegregated).

¹³⁴ *Milliken*, 418 U.S. 717.

¹³⁵ 397 U.S. 471 (1970).

¹³⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹³⁷ See *supra* notes 94-95 and accompanying text.

¹³⁸ COHEN, *supra* note 93, at 101-02.

¹³⁹ *Id.* at xvi-xviii.

of the Warren Court's liberals, Nixon was able to appoint a third—Lewis Powell.¹⁴⁰ Powell had previously authored a reactionary memo for the U.S. Chamber of Commerce arguing that American capitalism was being attacked by the media, higher education, religious organizations, and the judiciary and that big business needed to fight back through the courts.¹⁴¹ This memo, officially titled “Attack on American Free Enterprise System” but which became known as simply “The Powell Memo,” was a roadmap to corporate judicial domination using all the political power at its disposal.¹⁴²

Candidate and later President Nixon understood that when it comes to the judiciary, “personnel is policy.” Different judges have different interpretations of the law, and Nixon actively worked to get conservative jurists onto the court. It is possible that conservative retrenchment away from desegregated schools was inevitable. It is also possible that, had various political machinations not worked out quite the way they did, more victories would have been won for Black schoolchildren and other disadvantaged groups. There was a moment in the late 1960s when further significant gains for Black people, poor people, and others seemed tantalizingly within reach.

Today's disadvantaged groups are faced with a Supreme Court probably even less friendly toward minority rights than the Burger Court. However, the theory of interest-convergence predicts that even a more conservative Court not tending to be aligned with the interests of poor people might find itself overcome by compelling reasons to at least temporarily side with the marginalized. But the composition of the Court itself may also matter. An organized movement poised to seize political power away from those at the forefront was once the death of the Warren Court's judicial pronouncements. Another movement poised to do the same could strike the reverse blow.

¹⁴⁰ *Id.* at 57. One of those Warren-court liberals—Justice Abe Fortas—was harassed off the Court by Nixon allies, who also worked unsuccessfully to get liberal Justices Brennan and Douglas to resign. *Id.* at 49-51.

¹⁴¹ *Id.* at 101-02.

¹⁴² JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2011), as reprinted in *The Powell Memo: A Call-To-Arms for Corporations*, BILL MOYERS (Sept. 14, 2012), <https://billmoyers.com/content/the-powell-memo-a-call-to-arms-for-corporations/> [<https://perma.cc/DSH9-MZP7>]. In a 1996 book, Professors Jean Stefancic and Richard Delgado quote the Powell memo as an example of how conservative forces managed to re-establish control over large facets of American society after the 1960s. See JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 137 (1996) (“It's time for American business . . . to apply their great talents vigorously to the preservation of the system itself. . . . The judiciary may be the most important instrument for social, economic, and political change.” (quoting Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, U.S. Chamber of Com. Educ. Comm., Attack on American Free Enterprise System, 26, 30 (Aug. 23, 1971)) (alterations in original)).