is available to all. Progress in this critical area will require continued civil rights efforts, but may depend to a large extent on whites coming to recognize that their property right in being white has been purchased for too much and has netted them only the opportunity, as C. Vann Woodward put it, "to hoard sufficient racism in their bosoms to feel superior to blacks while working at a black's wages."

. . . .

The cost of racial discrimination is levied against us all. Blacks feel the burden and strive to remove it. Too many whites have felt that it was in their interest to resist those freedom efforts. That temptation, despite the counter-indicators provided by history, logic and simple common sense, remains strong. But the efforts to achieve racial justice have already performed a miracle of transforming the Constitution—a document primarily intended to protect property rights—into one that provides a measure of protection for those whose rights are not bolstered by wealth, power, and property.

NOTES

1. Edmund Morgan, American Slavery, American Freedom: The Ordeal of Colonial Virginia (1975).
2. David Brion Davis, The Problem of Slavery in the Age of Revolution: 1770–1820 (1975).
3. Leon Litwack, North of Slavery: The Negro in the Free States 1790–1860, at 79 (1967).
4. Dred Scott v. Sandford, 60 U.S. 393 (1857).
5. 198 U.S. 45 (1905).
6. 163 U.S. 537 (1896).

Brown v. Board of Education and the Interest-Convergence Dilemma

The year was 1959, five years after the Supreme Court's decision in *Brown.* If there was anything the hard-pressed partisans of the case did not need, it was more criticism of a decision ignored by the President, condemned by much of Congress, and resisted wherever it was sought to be enforced. Certainly, civil rights adherents did not welcome adding to the growing list of critics the name of Professor Herbert Wechsler, an outstanding lawyer, a frequent advocate for civil rights causes, and a scholar of prestige and influence. Nevertheless, Professor Wechsler chose that time to deliver Harvard Law School's Oliver Wendell Holmes Lecture raising new questions about the legal appropriateness and principled shortcomings of *Brown* . . . .

Courts, Wechsler argued, "must be genuinely principled, resting with respect to every step . . . on analysis and reasons quite transcending the immediate result that is achieved."[1] . . . Wechsler found difficulty with Supreme Court decisions where principled reasoning was in his view either deficient or, in some instances, nonexistent. He included the *Brown* opinion in the latter category.

Wechsler concluded the Court in *Brown* must have rested its holding on the view that "racial segregation is, *in principle,* a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." Yet, Wechsler found this argument untenable because it seemed to require an inquiry into the motives of the legislature, a practice generally foreclosed to the courts.

93 Harv. L. Rev. 518 (1980). Used by permission.

Wechsler then asserted that the legal issue in state-imposed segregation cases was not one of discrimination at all, but rather of associational rights: "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved." Wechsler reasoned that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant." And concluding with a question that has challenged legal scholars, Wechsler asked:

> Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?[2]

The Search for a Neutral Principle: Racial Equality and Interest Convergence

Scholars had little difficulty finding a neutral principle on which the *Brown* decision could be based. Indeed, from the hindsight of a quarter century of the greatest racial consciousness-raising the country has ever known, much of Professor Wechsler's concern seems hard to imagine. To doubt that racial segregation is harmful to blacks, and to suggest what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not have existed then. Professor Charles Black, therefore, correctly viewed racial equality as the neutral principle which underlay the *Brown* opinion. Black's major premise is that "the equal protection clause of the Fourteenth Amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states."[3] The equal protection clause clearly bars racial segregation because segregation harms blacks and benefits whites in ways too numerous and obvious to require citation.

Logically, the argument is persuasive, and Black has no trouble urging that "[w]hen the directive of equality cannot be followed without displeasing the white[s], then something that can be called a 'freedom' of the white[s] must be impaired."[4] It is precisely here, though, that many whites part company with Professor Black. Whites may agree in the abstract that blacks are citizens entitled to constitutional protection against racial discrimination, but few are willing to recognize that racial segregation is much more than a series of quaint customs that can be remedied effectively without altering the status of whites. The extent of this unwillingness is illustrated by the controversy over affirmative action programs, particularly those where identifiable whites must step aside for blacks they deem less qualified or less deserving. Whites simply cannot envision the personal responsibility and the potential sacrifice inherent in Professor Black's conclusion that true equality for blacks will require the surrender of racism-granted privileges for whites.

This sober assessment of reality raises concern about the ultimate import of Black's theory. On a normative level, as a description of how the world *ought* to be, the notion of racial equality appears to be the proper basis on which *Brown* rests, and Wechsler's framing of the problem in terms of associational rights thus seems misplaced. Yet, on a positivistic level—how the world *is*—large segments of the American people do not deem racial equality legitimate, at least to the extent it threatens to impair the societal status of whites. Hence, Wechsler's search for a guiding principle in the context of associational rights retains merit in the positivistic sphere, because it suggests a deeper truth about the subordination of law to interest-group politics with a racial configuration.

Although no such subordination is apparent in *Brown,* it is possible to discern in more recent school decisions the outline of a principle, applied without direct acknowledgment, that could serve as the positivistic expression of the neutral statement of general applicability. Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after *Brown,* this principle of "interest convergence" provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the Fourteenth Amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

It follows that the availability of Fourteenth Amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted,

will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

In assessing how this principle can accommodate both the *Brown* decision and the subsequent development of school desegregation law, it is necessary to remember that the issue of school segregation and the harm it inflicted on black children did not first come to the Court's attention in the *Brown* litigation: blacks had been attacking the validity of these policies for 100 years. Yet, prior to *Brown,* black claims that segregated public schools were inferior had been met by orders requiring merely that facilities be made equal. What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?

The decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. Advanced by lawyers for both the NAACP and the federal government, this point was not lost on the news media. *Time* magazine, for example, predicted that the international impact of *Brown* would prove scarcely less important than its effect on the education of black children: "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'"[5]

Second, *Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination, but also violent attacks in the South which rivalled those that took place at the conclusion of World War I. Their disillusionment and anger found poignant expression when black actor, Paul Robeson, in 1949 declared: "It is unthinkable . . . that American Negroes would go to war on behalf of those who have oppressed us for generations . . . against a country, the Soviet Union, which in one generation has raised our people to the full human dignity of mankind."[6] It

is not impossible to imagine that fear of the spread of such sentiment influenced subsequent racial decisions made by the courts.

Finally, some whites realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation. Thus, segregation was viewed as a barrier to further industrialization in the South.

. . . For those whites who sought an end to desegregation on moral grounds or for the pragmatic reasons outlined above, *Brown* appeared to be a welcome break with the past. When the Supreme Court finally condemned segregation, however, the outcry was nevertheless great, especially among poorer whites who feared loss of control over their public schools and other facilities. Their fear of loss gained force from the sense that they had been betrayed. They relied, as had generations before them, on the expectation that white elites would maintain lower class whites in a societal status superior to that designated for blacks. In fact, legislatures initially established segregated schools and facilities [in many cases] at the insistence of the white working class. Today, little has changed. Many poorer whites oppose social reform as "welfare programs for blacks" although, ironically, they have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.

Interest-Convergence Remedies under Brown

The question still remains as to the surest way to reach the goal of educational effectiveness for both blacks and whites. I believe that the most widely used court-ordered programs may in some cases be inferior to plans focusing on "educational components," including the creation and development of "model" all-black schools. . . . The remedies set forth in the major school cases following *Brown*—balancing the student and teacher populations by race in each school, eliminating one-race schools, redrawing school attendance lines, and transporting students to achieve racial balance—have not in themselves guaranteed black children better schooling than they received in the pre-*Brown* era. Such racial balance measures have often altered the racial appearance of dual school systems without eliminating racial discrimination. Plans relying on racial balance to foreclose evasion have not eliminated the need for

further orders protecting black children against discriminatory policies, including resegregation within desegregated schools, the loss of black faculty and administrators, suspensions and expulsions at much higher rates than white students, and varying forms of racial harassment ranging from exclusion from extracurricular activities to physical violence. Antidefiance remedies, then, while effective in forcing alterations in school system structure, often encourage and seldom shield black children from discriminatory retaliation.

The educational benefits of mandatory assignment of black and white children to the same schools are also debatable. If benefits did inure, they have begun to dissipate as whites flee in alarming numbers from school districts ordered to implement mandatory reassignment plans. In response, civil rights lawyers sought to include entire metropolitan areas within mandatory reassignment plans in order to encompass mainly white suburban school districts where so many white parents sought sanctuary for their children.

Thus, the antidefiance strategy was brought full circle from a mechanism for preventing evasion by school officials of *Brown*'s antisegregation mandate to one aimed at creating a discrimination-free environment. This approach to the implementation of *Brown,* however, has become increasingly ineffective; indeed, it has in some cases been educationally destructive. A preferable method is to focus on obtaining real educational effectiveness which may entail the improvement of presently desegregated schools as well as the creation or preservation of model black schools.

. . . .

Desegregation remedies that do not integrate may seem a step backward toward the *Plessy* "separate but equal" era. Some black educators, however, see major educational benefits in schools where black children, parents, and teachers can harness the real cultural strengths of the black community to overcome the many barriers to educational achievement. As Professor Laurence Tribe argued, "[J]udicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity."[7]

This is not to suggest that educationally oriented remedies can be developed and adopted without resistance. Policies necessary to obtain effective schools threaten the self-interest of teacher unions and others with vested interests in the status quo. But successful magnet schools may provide a lesson that effective schools for blacks must be a primary goal

rather than a secondary result of integration. Many white parents recognize a value in integrated schooling for their children but they quite properly view integration as merely one component of an effective education. To the extent that civil rights advocates also accept this reasonable sense of priority, some greater racial interest conformity should be possible.

NOTES

1. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15 (1959).

2. Id. at 34.

3. See, e.g., Charles Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421 (1960).

4. Id. at 429.

5. See Derrick Bell, Racial Remediation: An Historical Perspective on Current Conditions, 52 Notre Dame Law. 5, 12 (1976).

6. D. Butler, Paul Robeson 137 (1976) (unwritten speech before the Partisans of Peace, World Peace Congress in Paris).

7. Laurence Tribe, American Constitutional Law § 16-15, at 1022 (1978) (footnote omitted).