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 rec-
ognize 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 these 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 per-
formed a miracle of transforming the Constitution—a document primar-
ily 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:
3. Leon Litwack, North of Slavery: The Negro in the Free States 1790–1860,
at 79 (1967).
5. 198 U.S. 45 (1905).
6. 163 U.S. 537 (1896).

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 out-
standing 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." . . . Wechsler found difficulty with
Supreme Court decisions where principled reasoning was in his view ei-
ther 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.

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?  

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." 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." 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 equal opportunity 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 reaffirmation of the basic American principle that ‘all men are created equal.’”

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.”

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 accrue, 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.”

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

2. Id. at 34.
4. Id. at 429.
The Role of Fortuity in Racial Policy-Making

Blacks as Fortuitous Beneficiaries of Racial Policies

The involuntary sacrifice of black rights can serve as a catalyst enabling whites to settle serious policy differences. I now see that these silent covenants that differ so much in result are two sides of the same coin. The two-sided coin with involuntary racial sacrifice on the one side, and interest-convergent remedies on the other can be called: racial fortuity.

Racial fortuity resembles a contract law concept: the third-party beneficiary. In brief, two parties may contract to provide goods or services to a third. For example, a husband wishing to have flowers delivered to his wife on a weekly basis contracts with a florist to provide this service. If the florist fails to do so, the husband can sue, but a large and complicated body of law governs when the wife can sue the florist. While she was the intended beneficiary, she was not a party to the contract and may not even have known about it.

One aspect of this body of law is clear. The contracting parties must intend to confer a benefit on a third-party. As one court put it, “The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct, the third party may sue on the contract.” Thus, in many states, the wife could sue the florist. If the benefit were incidental, however, the third party has no right of recovery.


Sometimes the parties are identifiable. Often, though, one finds no technical contract as such. Rather, policy makers weigh various options and come to agreements or silent covenants. The Brown decision reflects the Supreme Court justices' consensus that for reasons of foreign policy and domestic tranquility constitutional protection for segregation must end. At the Constitutional Convention, the Framers sacrificed black hopes for freedom because they knew that they could not gain support for the Constitution unless it recognized slavery and protected slave owners' property in slaves.

As I have said, racial policy actions may be influenced, but are seldom determined, by the seriousness of the harm blacks are suffering, by the earnest petitions they have argued in courts, by the civil rights bills filed in legislative chambers, or even by impressive street protests. None of these change blacks' status as fortuitous beneficiaries. As with incidental beneficiaries in contract law, “The test is whether the benefit to the third person is direct to him or is but an incidental benefit to him arising from the contract. If direct he may sue on the contract; if incidental he has no right of recovery thereon.” Racial fortuity.

But, aren't racial policies often justified as remedies for discrimination? Didn't Lincoln's Emancipation Proclamation, by its very terms, claim to abolish slavery? Didn't the post--Civil War Amendments grant rights of citizenship to the former slaves? And didn't Brown v. Board grant the relief the NAACP lawyers sought by striking down racial segregation in the public schools?

All true, but these commitments came about when those making them saw that they, those they represented, or the country could derive benefits that were at least as important as those blacks would receive. Blacks were not necessary parties to these commitments. Lincoln acted in an understanding with his generals and other supporters that if he abolished slavery, it would disrupt the Confederate work force, foreign governments would not enter the Civil War on the side of the Confederacy, and Union armies could enlist the freed slaves to fill their badly depleted ranks.

The post--Civil War Amendments were adopted with the understanding that by doing so, Republicans would maintain control of the federal government for years to come. And the Supreme Court determined to decide Brown as it did because it agreed with the State Department that invalidating segregation in the public schools would benefit the nation's foreign policy. While blacks complained bitterly when each of these "civil
rights" arrangements was not enforced because policymakers moved on to new concerns, blacks were, as fortuitous beneficiaries, unable to gain meaningful enforcement despite their good faith expectation that commitments set out in the law, even in the Constitution, would be honored.

... Whites as Fortuitous Beneficiaries of Racial Policies

While the economic, political, and psychic benefits whites gained from slavery and segregation are demonstrable, the real costs to whites of those benefits are unacknowledged. As with blacks, most whites are not directly engaged in racial policymaking. This is true even though the racial policymakers are usually white, and whites generally identify with these policymakers assuming their influence is pivotal—as it often is. But their preferences, often their insistence on laws that undermine black rights and provide legal standing to various forms of discrimination, do not ensure the maintenance of these discriminatory policies when conditions change. In this sense, whites too are fortuitous beneficiaries to the racial policies that they seek and hold dear.

Recall how Jim Crow laws that would eventually segregate blacks in every aspect of public life began to emerge out of a series of unofficial racial agreements between white elites and poorer whites who demanded laws segregating public facilities to insure official recognition of their superior status over blacks with whom, save for color, they shared a similar economic plight. For the most part, courts readily upheld these laws.

Then in the late 1940s, policymakers and the Supreme Court began to revoke support for segregation in its most blatant forms. President Truman, under pressure from civil rights groups, issued executive orders providing for equal treatment and opportunity in the armed services, and abolishing racial discrimination in federal employment. The Supreme Court began finding unconstitutional rather obvious infringements on basic rights to vote. Courts struck down white primaries through which southern whites excluded blacks from meaningful participation in electoral politics. Resisting whites saw these decisions as peremptory revocation of policies they considered permanent. Yet while deeming themselves the prime motivations for policies of white preference, whites could no longer use the law to require continued enforcement of white preferences.

Thus, whites, too, became fortuitous beneficiaries of racial policies adopted and abandoned for reasons beyond race.

Racial Fortuity and Reparations

In light of foreign and domestic concerns that likely influenced the Brown decision, consider what interest-convergence factors might move policymakers to look favorably on the reparations-for-slavery claims that have drawn media and scholarly attention. After affirmative action, reparations could become the next area of major racial activism and controversy.

... Reparations has a history that began even before the Civil War. Its proponents have been many and their arguments varied, but in general they assert: 1) slaves were not paid for their labor for over 200 years, depriving their descendants of their inheritance; 2) the descendants of slave owners wrongfully inherited the profits derived from slave labor; 3) the U.S. government made and then broke its promise to provide former slaves with 40 acres and a mule; 4) systematic and government-sanctioned economic and political racial oppression since the abolition of slavery impeded and interfered with the self-determination of African Americans and excluded them from sharing in the nation's growth and prosperity; 5) the reparations that Germany gave to Jews and the United States to Native Americans and Japanese Americans are precedents for the payment of reparations to African Americans.

Opponents dismiss racial reparations as a pipe dream. None of those who were slaves or slave masters is still alive. Serious procedural barriers bar suits intended to require the descendants of slave owners to pay the descendants of slaves. Yale Law School Professor Boris Bittker conducted a thorough review of the legal difficulties facing reparations litigation, concluding that it is highly unlikely that blacks living today will obtain direct payments in compensation for their forebears' subjugation as slaves before the Emancipation Proclamation.3

Hidden by the often outraged opposition to reparations is that this country compensates for generalized loss all the time: certainly large corporations through bankruptcy laws, re-structuring, tax provisions, and—in the case of some worthy corporations like Chrysler or Lockheed—outright
government grants. The Japanese reparations program and that sought by blacks differ, but even so, the Japanese precedent might be helpful to black reparations' advocates.

As I write, Harvard Law Professor Charles Ogletree, Charles Garvy, Johnnie Cochran, and a host of other lawyers have filed a reparations suit against the City of Tulsa and the state of Oklahoma on behalf of hundreds of survivors of the total destruction of Greenwood, the prosperous black section of that city, in 1921. Plaintiffs filed litigation following failure of negotiations for a reparations settlement. The history is clear. In 1921, a young black man who had accidentally stepped on the toe of a white female elevator operator was charged with molesting her. Fearing he might be lynched, armed black men volunteered to help the sheriff protect the youth. A scuffle with whites resulted, shooting started, and two blacks and ten whites were killed. When the outnumbered blacks retreated to the black community, whites looted hardware and sporting goods stores, arming themselves with rifles, revolvers, and ammunition. Large groups of whites and blacks fired on each other. Whites then decided to invade what they called "Niggertown" and systematically wipe it out.

To accomplish this end, more than 10,000 armed whites gathered, 60 to 80 automobiles filled with armed whites formed a circle around the black section, while airplanes were used to spy on the movements of blacks and—according to some reports—drop bombs on the blacks. Black men and women fought valiantly but vainly to defend their homes against the hordes of invaders who, after looting the homes, set them on fire. Blacks seeking to escape the flames were shot down.

Fifty or more blacks barricaded themselves in a church where they resisted several massed attacks. Finally, a torch applied to the church set it ablaze, and the occupants began to pour out, shooting as they ran. Several blacks were killed. The entire black belt became a smoldering heap of blackened ruins. Hardly a shanty, house, or building was left standing. Domestic animals wandering among the wreckage were the only signs of life. Unofficial estimates put the death toll at 50 whites and 150 to 200 blacks, many of whom were buried in graves without coffins. Other victims incinerated in the burning houses were never accounted for.

In recent years, the City of Tulsa raised a memorial to the victims of the massacre, but the city is actively defending against the litigation. The judge in the case granted the plaintiffs' request to take depositions of some of their clients, all of whom are in their 80s or older in order to pre-

serve critical testimony about the tragedy.... The Tulsa litigation, by narrowing reparations claims to a specific and undeniable racial attack that caused the deaths of countless blacks and the destruction of a whole community, quiets opponents and exerts pressure for relief.

According to Randall Robinson: "The issue here is not whether or not we can, or will, win reparations. The issue rather is whether we will fight for reparations, because we have decided for ourselves that they are our due." Here is the activist strategy for responding to the restraints of racial fortuity. It is based on the conviction that a cause is worth pursuing despite the obstacles of law and public opinion. The pursuit can create conditions that convince policy makers, unmoved by appeals to simple justice, that relief is a prudent necessity.

NOTES
2. Id.