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**INTEREST-CONVERGENCE AND THE DISABILITY PARADOX:
AN ACCOUNT OF THE RACIAL DISPARITIES IN DISABILITY DETERMINATIONS
UNDER THE SSA AND IDEA**

By:

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INTRODUCTION

Under the Social Security Act (SSA), Americans with medically determinable impairments who are unable to engage in substantial gainful employment as a consequence of their impairment are entitled to Social Security Disability (SSD) benefits or Supplemental Security Income (SSI) depending on their earnings record and income level.¹ There are, of course, no racial qualifiers on eligibility.² Nonetheless, a growing body of evidence suggests a significant racial disparity in the award of disability benefits: white applicants for disability benefits are more likely to receive benefits than black applicants.³

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¹ 42 U.S.C. §§ 1381 – 1383(d).

² See 42 U.S.C. § 1382.

³ See Charles O. Thorpe & Richard Toikka, *Determinants of Racial Differentials in Allowance Rates for Social Security Disability Benefits*, 10 REV. BLACK POLITICAL ECON. 397 (1980); Jason D. Vendel, Note, *General Bias and Administrative Law Judges: Is There A Remedy For Social Security Disability Claimants?*, 90 CORNELL L. REV. 769 (2005).

Under the Individuals with Disabilities Education Act (IDEA), young Americans with educational disabilities are entitled to a free and appropriate public education, which includes an individualized educational program tailored to accommodate unique educational needs.⁴ Similar to SSD and SSI, race is not considered for purposes of IDEA eligibility.⁵ An extensive and enduring body of evidence, however, suggests a significant racial disparity in the identification of at least some educational disabilities: African-American students are more likely to be identified as disabled than Caucasian students.⁶

Comparatively, there exists a paradox between SSA and IDEA disability determinations, as African-Americans are less likely to be considered “disabled” for purposes of receiving disability benefits but are more likely to be considered “disabled” for purposes of IDEA. This paradox appears superficially irresolvable because African-Americans cannot simultaneously be *less* likely and, at the same time, *more* likely to be disabled than Caucasians.

There are some confounding variables, however, when conjunctively analyzing SSA and IDEA disability determinations. Specifically, the relevant disability definitions, which are derived from each respective federal statute, are not quite the same.⁷ SSA and IDEA disability determinations are reached through different processes, and different actors render the final determinations unless, of course, the disability determinations make their way to Article III courts.⁸ Additionally, the pool of eligible individuals is different because IDEA candidates are, on average, younger than SSA candidates.⁹

None of the foregoing disparities, however, offer an obvious account for the paradox. Nothing about the definitions, processes, decision-makers, or eligible pools are racially distinct, at least not in the fashion suggested by the evidence. Thus, the comparison may be apples-to-oranges, but it is nonetheless fruit, and there are no obvious reasons why the differences should matter.

More meaningful differences and a more compelling account of the paradox can be found beneath the surface in the distinct balance of interests implicated by the differences in disability determinations.

SSD applicants have an interest in securing benefits, and, in theory, the public has an interest in ensuring their receipt. Countervailing interests, such as the general interest in conserving the public fisc, the bureaucratic interests in stasis, and

⁴ 20 U.S.C. § 1412(a).

⁵ *See id.*

⁶ *See* Sarah E. Redfield and Theresa Kraft, *What Color is Special Education?*, 41 J.L. & EDUC. 129, 182 (2012); Russel J. Skiba, et al., *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 EXCEPTIONAL CHILDREN 264, 264-65 (2008).

⁷ *See* 42 U.S.C. § 1382; 20 U.S.C. § 1401.

⁸ *See* 42 U.S.C. §§ 1381-1383(d); 20 U.S.C. § 1414.

⁹ *See id.*

the interest in maintaining certain racial advantages by preserving the dominant culture, may complicate the public interest.¹⁰

The public's interest also coexists with the interests of special education students. Special education students have an interest in securing appropriate educational services, and the public has an interest in providing these services. The interests of both parties, however, are muddled by the history and current reality of special education; being labeled as "disabled" or in need of special education is associated with educational segregation, diminished educational opportunities, poor educational outcomes, and a lingering stigma of generalized inferiority.¹¹ Coincidentally, this type of treatment parallels the way the dominant majority has treated African-Americans throughout much of history. This parallel may be no coincidence at all. The disability paradox may be an illustration of the late Derrick Bell's "interest convergence" dilemma.¹²

According to Professor Bell's interest-convergence thesis, civil rights victories for African-Americans—and likely for other political minorities as well—have tended to occur only when the interests of African-Americans converge with the interests of Caucasian America.¹³ Therefore, when those interests diverge, entailing Caucasian America perceives no benefit, or no net benefit, from advancing civil rights for African-Americans, attempts to advance civil rights are less likely to succeed.

Interest-convergence may also account for the disability paradox. To further explain, the interests of African-Americans may diverge from majoritarian interests in one context but converge in others. In the SSD context, the interests of African-American applicants in securing benefits diverge from majoritarian interests in conserving the public fisc. The majoritarian interest may also encompass a desire to perpetuate a racially tinged hierarchy composed of deserving and undeserving beneficiaries of public funds. In the educational context, however, the interests of

¹⁰ See Nicholas Eberstadt, *Yes, Mr. President, We Are a Nation of Takers*, WALL ST. J., Jan. 24, 2013 (describing the push and pull between societies need for government assistance programs and public response to such programs).

¹¹ See Dept. of Ed., Provisional Data File: SY2010-11 Four-Year Regulatory Adjusted Cohort Graduation Rates (Nov. 26, 2012), <http://www2.ed.gov/documents/press-releases/state-2010-11-graduation-rate-data.pdf> (reporting that the average overall state graduation rate was 78.3%; for students with disabilities, the average state graduation rate was 57.2%); See also Beth A Ferri & David J Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TEACHERS COLLEGE RECORD 453 (2005).

¹² Professor Bell, who passed away on October 5, 2011, formally introduced the interest-convergence analysis derived from *Brown v. Board of Ed.*, 347 U.S. 483 (1954), in his article, *The Interest-convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Thereafter, it was one of the central tenets of his highly influential work. See, e.g., Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (suggesting, when read together, the Supreme Court's decisions in the University of Michigan affirmative action cases "provide a definitive example of my Interest-Convergence theory").

¹³ Derrick A. Bell *Brown v. Board of Education, and The Interest-convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

African-American students converge with majoritarian interests in securing funding for special education.

Part I of this Article describes the evidence supporting the argument that there is a racial disparity in the way SSD benefits are awarded. In particular, Part I addresses over thirty years of studies, many by the federal government, which consistently reveal the significant role race plays in SSD disability determinations. The studies illustrate African-Americans are less likely to receive disability benefits than Caucasians.¹⁴

Part II summarizes the large body of evidence documenting racial disparities in disability labeling under IDEA. It notes that the disproportionately high numbers of African-American students in special education classes have persisted despite of extensive research and documentation, private litigation, and a congressional mandate ordering states to review and revise their practices relating to students with disabilities.¹⁵

Finally, Part III attempts to account for this disability paradox by applying the interest-convergence framework. It describes Professor Bell's original thesis, reviews a recent critique, and summarizes the slightly modified version of the thesis offered by Professor Lani Guinier. Applying the Bell-Guinier framework, it concludes the disability paradox reflects a convergence of interests and promotes the existing racial hierarchy in three ways: first, by perpetuating inequalities in economic and educational opportunities; second, by promoting racial segregation; and, finally, by reinforcing negative racial stereotypes about racial minorities, including black Americans.

I. RACIAL DISPARITIES IN SOCIAL SECURITY DISABILITY DETERMINATIONS

The SSA provides two means of supplementary income to eligible disabled people: SSD and SSI.¹⁶ Workers who become disabled after a substantial work history and after having paid into the Social Security system, are recognized as having "insured status" and are able to draw from the SSD system.¹⁷ An "aged, blind, or disabled individual" not of "insured status" for purposes of SSD benefits may be

¹⁴ See, e.g., Thorpe, *supra* note 3; U.S. Gen. Accounting Office, GAO/HRD-92-56, *Social Security: Racial Difference in Disability Decisions Warrants Further Investigation* (1992); U.S. GEN. ACCOUNTING OFFICE, GAO-04-14, *SSA DISABILITY DECISION MAKING: ADDITIONAL STEPS NEEDED TO ENSURE ACCURACY AND FAIRNESS OF DECISIONS AT THE HEARINGS LEVEL* at 11 (2003).

¹⁵ See, e.g., Skiba, *supra* note 6; see e.g., Chinn, P.C., & Hughes, S. *School Suspensions: Are They Helping Children?*, Washington Research Project (1975), available at http://diglib.lib.utk.edu/cdf/data/0116_000050_000205/0116_000050_000205.pdf.

¹⁶ U.S. Social Security Administration, *Benefits for People With Disability*, available at <http://www.ssa.gov/disability/> (last visited April 3, 2013).

¹⁷ U.S. Social Security Administration, *Difference Between Social Security Disability and SSI*, available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/245/~/-/difference-between-social-security-disability-and-ssi-disability (last visited April 4, 2013).

entitled to SSI.¹⁸ Unlike SSD, SSI eligibility and the benefit amount are “need-based.”¹⁹ Need is calculated with reference to both annual income and available resources.²⁰ Calculations of both income and resources are subject to a series of exclusions. The income limitation, for example, excludes need-based assistance from state programs,²¹ and the resource limitation excludes the value of one’s home, “household goods, personal effects, and an automobile, to the extent that their total value does not exceed such amount as the Commissioner of Social Security determines to be reasonable.”²²

Although the eligible populations are different, the disability standards for SSI and SSD are the same: claimants are entitled to benefits if they have a medically determinable impairment, which prevents them from engaging in “substantial gainful activity.”²³ Social Security regulations mandate a five-step process for determinations of disability.²⁴

In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity.²⁵ If the claimant is not engaged in substantial gainful activity, the analysis of the claim proceeds to step two.²⁶ Step two, commonly known as “severity regulation,” involves a minimum threshold determination of whether the claimant is suffering from a severe impairment.²⁷ If the claimant is not engaged in substantial gainful activity and has a severe impairment, the evaluation then proceeds to step three.²⁸ Step three requires a determination of whether the impairment is equivalent to one of a number of listed impairments the Commissioner acknowledges as being so severe as to preclude one from substantial gainful activity.²⁹ If the impairment meets or equals a “Listed Impairment,” the claimant is conclusively presumed to be disabled.³⁰ If a claimant

¹⁸ See 42 USC §1381, *et. seq.*

¹⁹ 42 U.S.C. §1382(a).

²⁰ *Id.* (for single persons, resources cannot exceed \$2,000 and for married persons living together, resources cannot exceed \$3,000).

²¹ *Id.*

²² 42 U.S.C. § 1382(b).

²³ *Claussen v. Chater*, 950 F.Supp. 1287, 1292 (D. N.J. 1996). Since the disability standard and the determination processes are the same, the two separate programs will be conflated for purposes of this project and generally referred to as Social Security Disability, or SSD.

²⁴ See 20 C.F.R. § 416.920 (2012).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

does not suffer from a “Listed Impairment” or its equivalent, the analysis proceeds to steps four and five.³¹

Under these steps, the Commissioner must determine whether the claimant retains the ability to perform either his or her former work or some less demanding employment.³² Step four requires a determination of whether the claimant retains the residual functional capacity to perform work he or she performed in the past.³³ If the claimant is able to meet the demands of his or her past work, then he or she is not disabled within the meaning of the Act.³⁴ At step four, as in the previous steps, the claimant bears the burden of proof.³⁵

If a claimant demonstrates an inability to resume his or her former occupation, the evaluation moves to step five.³⁶ At this final stage, the burden of proof shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability.³⁷ Further, a determination of disability at step five must be based on the claimant's age, education, work experience and residual functional capacity, and must consider the cumulative effect of all of the claimant's impairments.³⁸

Furthermore, SSD claimants face a lengthy bureaucratic process to secure their disability determination. The process includes:

- (1) an initial application to the state agency charged with administering the program;
- (2) if unsuccessful, a request for reconsideration by the same state agency;
- (3) if unsuccessful, a request for a hearing before an Administrative Law Judge (ALJ);
- (4) if unsuccessful, a request for review by the Appeals Council; and
- (5) if unsuccessful, a request for review by a federal court.³⁹

The time between an applicant's initial application and a hearing before an ALJ can take up to two years.⁴⁰

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Claussen, 950 F.Supp. at 1294.

³⁶ See 20 C.F.R. §§ 404.1520, 416.920 (explaining the five-step sequential process used to determine if one is disabled).

³⁷ Claussen, 950 F.Supp. at 1294.

³⁸ See 20 C.F.R. §§ 404.1520, 416.920; see also *Sullivan v. Zebley*, 493 U.S. 521 (1990); Claussen, 950 F.Supp. 1287 (as applied to a claim of disability resulting from multiple sclerosis).

³⁹ See U.S. Social Security Administration, Disability Determination Process, available at <http://www.ssa.gov/disability/determination.htm> (last visited April 23, 2012); U.S. Social Security Administration, Disability Appeal: How the disability Appeals Process works, available at <http://secure.ssa.gov/apps6z/iAppeals/msg002.jsp> (last visited April 23, 2013).

Despite what appears to be a standardized scheme to evaluate claims for disability benefits and what appears to be plenty of time for careful deliberation, negative aspects such as inconsistency, opacity, and the effects of structural and unconscious biases plague the process.⁴¹ Of greatest concern is the substantially higher rate at which Caucasian applicants are awarded benefits in comparison to African-American applicants.⁴²

The SSA's disparate treatment of African-Americans applying for disability benefits is far from novel. As early as 1980, researchers sifted through available evidence in order to explain the apparent racial disparities in award rates.⁴³

In April 1992, the SSA itself issued a lengthy report on the disparate approval ratings between African-American and Caucasian applicants for disability benefits.⁴⁴ The report concluded that further investigation was necessary before any definitive conclusions could be drawn.⁴⁵ In September 1992, just five months later, the SSA issued another report attempting to fulfill the April 1992 report's call for further research.⁴⁶ The investigation brought limited success in determining the cause of the disparate treatment of applicants.⁴⁷ The report successfully identified the point in the process during which much inexplicable disparate treatment took place: the ALJ level.⁴⁸ While there were disparate levels of treatment between African-American and Caucasian disability applicants at the initial stages, most of the differences could be explained by factors unrelated to the applicant's race.⁴⁹ At the ALJ level, however, much of the difference in approval rates could not be explained.⁵⁰ This conclusion brought into question the relatively limited oversight of ALJ decision-making.

In September 2002, the General Accounting Office (GAO, now the Government Accountability Office) reported that a lack of data regarding the race of applicants prevented researchers from drawing a definitive conclusion about the

⁴⁰ See Claussen, 950 F.Supp. 1287.

⁴¹ See Vendel, *supra* note 3.

⁴² See *id.*

⁴³ See, e.g., Thorpe, *supra* note 3.

⁴⁴ U.S. Gen. Accounting Office, GAO/HRD-92-56, *Social Security: Racial Difference in Disability Decisions Warrants Further Investigation* (1992).

⁴⁵ *Id.* at 47.

⁴⁶ U.S. Gen. Accounting Office, GAO/T-HRD-92-41, *Social Security: Racial Difference in Disability Decisions* (1992).

⁴⁷ *Id.*

⁴⁸ *Id.* at 2.

⁴⁹ *Id.*

⁵⁰ *Id.*

impact of race at the ALJ decision-making level.⁵¹ In November 2003, however, the GAO issued a follow-up study with some startling results.⁵² The data revealed,

among claimants who were represented by attorneys, white and African-American claimants were equally likely to be allowed benefits, but among claimants who were not represented by attorneys, African-American claimants were significantly less likely to be awarded benefits than white claimants. Moreover, claimants who were represented by persons other than attorneys, such as legal aides, friends[,] or family, were more likely to be awarded benefits than claimants who are not represented; however, among claimants represented by these nonattorneys, African-Americans were less likely to be awarded benefits than whites.⁵³

⁵¹ U.S. GEN. ACCOUNTING OFFICE, GAO-02-831, *SSA DISABILITY DECISION MAKING: ADDITIONAL MEASURES WOULD ENHANCE AGENCY'S ABILITY TO DETERMINE WHETHER RACIAL BIAS EXISTS* at 3, 6, 18 (2002) (significantly, the SSA claimed that the lack of such statistics suggested a lack of racial bias, as compared to GAO's interpretation that the lack of such statistics cannot definitively rule out racial bias).

⁵² U.S. GEN. ACCOUNTING OFFICE, GAO-04-14, *SSA DISABILITY DECISION MAKING: ADDITIONAL STEPS NEEDED TO ENSURE ACCURACY AND FAIRNESS OF DECISIONS AT THE HEARINGS LEVEL* at 11 (2003).

Percentage of Claimants Allowed Benefits at the Hearings Level by Race and Region, 1997 to 2000:

Region	All	White	African-American	Other race/ethnicity
All Regions	59	63	49	51
Region 1: Boston	73	76	66	62
Region 2: New York	64	72	51	57
Region 3: Philadelphia	60	62	59	37
Region 4: Atlanta	60	65	51	61
Region 5: Chicago	55	59	46	45
Region 6: Dallas	54	61	39	52
Region 7: Kansas City	59	61	51	45
Region 8: Denver	59	61	66	48
Region 9: San Francisco	53	57	49	45
Region 10: Seattle	60	62	53	51

⁵³ *Id.* at 5.

In 2007, several researchers from the GAO published a literature review and independent empirical study of racial disparities within the SSA's disability benefits programs.⁵⁴ The study noted, "Current SSA data indicates that racial differences exist in benefit award rates at the hearings level[,] and "these differences . . . are evident in almost every SSA region."⁵⁵ "[T]hese crude or unadjusted racial differences in award rates,"⁵⁶ however, reflected no attempt to discount confounding variables. Accordingly, the researchers attempted to control for non-racial variables utilizing logistic regression models and Oaxaca decomposition methods.⁵⁷

The subsequent regression analysis of almost 8000 claims⁵⁸ revealed a claimant's race had a significant effect on ALJ decisions in some cases:

When we compared white claimants with African-American claimants, we found statistically significant differences in the likelihood of allowance, but only among claimants who had no representation. For example, among claimants with no representation, the odds of being allowed benefits for African-Americans were about one half as high as the odds of being allowed for white claimants. In contrast, among claimants with attorney representation, we found no statistically significant difference in the likelihood of allowances between whites and African-Americans. Interestingly, 58% of the African-Americans in our sample had attorneys, while 71% of white claimants had attorneys.⁵⁹

The study also found that the positive impact of attorney representation was much greater for African-American claimants than for Caucasian claimants:⁶⁰

Specifically, the odds of being awarded benefits for African-American claimants with attorney representation were more than five times higher than the odds of being allowed for African-American claimants without attorney representation. In comparison, the odds of being allowed benefits for white claimants with attorney representation were three times higher than the odds of being allowed benefits for white claimants with no representation.⁶¹

⁵⁴ Erin M. Godtland, Michele Grgich, Carol Dawn Petersen, Douglas M. Sloane, & Ann T. Walker, *Racial Disparities in Federal Disability Benefits*, 25 CONTEMPORARY ECONOMIC POLICY No. 1, Jan. 2007 at 27.

⁵⁵ *Id.* at 31.

⁵⁶ *Id.*

⁵⁷ *Id.* at 28.

⁵⁸ *Id.* at 31 (7,908 total claims).

⁵⁹ *Id.* at 38-39.

⁶⁰ *Id.* at 39.

⁶¹ *Id.*

The researchers further concluded that they “cannot empirically explain why the effect of attorney representation is greater for African-Americans.”⁶²

The results of the Oaxaca decomposition were similar.⁶³ Most of the disparity in award rates was explicable in cases with attorney representation:

78% of the difference in predicted award rates between whites and African-Americans is due to differences in characteristics between African-Americans and whites. The remaining 22% is due to either unequal treatment in the disability decision-making process or factors that are not controlled for in the model or to some combination of the two.⁶⁴

Among claimants without attorney representation, however, only

60% of the difference in predicted award rates between whites and African-Americans is due to differences in characteristics. The remaining 40% is due to either unequal treatment or factors that are not controlled for in the model or to some combination of the two. The results of this technique buttress the conclusions from our final logistic regression model.⁶⁵

Thus, the researchers concluded, “[A]mong claimants without attorney representation, there are substantial differences in award rates between African-Americans and Caucasians that cannot be explained by differences in other factors.”⁶⁶

II. RACIAL DISPROPORTIONALITY UNDER IDEA

IDEA was enacted in part because Congress recognized, “[I]t is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results

⁶² *Id.* Two attorneys associated with the National Organization of Social Security Claimant Representatives (NOSSCR), however, state that a possible explanation is because “attorneys increase the claimant’s likelihood of being awarded benefits by (1) providing assistance with the development of evidence over and above SSA’s efforts to develop evidence and (2) coaching claimants to improve their credibility as witnesses; *Id.* Another possible explanation is that “attorneys often screen cases to select claimants with strong cases. *Id.*

⁶³ *See id.* at 41.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

for such children and to ensure equal protection of the law.”⁶⁷ One of IDEA’s stated purposes is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living[.]”⁶⁸

A state, which accepts IDEA Part B funds, is mandated to provide children with disabilities between the ages of three and twenty-one with a free appropriate public education (FAPE).⁶⁹ Not only does IDEA impose the FAPE requirement, but it also imposes an affirmative duty on the state to identify, locate, and evaluate all children with disabilities residing in the state.⁷⁰ In addition, the school must develop an Individualized Education Program (IEP) for each child with a disability.⁷¹ The IEP for each student must ensure that

[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁷²

The “IEP Team” includes the parents of a child, at least one regular education teacher of the child, at least one special education teacher, a school representative familiar with the curriculum and available resources, and an individual who can interpret the implications of evaluation results.⁷³ The IEP Team seeks to identify how the child is performing academically and whether the child’s disability affects his or her progress in the regular educational curriculum.⁷⁴ The IEP Team will then create “measurable annual goals,”⁷⁵ “a statement of the special education and related services and supplementary aids and services,”⁷⁶ “an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class[.]”⁷⁷ and “a statement of any individual-appropriate accommodations

⁶⁷ 20 U.S.C. § 1400(c)(6) (2010).

⁶⁸ *Id.* at § 1400(d)(1)(A).

⁶⁹ *Id.* at § 1412(a)(1)(A) (2005).

⁷⁰ *Id.* at § 1412(a)(3)(A).

⁷¹ *Id.* at § 1412(a)(4).

⁷² *Id.* at § 1412(a)(5)(A).

⁷³ *Id.* at § 1414(d)(1)(B).

⁷⁴ *Id.* at § 1414(d)(1)(A)(i)(I)(aa).

⁷⁵ *Id.* at § 1414(d)(1)(A)(i)(II).

⁷⁶ *Id.* at § 1414(d)(1)(A)(i)(IV).

⁷⁷ *Id.* at § 1414(d)(1)(A)(i)(V).

that are necessary to measure the academic achievement and functional performance of the child[.]”⁷⁸

Congress enacted IDEA because it found children with disabilities were: (A) not receiving appropriate educational services; (B) excluded entirely from the public school system; (C) denied successful educational experiences because of undiagnosed disabilities, and (D) public schools often lack resources to assist families.⁷⁹ One goal of IDEA, of course, was to open the doors of public education to children with disabilities. Beyond access, however, Congress was concerned that even when granted access to public education, children with disabilities were still not provided appropriate services to ensure their academic success.

In 1982, the Supreme Court minimized the impact IDEA might have had on many children.⁸⁰ In *Board of Education v. Rowley*, the Court decided a school did not deny a deaf student a FAPE when the school refused to provide a sign-language interpreter in the classroom.⁸¹ In reaching this decision, the Court swept away the broad mandate many presumed IDEA imposed on school districts across the country.⁸² Rather than require schools to accommodate students with disabilities to ensure each child can achieve his or her full potential by accessing the full range of the general educational curriculum, the Court held IDEA only requires schools to provide services that provide a benefit to the child and that allow the child to advance from grade to grade.⁸³

Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.⁸⁴

Students with disabilities, then, are entitled to access to public education, but little more. This limited promise stands in stark contrast with similar mandates for gifted programs.⁸⁵

Although gifted students are often provided with specialized education, many times removed from the regular classroom and provided supplemental curriculum,

⁷⁸ *Id.* at § 1414(d)(1)(A)(i)(VI).

⁷⁹ *Id.* at § 1400(c)(2)(A)-(D).

⁸⁰ *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

⁸¹ *Id.* at 209-10.

⁸² *Id.* at 200.

⁸³ *Id.* at 203-204.

⁸⁴ *Id.* at 203.

⁸⁵ *See*, Janet R. Decker, Suzanne E. Eckes, and Jonathan A. Plucker, *Charter Schools Designed for Gifted and Talented Students: Legal and Policy Issues and Considerations*, 259 ED. LAW REP. 1, 6, and 10 (October 14, 2010) (discussing “gifted-plus” students, who qualify as gifted and disabled).

IDEA does not apply to them. Gifted students are not necessarily children with disabilities.⁸⁶ In fact,

“gifted and talented” . . . means students . . . who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities.⁸⁷

Thus, while certain students, who are presumably high achievers, are singled out for exceptional services, students with disabilities are singled out for services that merely provide a benefit; the rest of the students are entitled to a general education.

IDEA defines a child with a disability as:

a child...with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance..., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.⁸⁸

Essentially, the IDEA definition encompasses two requirements: (1) whether a child is identified as having an impairment, and (2) whether the child needs special education because of that impairment.

The process for identifying a child with a disability begins with the school seeking parental consent to conduct an evaluation.⁸⁹ An effective evaluation procedure uses a variety of assessment methods and elicits a wide scope of information.⁹⁰ IDEA specifically states the educational agency “shall . . . not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the

⁸⁶ Note, however, that implications for labels vary between the States. For instance, in Delaware, “‘Exceptional Child’ means a child with a disability or a gifted and talented child[.]” 14 Del.C. § 3101(4). Furthermore, state definitions for “gifted and talented” may vary. In Delaware, “gifted or talented child” means “a child [between the ages of four and twenty-one] or until receipt of a regular high school diploma, whichever occurs first, who by virtue of certain outstanding abilities is capable of a high performance in an identified field.” Such an individual, identified by professionally qualified persons, may require differentiated educational programs or services beyond those normally provided by the regular school program in order to realize that individual’s full contribution to self and society.” 14 Del.C. § 3101(6).

⁸⁷ 20 U.S.C. § 7801(22) (2002).

⁸⁸ *Id.* at § 1401(3)(A); *see also* 34 C.F.R. § 300.8(c) (2007) (providing definitions for each of the impairments listed in the definition).

⁸⁹ 20 U.S.C. § 1414(a)(1) (2005).

⁹⁰ *Id.* at § 1414(b)(2)(A) (“gather[s] relevant functional, developmental, and academic information”).

child[.]”⁹¹ It is imperative for the agency to use techniques that balance cognitive and behavioral factors in addition to physical or developmental factors.⁹²

IDEA stipulates the determinant factor of whether a child is a child with a disability shall not be “lack of appropriate instruction in reading,...math[.]...or limited English proficiency.”⁹³ Furthermore, “a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability[.]”⁹⁴ Consequently, in the evaluation process, there is a constant battle between defining children with disabilities and distinguishing them from other types of non-successful students. Implicitly, some students simply do not succeed for any reason within IDEA’s jurisdiction.

In enacting IDEA, Congress noted, as “[m]inority children comprise an increasing percentage of public school students[.]...recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession[.]”⁹⁵ IDEA further found that when considering the general school population, “[m]ore minority children continue to be served in special education than would be expected...[, and] African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their [Caucasian] counterparts.”⁹⁶ Lastly, Congress found some studies have indicated “schools with predominately [Caucasian] students and teachers have placed disproportionately high numbers of their minority students into special education,”⁹⁷ and “[a]s the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.”⁹⁸

Due to the recognized disproportionate representation of minorities in certain categories of disability in certain locales and the potential that disproportionality may be linked to bias, either unconscious or intentional, IDEA Part B mandates states to collect data to determine if there is a significant disproportionality based on race and ethnicity.⁹⁹ In the event of significant disproportionality, the state must “review, and, if appropriate, revis[e] policies, procedures, and practices used in such identification or placement[.]”¹⁰⁰

⁹¹ *Id.* at § 1414(b)(2)(B).

⁹² *Id.* at § 1414(b)(2)(C).

⁹³ *Id.* at § 1414(b)(5).

⁹⁴ *Id.* at § 1414(b)(6)(A) (enumerating the basic skills).

⁹⁵ *Id.* at § 1400(c)(10)(C) and (D).

⁹⁶ *Id.* at § 1400(c)(12)(B) and (C).

⁹⁷ *Id.* at § 1400(c)(12)(E).

⁹⁸ *Id.* at § 1400(c)(13)(A).

⁹⁹ *Id.* at § 1418(d).

¹⁰⁰ *Id.* at § 1418(d)(2).

Of special significance is the disproportionality in the specific categories of “mental retardation,”¹⁰¹ emotional disturbance,”¹⁰² and “specific learning disabilities.”¹⁰³ Known as “soft identifications” or “social model” categories, these types of disabilities “depend on clinical judgment, not just medical or biological testing.”¹⁰⁴

In 2008, a team of researchers led by Russell J. Skiba of Indiana University concluded the “disproportionate representation of minority students is among the most critical and enduring problems in the field of special education.”¹⁰⁵ The study also noted that this disproportionality continues to persist despite litigation, federal reports, and “abundant research on the issue.”¹⁰⁶ In addition, the study revealed “consistent patterns of disproportionality,”¹⁰⁷ i.e., a disproportionality that was relatively stable over time.¹⁰⁸ African Americans were “the most over-represented group in special education programs in nearly every state.”¹⁰⁹ This research was augmented by the *31st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (IDEA)*.¹¹⁰ The Department of Education (DOE) also

¹⁰¹ “Mental retardation means significantly sub-average general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child’s educational performance.” 34 C.F.R. § 300.8(c)(6).

¹⁰² 34 C.F.R. § 300.8(c)(4) (“[e]motional disturbance means a condition exhibiting one or more of the

following characteristics over a long period of time and to a marked degree that adversely affects a child’s educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems... Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under [this section]).

¹⁰³ 34 C.F.R. § 300.8(c)(10) (“[s]pecific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia... Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage”).

¹⁰⁴ Redfield, *supra* note 6, at 182.

¹⁰⁵ Skiba, *supra* note 6; *see e.g.*, Chinn, *supra* note 15.

¹⁰⁶ *Id.* at 264-65.

¹⁰⁷ *Id.* at 268.

¹⁰⁸ *Id.* at 269.

¹⁰⁹ *Id.* at 269.

¹¹⁰ *See* U.S. DEPT. OF EDUCATION, 31ST ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) (2012) (hereinafter “DOE REPORT”).

issued a report in November of 2012, demonstrating, in unequivocal fashion, the continuing disparities in labeling students with disabilities under IDEA.¹¹¹

DOE uses “risk ratio” to measure disproportionality.¹¹² A “risk ratio” is calculated by comparing a subgroup’s “risk index,” or proportion of a particular subgroup assigned to a subject category, with that of another subgroup.¹¹³ For example, if 5% of all African-American students are considered disabled under IDEA and 5% of all Caucasian students are considered disabled under IDEA, then each group has a risk index of 5%, and the risk ratio is 1.0, which is proportionally equal.¹¹⁴ If just 2.5% of Caucasian students were considered disabled, however, then the risk ratio for African-American students would be 2.0, indicating African-American students would be twice as likely to be labeled disabled under IDEA.¹¹⁵

According to the DOE analysis, African-American infants (birth through age two) were tied with Hispanic infants for the lowest risk ratio in their age group, indicating they were less likely to be served under IDEA.¹¹⁶ In contrast, Caucasian infants were more likely to be served under IDEA with a risk ratio of 1.2.¹¹⁷ For children ages three through five, black children “with a risk ratio of 0.97, were almost as likely to be served under Part B as children ages [three] through [five] of all other racial/ethnic groups combined,”¹¹⁸ whereas white children were, again, more likely to be served, with a risk ratio of 1.29.¹¹⁹

The ratios were inverted among school-aged children (ages six through twenty-one).¹²⁰ “[African-American] (not Hispanic) students were 1.45 times more likely to be served...under *IDEA*, Part B, than students in all other racial/ethnic groups combined[.]”¹²¹ Caucasian students, meanwhile, had the second lowest risk ratio among school-aged children at just 0.88.¹²²

Particularly insightful were the risk ratios for specified disabilities. For Caucasian students, three of the four lowest risk ratios were for the so-called “soft categories” of cognitive or behavioral disabilities, which include “intellectual disabilities” (.63), “specific learning disabilities” (.75), and “emotional disturbance”

¹¹¹ *See id.*

¹¹² *See id.* at 16.

¹¹³ For a useful overview of the terminology, *see Skiba, supra* note 6, at 266-68.

¹¹⁴ *See id.* at 267.

¹¹⁵ *See id.*

¹¹⁶ DOE REPORT, *supra* note 111, at 16.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 32.

¹¹⁹ *Id.* at 31 tbl.4.

¹²⁰ *Id.* at 57.

¹²¹ *Id.*

¹²² DOE REPORT, *supra* note 111, at 57 tbl.16.

(.85).¹²³ For African-American students, these same “soft” disabilities presented three of their four *highest* risk ratios: “specific learning disabilities” (1.47), “emotional disturbance” (2.29), and “intellectual disabilities” (2.64).¹²⁴ Moreover, African-American students’ risk ratios for “emotional disturbance” and “intellectual disabilities” were the highest for any disability among the test groups.¹²⁵

¹²³ *Id.* (among the four lowest for white students was “hearing impairments,” with a risk ratio of .75)

¹²⁴ *Id.* (also among the top four for black students was “multiple disabilities,” with a risk ratio of 1.49)

¹²⁵ *Id.* at 58. The numbers from Delaware are consistent with the national trend: African-American children are far more likely to be labeled as “mentally retarded,” “emotionally disturbed,” or to have “specific learning disabilities” than White children. *See IDEA Part B Child Count*, DATA ACCOUNTABILITY CENTER (Sept. 10, 2012), *available at* <http://www.ideadata.org/PartBChildCount.asp> (follow “csv” hyperlink under “2011”). In Delaware, Black school-age children account for about 6,710 or forty percent (40%) of students with disabilities compared to White school-age children who account for about 7,667 or forty-five percent (45%). *Id.* Black students represent forty-eight percent (48%) (774) of the students in the category “intellectual disability,” compared to thirty-seven percent (37%) (598) white students. *Id.* Black students represent forty-four percent (44%), or 3,851 of Delaware students labeled with specific learning disabilities compared to forty percent (40%), or 3,501 of White students. *Id.* Not only are the numbers disproportionate in the representation of Black students as a percentage of the student body in the State, but also when compared to National data. *Id.* The complete table of risk ratios follows:

Disability	American Indian/ Alaska Native	Asian/ Pacific Islander	Black (not Hispanic)	Hispanic	White (not Hispanic)
All disabilities below	1.58	0.53	1.45	0.95	0.88
Autism	0.77	1.32	0.93	0.61	1.32
Deaf-blindness	2.02	1.00	0.84	1.02	1.04
Emotional disturbance	1.69	0.26	2.29	0.56	0.85
Hearing impairments	1.27	1.26	1.09	1.31	0.75
Intellectual disabilities	1.38	0.51	2.64	0.76	0.63
Multiple disabilities	1.29	0.66	1.49	0.67	1.03
Orthopedic impairments	1.06	0.87	0.94	1.20	0.93
Other health impairments	1.34	0.35	1.22	0.50	1.43
Specific learning disabilities	1.84	0.40	1.47	1.22	0.75
Speech or language impairments	1.45	0.77	1.03	0.96	1.03

III. AN INTEREST-CONVERGENCE ANALYSIS

A. The Disability Paradox

Evidence suggests that racial minorities, and African-Americans in particular, are less likely to be considered “disabled” when applying for SSD benefits, but are more likely to be considered “disabled” for purposes of placement in special education classes under IDEA.¹²⁶ What could account for this paradox?

Perhaps an explanation could be found in the differences between the two programs: SSD and IDEA employ different definitions, serve different populations, and utilize different processes.¹²⁷ Nothing about these differences offers an obvious explanation for the paradox; if anything, the differences suggest the disparities should run in the opposite direction.

To be classified as disabled under the SSD program, an individual must have a medically determinable impairment and be unable to engage, by virtue of the impairment, in substantial gainful employment.¹²⁸ To be classified as disabled under IDEA, an individual must have one or more specified impairments (although one of the specifications is for “other health impairments”) and need, by virtue of those impairments, special education.¹²⁹ As a result, the definitions target different aspects of disability: the SSD definition targets the work consequences,¹³⁰ and the IDEA definition targets the educational consequences.¹³¹ Benefits are also available to different populations: SSD to working-age Americans (and their beneficiaries),¹³² and IDEA to younger Americans (under Part B, ages three to twenty-one).¹³³

It is possible that by some objective measure, that is, some measure that is independent of labeling biases, older African-Americans are proportionally less likely to have work-related disabilities while younger African-Americans are proportionally more likely to have education-related disabilities.¹³⁴ That result, however, seems unlikely because nothing in the available evidence supports the proposition that the racial gap in disability is a phenomenon confined to youth.¹³⁵ A comprehensive examination of more than two-million respondents to the Census Bureau’s 2006 American Community Survey concluded that African-Americans experienced a

¹²⁶ See discussion *supra* Parts I, II.

¹²⁷ *Id.*

¹²⁸ See 20 C.F.R. § 416.905(a).

¹²⁹ See 20 U.S.C. § 1401(3)(A).

¹³⁰ See 20 C.F.R. § 416.905(a).

¹³¹ See Title I of the Individuals with Disabilities Act, § 601(d)(1)(A)-(C).

¹³² See 42 U.S.C. § 1381 et. seq.

¹³³ 20 U.S.C. § 1412(a)(1).

¹³⁴ See discussion *supra* Parts I, II.

¹³⁵ Amani M. Nuru-Jeter, et al., *Black-White Differences in Self-Reported Disability Outcomes in the U.S.: Early Childhood to Older Adulthood*, 126 PUBLIC HEALTH REP. 834, 834-37 (2011) (discussing evidence that racial disability gaps peak in the midlife ages).

higher risk of disability and, specifically, functional limitations, vision/hearing/sensory impairment, and memory/learning problems across their lifespan.¹³⁶ The racial gap in disability actually peaked in midlife, specifically ages fifty to sixty-nine, when African-American respondents were roughly twice as likely to have disabilities.¹³⁷ These findings are consistent with studies suggesting that, for a combination of medical and socio-economic reasons, elderly African-Americans are more likely to be disabled than elderly Caucasians;¹³⁸ elderly African-Americans also experience the onset of disability at an earlier age.¹³⁹ In summation, the evidence suggests the racial gap in disability does not decrease with age but actually increases, reaching its peak near the end of the working years.¹⁴⁰

An alternative explanation may be found in the differences between the disability determination processes utilized under SSD and IDEA. SSD determinations are made initially by state agencies; applicants not satisfied with the initial determination may request reconsideration from the agency and then, if necessary, a hearing before an ALJ, followed by a subsequent review by an Appeals Council.¹⁴¹ IDEA determinations are made by local educational agencies after notice, evaluation, and a meeting with the child and her parents or guardians; parents not satisfied with the results of this determination may request a due process hearing before an impartial hearing officer.¹⁴² In both processes, dissatisfied parties can appeal the results of the administrative process to the federal courts.¹⁴³

The SSD process is, thus, more formal and more cumbersome. Ordinarily, formality suggests the SSD process is relatively disadvantageous to African-Americans, who, because of wealth disparities, would seem less likely to have access to the legal resources needed to pursue a claim to a successful conclusion. The formality of the SSD process, however, is likely not the explanation. The availability of attorney's fees in SSD cases—typically, through contingency fee arrangements—generally, ensures the availability of qualified and vigorous representation even to low-income clients. Additionally, the relatively formalized process reduces the likelihood and impact of improper biases, including those rooted in or related to

¹³⁶ *Id.* at 834, 836.

¹³⁷ *Id.* at 836.

¹³⁸ See Heather E. Whitson, et al., *Black-White Disparity in Disability: The Role of Medical Conditions*, 59 J. AM. GERIATR. SOC'Y. 844, 844-46 (2011).

¹³⁹ Sandra Y. Moody-Ayers, et al., *Black-White Disparities in Functional Decline in Older Persons: The Role of Cognitive Function*, 60 JOURNALS OF GERONTOLOGY 933, 933-39 (2005).

¹⁴⁰ See Nuru-Jeter, *supra* note 135, at 834-37.

¹⁴¹ See Richard E. Levy, *Social Security Disability Determinations: Recommendation for Reform*, 1990 BYU L. REV. 467, 467-76 (1990).

¹⁴² See Perry A. Zirkel, *Over Due Process Revisions for the Individuals with Disabilities Education Act*, 55 MONT. L. REV. 403 (1994).

¹⁴³ See Levy, *supra* note 141, at 467; See Zirkel, *supra* note 142.

race.¹⁴⁴ Thus, nothing in relation to the determination processes fully explains the disability gap.

The differences between SSD and IDEA may play some role in the formation of the disability gap. Consequently, it would take a far more sophisticated analysis than employed above to completely discount the aforementioned differences. Thus, neither logic nor the available empirical evidence offer any apparent support for the proposition that differences in the programs themselves—in their definitions, beneficiaries, or processes—can account for all or any significant portion of the disability gap. More compelling explanations may be found elsewhere; specifically, an elegant and persuasive explanation may be found in the interest-convergence thesis.

B. Interest Convergence and Divergence

1. *Interest-Convergence: The Bell Thesis*

One of the earliest and most influential criticisms of the Supreme Court's decision in *Brown v. Board of Education*¹⁴⁵ was voiced in April 1959.¹⁴⁶ Herbert Wechsler, Columbia professor of law, appeared at Harvard Law School to give the prestigious Holmes Lecture.¹⁴⁷ In his speech, and article memorializing his speech in the pages of the Harvard Law Review, Wechsler declared his sympathy with the *Brown* Court's effort.¹⁴⁸ He professed his inability, however, to discern a "neutral principle" legitimizing the Court's decision.¹⁴⁹

For Wechsler, the problem with *Brown* "inheres strictly in the reasoning of the opinion."¹⁵⁰ He deduced the opinion "must have rested on the view that racial

¹⁴⁴ For one of the seminal works on the advantages of formalized processes for minority groups, see Richard Delgado, *Critical Legal Studies and the Realities of Race: Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407, 409-10 (1988):

In its original form, Duncan Kennedy's "fundamental contradiction" holds that in every Western society there exists within individuals a tension between community and security, or between informality and formality. I believe that in racially divided societies, like ours, there is a further split: members of the majority race will generally prefer informality, minorities formality. Whites will want community. We will want the safety that comes from structure, rights and rules. They will want free-flowing, uninhibited, interpersonal relationships with all the barriers down. We will settle for safety, even if this means that some of the barriers must remain up.

¹⁴⁵ 347 U.S. 483 (1954).

¹⁴⁶ See Herbet Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1 (1959).

¹⁴⁷ See *id.* at 1.

¹⁴⁸ *Id.* at 31-34.

¹⁴⁹ *Id.* at 34.

¹⁵⁰ *Id.* at 32.

segregation is, in principle, a denial of equality to the minority against whom it is directed.”¹⁵¹ Nevertheless, neither the cited empirical evidence nor the Court’s rhetoric was sufficient to persuade Wechsler the proposition is valid.¹⁵² Wechsler concluded the real harm of segregation was not inequality;¹⁵³ instead, the real harm was a deprivation of the freedom of association: a harm that would fall equally on pro-segregation Caucasians if they were forced to integrate.¹⁵⁴ Therefore, the difficulty with the *Brown* decision was lack of neutrality.¹⁵⁵ Wechsler claimed the decision was partial toward African-American interests and a black perspective, vindicating “the freedom of association is denied by segregation” but failing to recognize that “integration forces an association upon those for whom it is unpleasant or repugnant.”¹⁵⁶

Professor Derrick Bell first presented his “interest-convergence” thesis as part of an effort to locate the “neutral principle” that eluded Wechsler.¹⁵⁷ Bell believed that by examining *Brown* in its historical context and by comparing the decision with other subsequent desegregation decisions, a neutral explanatory principle would emerge, a principle that apparently animated—if it did not justify—the *Brown* decision.¹⁵⁸ Bell wrote,

[I]t 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 sought by Professor Wechsler. 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.¹⁵⁹

For Bell, then, the decision in *Brown* did not turn on a relative assessment of the associational interests of Caucasian and African-Americans; Wechsler was

¹⁵¹ *Id.* at 33.

¹⁵² *Id.* at 34.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 35.

¹⁵⁶ *Id.* at 34. For more on Wechsler’s critique and its implications for modern desegregation cases, see Robert L. Hayman, Jr., *Neutral Principles and the Resegregation Decisions*, 9 WIDENER LAW SYMPOSIUM JOURNAL 129, 129-64 (2002).

¹⁵⁷ See Bell, *supra* note 12, at 519.

¹⁵⁸ Bell, *supra* note 12, at 523.

¹⁵⁹ *Id.*

incorrect regarding that notion.¹⁶⁰ Importantly, those who believed the “neutral principle” supporting *Brown* was precisely the equality principle *Brown* claimed to vindicate were also wrong. Bell disagreed that *Brown* ‘simply’ stood for the principle that segregation was uniquely harmful to African-Americans and that such a simplistic understanding offended the guarantee of equal protection. Back in 1960, Professor Charles Black of Yale wrote in response to Wechsler,

[T]he basic scheme of reasoning on which these cases can be justified is awkwardly simple. First, 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. Secondly, segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. No subtlety at all. Yet I cannot disabuse myself of the idea that that is really all there is to the segregation cases. If both these propositions can be supported by the preponderance of argument, the cases were rightly decided.¹⁶¹

For Bell, *Brown* was no more about the unequal harm done to African-Americans than it was about their associational interests:

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.¹⁶²

Here was the key to *Brown* and where the interests converged: on the *appearance* of “racial justice.”¹⁶³ Many African-Americans argued that compulsory segregation was morally wrong and inherently unequal; many Caucasians agreed.¹⁶⁴ Therefore, official representatives of America, specifically, the Solicitor General of the United States, had joined the battle, and the Supreme Court, at long last, granted African-Americans their victory.¹⁶⁵ This outcome was achieved only when it became clear that the continuing existence of formal racial segregation compromised not merely the principle of equality but, also, the strategic interests of the United States

¹⁶⁰ *Id.*

¹⁶¹ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 421 (1960).

¹⁶² Bell, *supra* note 12, at 523.

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 525.

¹⁶⁵ *See id.* at 524.

in the Cold War battle for the hearts and minds of the international community.¹⁶⁶ “I contend,” Bell concluded,

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.¹⁶⁷

For Professor Bell, interest-convergence explained the monumental victory in *Brown v. Board of Education*. In the midst of the Cold War, white America had powerful international interests in seeing an end to official racial segregation.¹⁶⁸ As the desegregation struggle continued, however, the interests of black and white America diverged. White America sought only a formal end to segregation; it had little interest in actually integrating its schools.¹⁶⁹

Both critics and supporters of the interest-convergence thesis agree the thesis has had an enormous influence on contemporary jurisprudence, providing a fresh and distinctive perspective on the struggle for racial equality.¹⁷⁰ Thus, the thesis has been used to account for the results in a wide variety of legal disputes.¹⁷¹ Several theorists, for example, have suggested that the thesis provides the best account of the modern Court's affirmative action doctrine.¹⁷² Racial affirmative action is nearly impossible to justify as a remedy for discrimination against African-Americans, but it is now justified principally by reference to the benefits it affords white America—i.e., the benefits conferred through education in a racially diverse environment.¹⁷³

2. *Interest-Convergence: A Contemporary Critique*

In a recent article, University of Texas Law Professor Justin Driver suggests that although the “interest-convergence” thesis has made “considerable contributions to legal discourse,”¹⁷⁴ a meaningful critique of Professor Bell's theory is

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 528-29.

¹⁷⁰ Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 921-25 (2007).

¹⁷¹ *Id.*

¹⁷² See, e.g., Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 213 (2004) (“*Grutter* demonstrates Bell's point. . . . [The] Court finds a compelling interest in diversifying the classroom for the benefit of white students.”).

¹⁷³ *Id.*

¹⁷⁴ Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW U. L. REV. 149, 157 (2011).

“long overdue.”¹⁷⁵ In an effort to jump-start that critique, Professor Driver offers four specific criticisms: first, the thesis incorrectly presumes the existence of distinctive “black interests” and “white interests;”¹⁷⁶ second, the thesis wrongly proposes historical continuity between the racial experience of Caucasians and African-Americans;¹⁷⁷ third, the thesis slights both the individual and group agency of Caucasian and African-Americans;¹⁷⁸ and lastly, Professor Bell failed to adequately test his own hypothesis.¹⁷⁹

Each of those four proposed criticisms miss the mark, however, by failing to address issues that are both important and relevant for purposes of this study.

Regarding the first criticism, it is undoubtedly the case that the interests of members of any racial group are not monolithic, and, indeed, there are instances where intra-group perceptions and preferences may sharply diverge from one another. The mere fact that distinctive interests are not universally shared, however, does not make them any less distinctive. Similarly, the fact that distinctive interests are not discernible in some cases does not entail they are not discernible in all cases. Professor Driver appears to concede these points, in acknowledging the existence of distinct black interests in the Jim Crow era.¹⁸⁰ It must be noted that *Plessy v. Ferguson* was hardly the closing expression of white supremacy, and the legal and political issues surrounding race and racial equality have not disappeared in the hundred years since that decision. Those issues persist today, although perceived differently, and may be resolved differently by various groups of Americans divided among racial lines, some of which are defined by race.

To take just one example, in a 2012 survey by the Pew Research Center, 62% of African-American respondents agreed “every possible effort,” including the use of preferential treatment, should be made “to improve the position of minorities.”¹⁸¹ Comparatively, a mere 22% of Caucasian respondents held the same view.¹⁸² Thus, according to the survey, racial affirmative action was not universally embraced or opposed by either group; that result is hardly a surprise, as one need not look past

¹⁷⁵ *Id.* at 156.

¹⁷⁶ *Id.* at 165.

¹⁷⁷ *Id.* at 171.

¹⁷⁸ *Id.* at 175.

¹⁷⁹ *Id.* at 181.

¹⁸⁰ *Id.* at 165.

¹⁸¹ Pew Research Center, *Trends in American Values: 1987-2012 – Partisan Polarization Surges in Bush, Obama Years* 89 (June 4, 2012). The survey also reported more generally that “African Americans have consistently been more confident than whites in government’s ability to perform efficiently and more supportive of the social safety net and a larger role for the government in society” *Id.* at 31. Additionally, the survey found that black and white Americans held vastly different perceptions of our progress toward racial equality: 61% of blacks said, “there has been little real improvement in the position of black people in this country,” while just 33% of whites had that view. *Id.* at 87.

¹⁸² *Id.*

the opinions of the Supreme Court for similar evidence.¹⁸³ Determining interests by such a method cannot be the standard for denominating an interest; if it is, then group interests would not exist. Contrarily, as Professor Bell presumed, as long as race has political and legal salience, as it still does, it is logical to infer the existence of racial group interests. Naturally, groups have varying interests, regardless of identifying characteristics such as race, economic status, and political affiliations. It is the collective acceptance of those interests that brings the group into fruition.

Regarding the second critique, Professor Bell's thesis is distorted by the "misperception" of continuity in America's racial experience,¹⁸⁴ Professor Driver somewhat misses the point. Professor Driver uses one of Professor Bell's more provocative observations as the springboard for his analysis, "[t]he difference in the condition of slaves in one of the gradual emancipation states and black people today is more of degree than kind."¹⁸⁵ Professor Driver suggests "to state this point is to refute it" because it flies "in the face of the overwhelming evidence of the tremendous strides that the United States has made with respect to race relations."¹⁸⁶ The point is not that there has not been any improvement in "race relations," or even that there has not been any improvement for African-Americans, either in absolute terms or relative to Caucasians; instead, the central dynamic of the American experience with regard to race has been constant: African-Americans remain inferior to Caucasians by every significant socio-economic measure.¹⁸⁷ Attempts to reduce inequality, at the expense of white superiority, continue to be met with resistance, sometimes in the legislative arena and sometimes in the Supreme Court.¹⁸⁸ The schools were desegregated; racial equality, however, has yet to be realized.¹⁸⁹ In the struggle for equality, there have been periods of progress; despite that progress, inequality persists.¹⁹⁰ Thus, is it impossible to perceive a central continuity in America's racial experience?

Professor Driver's third critique, that the interest-convergence thesis "accords an almost complete absence of agency" to Caucasian and African-Americans, is a common criticism of critical and postmodern theory.¹⁹¹ Whatever its force in other contexts, it is a misplaced criticism here. The interest-convergence

¹⁸³ See, Ann L. Lijima, *Affirmative Action: A Close Case for a Split Court*, 60 BENCH & B, MINN. 16, Feb. 2003, at 3-5, 7. Discussing current views toward racial affirmative action held by Justice Thomas, who has been a persistent critic of racial affirmative action on the current Court, and Justice Breyer and Ginsberg who have been consistent supporters.

¹⁸⁴ Driver, *supra* note 174, at 171.

¹⁸⁵ *Id.* (citing Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 16 (1979)).

¹⁸⁶ *Id.*, at 171-72.

¹⁸⁷ Thomas M. Shapiro & Jessica L. Kenty-Drane, *The Racial Wealth Gap*, in *African Americans in the U.S. Economy* 175, 176 (Cecilia A. Conrad et. al. eds., 2005).

¹⁸⁸ Driver, *supra* note 174, at 173.

¹⁸⁹ *Id.* at 172.

¹⁹⁰ Driver, *supra* note 174, at 172.

¹⁹¹ Driver, *supra* note 174, at 175.

theory is not, as Professor Driver suggests, a claim about either the inevitable futility of black resistance to inequality or the inevitable complicity of white decision-makers in preserving white privilege. It does not, as Professor Driver concludes, lead, ultimately, to despair. To the contrary, the thesis offers an account of the historical constraints of the struggle for equality; it identifies what has been the condition predicate for success.¹⁹² As a historical account, however, the thesis celebrates the role of individual crusaders—black and white—in affecting positive change. “[I]nterest-convergence” is necessary for lasting legal change, but it still requires action—sometimes daring action—from protestors, lawyers, and judges.¹⁹³ Moreover, insight into the historical constraints offers not only strategic advantages while operating within its framework but exposes the constraints to scrutiny and, ultimately, to the possibility of change.¹⁹⁴

¹⁹² Professor Stephen Feldman makes a similar point in his own response to Professor Driver. For Professor Feldman, the critical error is in obscuring the historical nature of the interest-convergence thesis:

Driver seriously diminishes Bell's contributions by describing the interest-convergence thesis as future-oriented. Scholars can use interest convergence as a tool—a broad lens—to help explain historical developments related to social justice, whether focused on African Americans, other racial minorities, religious minorities, or similarly marginalized groups. As such, interest convergence is not a universal maxim, but it is a historical pattern that appears repeatedly throughout American history, no more, no less. Indeed, interest convergence is neither an assertion of permanent social landscapes nor a strategy for the future.

Colloquy, Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-convergence Thesis*, 106 NW. U. L. REV. 248, 259 (2012).

¹⁹³ As Professor Bell himself explained in his initial presentation of the interest-convergence thesis, the Cold War concerns pervasive in 1954 America

may seem insufficient proof of self-interest leverage to produce a decision as important as *Brown*. They are cited, however, to help assess and not to diminish the Supreme Court's most important statement on the principle of racial equality. Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.

Bell, *supra* note 12, at 525.

¹⁹⁴ Professor Bell ultimately soured on the prospects for legal equality, but he continued to advocate the need for struggle. That struggle, he suggested, has not only existential value, but instrumental value as well: “Continued struggle can bring about unexpected benefits and gains that in themselves justify continued endeavor. The fight in itself has meaning and should give us hope for the future.” Derrick Bell, *Racial Realism*, 27 CONN. L. REV. 363, 377 (1992). “I am convinced,” he concluded,

that there is something real out there in America for black people. It is not, however, the romantic love of integration. It is surely not the long-sought goal of equality under law, though we must maintain the struggle against racism else the erosion of black rights will become even worse than it is now. The Racial Realism that we must seek is simply a hard-eyed view of racism as it is and our subordinate role in it. We must realize, as our slave forebears, that the struggle

Professor Driver's fourth and final critique asserts that the interest-convergence thesis is rendered irrefutable by the tendency of its supporters, including Professor Bell, to subject cases to varying levels of scrutiny to reveal, or to ignore, underlying meanings.¹⁹⁵ In support of this criticism, Professor Driver cites a number of cases, including older cases, such as *Strauder v. West Virginia*,¹⁹⁶ and more recent cases, including *Palmore v. Sidoti*,¹⁹⁷ which are at odds with the theory and were largely dismissed by Professor Bell.

Indeed, arguments can be made that the aforementioned outlying cases *do* fit the theory; Professor Bell asserted some of these arguments, and Professor Driver even raised some of his own. Ultimately, the criticism that every case does not fit in the racial corpus must be subjected to the same "sustained" analysis.¹⁹⁸ Professor Bell, however, should not bear that burden. Rather, Professor Bell's work is best viewed not as the final word on interest-convergence but as an invitation to dialogue. Professor Driver's work is a part of this ongoing dialogue as is the instant effort.

for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome.

Id. at 377-78.

¹⁹⁵ Driver, *supra* note 174, at 181.

¹⁹⁶ *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding a West Virginia law that categorically excluded black citizens from the jury pool was unconstitutional). Professor Driver makes much of Chief Justice Strong's language in *Strauder*, which recognizes the stigmatizing effects of racial exclusion. However, the narrow holding of *Strauder* had limited practical value as the Chief Justice was careful to note that while the Constitution prohibited categorical exclusion from the jury pool, it did not necessarily guarantee that black jurors actually serve on juries. Further, any understanding about racial exclusion that was gained from *Strauder* was quickly undone, initially by *Pace v. Alabama*, 106 U.S. 583 (1883) (finding a lack of inequality in Alabama's anti-miscegenation law), and then completely by *Plessy v. Ferguson*, 163 U.S. 537 (1896) (insisting that racial segregation did not connote inferiority, and that, in any event, if "one race be inferior to the other socially, the [C]onstitution of the United States cannot put them upon the same plane."). Even the narrow holding had limited practical value: the Chief Justice was careful to note that while the Constitution prohibited categorical exclusion from the jury pool, it did not necessarily guarantee that black jurors actually serve.

¹⁹⁷ See *Palmore v. Sidoti*, 466 U.S. 429 (1984) (finding the decision of a Florida trial court that had modified a custodial agreement because the custodial parent had entered into an inter-racial relationship, which later became an inter-racial marriage, unconstitutional). Chief Justice Burger's opinion in this case would seemingly have been an easy and unremarkable one, except for the rhetorical gymnastics required to accommodate the Court's rigid "state action" requirement. Conceding the possibility that social prejudice might genuinely have caused the judge to be concerned for the welfare of the child, Chief Justice Burger declared that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." This rhetorical mishmash may have confirmed the incoherence of the public-private dichotomy, but it signaled no change in the Court's embrace.

¹⁹⁸ See, e.g., Driver, *supra* note 174, at 185 ("Rather than offering a sustained analysis of the opinions, however, Professor Bell merely cited them in a footnote as instances of contradiction-closing cases"); "Professor Bell has refrained from dedicating sustained attention." *Id.* at 186.

3. *Interest-Convergence: Forging Convergence, Divergence, and Identity*

The dialogue on interest-convergence was significantly re-shaped in 2004, with the publication of Harvard Law Professor Lani Guinier's re-assessment of *Brown* and the interest-convergence thesis. In *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, Professor Guinier offers her own exegesis of *Brown* with an expanded analysis of the racial interests at play.¹⁹⁹ Those interests, Professor Guinier notes, were forged by generations of racial politics and included complex alliances and divisions, which were often of a deeply psychological nature.²⁰⁰ To truly read *Brown*, Professor Guinier suggests, one must be able to read race, in all of its dimensions.²⁰¹ Thus, Professor Guinier advocates a new "racial literacy" as a way to untangle the various interest convergences and divergences present in the desegregation cases.²⁰²

Professor Guinier's analysis begins with a survey of the racial landscape at the time of *Brown*.²⁰³ An important part of that landscape was the intra-racial alliance of working-class and wealthy Caucasians.²⁰⁴ That alliance was no accident; "the psychology of segregation," Professor Guinier observes, "did not affect African-Americans alone; it convinced working-class Caucasians that their interests lay in white solidarity rather than collective cross-racial mobilization around economic interests."²⁰⁵

In Professor Guinier's view, the advocates of desegregation, and the *Brown* Court itself, critically erred in failing to perceive the strength of this alliance.²⁰⁶ That failing, in turn, was rooted in a broader shortcoming, the inability to recognize that segregation was just a symptom of deeper disorders—the belief in black inferiority and a commitment to white supremacy.²⁰⁷ Professor Guinier notes how the late Judge Robert Carter, one of the NAACP attorneys in *Brown*, came belatedly to this realization:

Both Northern and Southern white liberals and blacks looked upon racial segregation by law as *the primary* race relations evil in this country. It was not until *Brown I* was decided that blacks were able to understand that the fundamental vice was not legally enforced *racial*

¹⁹⁹ Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92 (2004).

²⁰⁰ *Id.* at 114.

²⁰¹ *See id.*

²⁰² *Id.* at 114-15.

²⁰³ *Id.* at 98.

²⁰⁴ *Id.* at 99.

²⁰⁵ *Id.* at 96.

²⁰⁶ *Id.* at 99.

²⁰⁷ *Id.*

segregation itself; that this was a mere by-product, a symptom of the greater and more pernicious disease—white supremacy.²⁰⁸

Brown compounded its error with an asymmetric focus on segregation's psychological harms to black children, thereby reinforcing both the stigma of inferiority and a divergence of black-white interests.²⁰⁹ "*Brown's* racial liberalism," Professor Guinier maintains, "did not offer poor whites even an elementary framework for understanding what they might gain as a result of integration."²¹⁰ The *Brown* decision "solidified the false interest convergence between southern white elites and southern poor whites, ignored the interest divergence between poor and middle-class blacks, and exacerbated the interest divergences between poor and working-class whites and blacks."²¹¹

Three vital points emerge from Professor Guinier's analysis. The first involves an appreciation of the ways in which race is constructed—that is, the ways in which racial identity and racial interests merge.²¹² Professor Guinier indicates that the various convergences and divergences of racial interests are neither accidental nor natural but result from the careful manipulations of powerful parties who use race to advance their interests.²¹³

Those most advantaged by the status quo have historically manipulated race to order social, economic, and political relations to their benefit. Then and now, race is used to manufacture both convergences and divergences of interest that track class and geographic divisions. The racialized hierarchies that result reinforce divergences of interest among and between groups with varying social status and privilege, which the ideology of white supremacy converts into rationales for the status quo. Racism normalizes these racialized hierarchies; it diverts attention from the unequal distribution of resources and power they perpetuate. Using race as a decoy offers short-term psychological advantages to poor and working-class whites, but it also masks how much poor whites have in common with poor blacks and other people of color.²¹⁴

A second, closely-related notion suggests race is not the only variable in the forging and re-forging of convergent, or divergent, interests. Professor Guinier's analysis of segregation and desegregation reveals "the dynamic interplay among race, class, and geography."²¹⁵ She explains further:

²⁰⁸ *Id.* (quoting Robert Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION* 23 (Derrick A. Bell, ed., 1980)).

²⁰⁹ *Id.* at 109.

²¹⁰ *Id.* at 102.

²¹¹ *Id.*

²¹² *See id.* at 94-100.

²¹³ *Id.* at 114.

²¹⁴ *Id.*

²¹⁵ *Id.* at 115.

[W]hile racial literacy never loses sight of race, it does not focus exclusively on race. It constantly interrogates the dynamic relationship among race, class, geography, gender, and other explanatory variables. It sees the danger of basing a strategy for monumental social change on assumptions about individual prejudice and individual victims. It considers the way psychological interests can mask political and economic interests for poor and working-class whites. It analyzes the psychological economy of white racial solidarity for poor and working-class whites and blacks, independent of manipulations by ‘the industrialists and the lawyers and politicians who served them.’ Racial literacy suggests that racialized hierarchies mirror the distribution of power and resources in the society more generally. In other words, problems that converge around blacks are often visible signs of broader societal dysfunction. Real interest convergences among poor and working-class blacks and whites are possible, but only when complex issues are analyzed and acted upon with their structural, not just their legal or their asymmetric psychological, underpinnings in mind. This means moving beyond a simple justice paradigm that is based on formal equality, while contemplating what it will take to create a moral consensus about the role of government and the place of the public itself.²¹⁶

While Professor Guinier focuses on the interplay between race, class, and geography,²¹⁷ disability is also a vital part of the racial landscape and an essential part of the instant work. Disability mirrors the story of race, and, often, the two narratives intersect.²¹⁸ Essentially, racial disparities in disability determinations signify the distribution and preservation of power.²¹⁹

Such notions lead to a third critical point: for Professor Guinier—and for, less explicitly, Professor Bell before her—racial hierarchy results not from the sum of individual prejudices but from deeply entrenched and deeply inscribed structures of power.²²⁰ “[R]acial literacy emphasizes the relationship between race and power. Racial literacy reads race in its psychological, interpersonal, and structural dimensions. It acknowledges the importance of individual agency but refuses to lose sight of institutional and environmental forces that both shape and reflect that agency.”²²¹

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ See Robert L. Hayman, Jr. & Nancy Levit, *Un-Natural Things: Constructions of Race, Gender, and Disability in CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS* 159, 165-70 (Temple University Press 2002).

²¹⁹ See *id.* at 170-71; Guinier, *supra* note 199, at 115.

²²⁰ Guinier, *supra* note 199, at 115.

²²¹ *Id.*

Thus, the critical locus of interest-convergence scrutiny is not so much the individual decisions, which consist with or contradict racial hierarchy; instead, the theory emphasizes the processes of forging racial identities and racial interests and of shaping the perceptions of those identities and interests. Consequently, the aggregate results of those individual decisions are both predictable and, to those in power, more palatable.

C. Interest Convergence and Divergence in Disability Decisions.

1. *Interest-Convergence and Individual Intent*

The interest-convergence theory offers a compelling account of the disability paradox. The contradictory disparities in disability determinations are rational when considered as manifestations of converging and diverging racial interests; minority over-representation in the IDEA context is consistent with majority interests while in the SSD context, it is not. Before exploring this view, it is important to disclaim a contention that is not a part of this thesis. Professor Bell's original interest-convergence theory is, generally, read as an account of the subjective motivations of decision-makers.²²² Thus, the nine justices of the *Brown* Court acted upon the perceived benefits to white America in ruling segregation unconstitutional. Extending the interest-convergence thesis to disability decisions allegedly includes a statement regarding the subjective motivations of decision-makers in the SSD and IDEA contexts. Specifically, the interest-convergence theory suggests those decision-makers are inclined to find, or not find, disability based on their perceptions of the alignments between their decisions and white interests. That notion, though, is not the aim of this thesis.

Quite to the contrary, this thesis suggests decision-makers, in such cases, intend to perpetuate racial hierarchy; their decisions are the deliberate expression of racial hostility. Further, they may even consciously weigh the benefits of their decisions to "white America." With regard to the question of whether that approach is often, occasionally, or hardly ever employed is not answered here;²²³ instead, no matter the frequency, those disability decisions are consistent with an alignment of interests, which preserve the racial and ability hierarchies. Those determinations are rendered despite whether the racial gaps in disability decisions, and the hierarchies they reinforce, are consciously desired, merely tolerated, or largely unnoticed because they are so unexceptional.

²²² See, e.g., *id.*

²²³ We do note, however, that the processes seem to permit the expression of bias, see generally, Vendel, *supra* note 3 (bias in SSD process), and that in some cases, the expression of racial or ethnic bias has been sufficiently extreme and overt to require judicial correction. See, e.g., *Grant v. Commissioner, SSA*, 111 F. Supp. 2d 556 (M. D. Pa. 2000) (vacating decisions of ALJ who used the word "nigger" and who disparaged blacks, Hispanics, and other "no-goodniks"); *Pastrana v. Chater*, 917 F. Supp. 103, 110-111 (D. P. R. 1996) (vacating decision of ALJ who at considerable length, derided work habits of Puerto Ricans).

To briefly clarify, individual decisions in these cases are substantially constrained by structures of power. For Professor Bell, those structures established a condition predicate to civil rights victories; consequently, efforts to secure equality could succeed only when minority interests were perceived to align with majority interests.²²⁴ Professor Guinier elaborated on the role of powerful interests in constructing the critical variables in Bell's thesis including constructing race and racial interests, in forging convergences and divergences within and between those interests and in shaping the perception of those interests and of their alignment.²²⁵ Thus, the constraints present in the processes described by Professors Bell and Guinier are a part of the modern racial landscape. Indeed, the results of the disability decisions rendered within that landscape are, in the aggregate, consistent with the interest-convergence thesis.²²⁶

An attempt to gauge the presence or level of racial *animus* in individual disability determinations is not made; neither "*animus*" nor "intent" nor any of the operative legal terms do justice to the full range of possible correlations between human cognition and action.²²⁷ The results of the individual decisions can be at least partially explained without solving the intractable problems surrounding human volition.

Moreover, a focus on the motives behind individual decisions misses a still simpler point: the class of decision-makers is enormous and may fairly include all of

²²⁴ Bell, *supra* note 12, at 523.

²²⁵ Guinier, *supra* note 199, at 94.

²²⁶ Thus, Skiba, et al., conclude, "there is no single simple explanation that appears to fit the data on special education disproportionality. Rather, minority disproportionality in special education appears to be *multiply determined*, a product of a number of social forces interacting in the lives of children and the schools that serve them[.]" Skiba, *supra* note 6, at 278.

²²⁷ Philosopher Martha Nussbaum explains:

Western philosophers, ever since Plato and Aristotle, have agreed that the explanation of human action requires quite a few distinct concepts; these include the concepts of belief, desire, perception, appetite, and emotion—at the very least. Some contemporary philosophers have felt that Aristotle was basically right, and that we do not need any categories other than those he introduced. Others have not been so satisfied. The Stoics introduced a further notion of impulse (*hormê*), in the belief that the Aristotelian categories did not altogether capture the innate tendency of things to preserve their being. In a related move, Spinoza introduced the idea of *conatus*, and gave it great prominence. Kant was partial to the notion of inclination (*Neigung*), feeling that it captured features of emotion and desire not fully included in the Aristotelian/mediaeval framework. Recently some philosophers have argued that the concept of intention is both irreducible to any of the others and an essential part of explaining action. And of course others have shown an interest in the concepts introduced by psychoanalysis.

Martha C. Nussbaum, *Flawed Foundations: the Philosophical Critique Of (A Particular Type Of) Economics*, 64 U. CHI. L. REV. 1197 (1997). For the seminal work critique of "intent" in matters of racial discrimination, see Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-24, 381, 385-86 (1987).

society. This inclusive notion is partially due to the nature of the processes at hand. The SSD process includes not merely ALJs but also a wide variety of state and federal employees.²²⁸ The IDEA process includes not merely hearing examiners but also teachers and parents.²²⁹

This inclusive notion is also partially due to the systemic nature of the decisions that produce and consistently re-produce the disparities. With regard to the IDEA disparities, Skiba, *et al.*, note:

There may be some temptation to restrict the interpretation of “inappropriate identification” so as to focus primarily on special education policies, practices, and procedures. Yet, the data clearly indicate[s] that racial and ethnic disparities in special education are not solely a special education problem, but are also rooted in a number of sources of educational inequity in general education, including curriculum; classroom management; teacher quality; and resource quality and availability. Students who are referred to special education because they have failed to receive quality instruction or effective classroom management have been inappropriately identified as much as if they were given an inappropriate test as part of special education assessment.²³⁰

Finally, this inclusive notion is also partially due to the enduring nature of the disparities; the question, after all, is not only why this disability paradox exists but also why the paradox persists. After decades of research and analysis, the paradox remains unresolved, and little progress has been made in reducing its constituent disparities. In this apparent acquiescence to inequality, society may simply be complicit.

2. *Interest-Convergence and Racial Hierarchy*

Therefore, with regard to all of the foregoing, the conflicting disparities in disability determinations are consistent with a white-over-black racial hierarchy and, thus, also comport with the interest-convergence account. In particular, the disability paradox reflects a convergence of interests and promotes the existing racial hierarchy in three ways: first, by perpetuating inequalities in economic and educational opportunities; second, by promoting racial segregation; and third, by reinforcing negative racial stereotypes about racial minorities, including African-Americans.

a. *Unequal Opportunities*

Identifying an individual as “disabled” produces a very different outcome in the SSD context when compared to the IDEA context. Denial of SSD and SSI benefits for claimants with medial impediments entails those individuals often go

²²⁸ See Vendel, *supra* note 3, at 775-76.

²²⁹ See 20 U.S.C. § 1414(d)(1)(b) (2010).

²³⁰ Skiba, *supra* note 6, at 282 (citations omitted).

without the public benefits necessary for their subsistence. The consequences are heightened for racial minorities and their dependents; African-Americans, in particular, confront an array of inter-related systemic disadvantages. They are more likely to be unemployed,²³¹ poor,²³² subjected to inadequate access to health care²³³ resulting in severe medical problems,²³⁴ and increased reliance on disability benefits.²³⁵ Minorities frequently experience these social and economic disadvantages over multiple generations.²³⁶

In contrast, a positive determination for IDEA applicants entails more negative consequences, especially for minority students. Data recently released by the United States Department of Education documents depressed graduation rates for students with disabilities in nearly every state.²³⁷ In forty-seven of the forty-eight reporting jurisdictions,²³⁸ students identified as having disabilities under IDEA

²³¹ According to the Bureau of Labor Statistics, in February 2013, the black unemployment rate was 13.8%; the white unemployment rate was 7.2%. See Bureau of Labor Statistics, U.S. Department of Labor, *The Editor's Desk*, Unemployment rates by race and ethnicity, (2010) available at http://www.bls.gov/opub/ted/2011/ted_20111005.htm.

²³² According to the Census Bureau, the 2011 poverty rate among black Americans was 27.6%; among white Americans it was 9.8%. A gap of at least twenty points has been constant throughout the four-decade time span covered by this analysis. See U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2011* 52-53 (September 2012).

²³³ See, e.g., U.S. Department of Health & Human Services, *2011 National Healthcare Disparities Report* 242 (March 2012) (noting that previous and current disparities reports indicate “Blacks had poorer quality of care and worse access to care than Whites for many measures tracked in the reports”).

²³⁴ See, e.g., Jennifer M. Orsi, et al., *Black-White Health Disparities in the United States and Chicago: A 15-Year Progress Analysis*, 100 AM J PUBLIC HEALTH 349, 352 (Feb. 2010) (noting that racial disparities in health in the United States have been well documented, and finding “minimal progress being made by the United States as a whole toward the reduction or elimination of racial health disparities”); Vernelia R. Randall, *Eliminating Racial Discrimination in Health Care: A Call for State Health Care Anti-Discrimination Law*, 10 DEPAUL J. HEALTH CARE L. 1, 2-3 (2006) (noting that racial minorities “are sicker than white Americans; they are dying at a significantly higher rate”).

²³⁵ The Social Security Administration notes that in 2011, “12.6 percent of the population was African American; however, 19 percent of disabled workers receiving benefits were African American.” *Social Security Is Important To African Americans*, available at <http://www.ssa.gov/pressoffice/factsheets/africanamer.htm>.

²³⁶ See Bureau of Labor Statistics, *Unemployment Rates by Race and Ethnicity, 2010*, http://www.bls.gov/opub/ted/2011/ted_20111005.htm (analyzing unemployment rates by race and ethnicity over a four-decade time period); see also *supra* note 115, at 15 (tracking poverty rates from 1959 to 2011).

²³⁷ See U.S. Dept. of Ed., *supra* note 11.

²³⁸ Reporting jurisdictions included forty-seven states plus the District of Columbia. Idaho, Kentucky, and Oklahoma received or have a pending request for an extension of the time line for data submission. Only South Dakota reported a higher graduation for students with disabilities, 84%, compared to an overall graduation rate of 83%. *Id.*

graduated at a lower rate than the overall population: the gap ranged from six points to fifty-two points, with an average gap of twenty-one points.²³⁹

Within the cohort of students with disabilities, the reality is even more severe. Professor Beth A. Ferri and David J. Connor observe,

Recent studies show how the label of disability triggers disparate outcomes for White students and students of color. For White students, special education eligibility is more likely to guarantee access to extra support services, maintenance in general education classrooms, and accommodation for high-status examinations. For students of color, however, being labeled as disabled can result in decreased access to general education and poorer transition outcomes.²⁴⁰

This trend is confirmed by the *31st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (IDEA)*.²⁴¹ The DOE report also documents markedly different outcomes for black and white students identified as “disabled” under IDEA.²⁴² According to the report, the Caucasian student dropout rate is 21.1% while the African-American student dropout rate is 32.5%.²⁴³ For Caucasian students, the graduation rate is 64.3%; for African-American students, the graduation rate is 42.5%.²⁴⁴

b. Segregation.

White “interest” in maintaining some degree of segregation persists.²⁴⁵ According to the General Social Survey (GSS), from 1972 to 1996 (when GSS stopped posing the question in its surveys), the percentage of Caucasian Americans who objected to sending their children to schools with “a few blacks” dropped to a negligible number.²⁴⁶ The percentage who objected to sending their children to schools that were “half black,” however, held steady at roughly 20%; those who objected to sending their children to schools that were “mostly black” also held steady at roughly 40%.²⁴⁷ Lawrence D. Bobo, et al. posited such objections are “consistent with the notion that whites are defending their group position.”²⁴⁸

²³⁹ The average overall state graduation rate was 78.3%; for students with disabilities, the average state graduation rate was 57.2%. See U.S. Dept. of Ed., *supra* note 11.

²⁴⁰ Ferri & Connor, *supra* note 11.

²⁴¹ See generally DOE Report, *supra* note 111.

²⁴² *Id.*

²⁴³ *Id.* at 69. For Hispanic students, the drop-out rate was 32.4%. *Id.*

²⁴⁴ *Id.* For Hispanic students, the graduation rate was 44.8%. *Id.*

²⁴⁵ See Lawrence D. Bobo, et al., *Real Record on Racial Attitudes*, in *SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972* 50 Figure 3.4 (Peter V. Marsden, ed. 2012).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 49.

The disability paradox may correlate with this “interest” in racial segregation, as SSD denials may indirectly foster segregation while positive disability determinations under IDEA may directly produce racial segregation.

Arguably, since SSD denials result in a loss of potential income, African-American claimants are disadvantaged due to their disproportionately high number of denials.²⁴⁹ Given the obvious relationship between income and housing choices, along with the “reinvigorated” positive correlation between residential segregation and *de facto* school segregation,²⁵⁰ an indirect effect of a differential loss of potential income may be increased racial segregation of both neighborhoods and schools.

Alternatively, grants of IDEA disabilities promote a different kind of racial segregation—*intra*-school segregation—and do so quite directly.²⁵¹ Ability tracking, combined with the longstanding racial gaps in standardized measures of ability,²⁵² has long produced racial separation within schools.²⁵³ As Ferri and Connor note:

During the 1950s, as *Brown* was becoming a reality, a sharp rise in standardized testing helped to establish a set of rigid norms regarding academic ability based on White, middle-class American experiences, values and expectations. As an institutionalized practice, the testing movement simultaneously identified and created groups of students who deviated from the “normal” or “average” student. The result was the seemingly beneficent provision of separate classes...Yet, because of biased notions of race and ability, “special” classes became increasingly populated by minority, immigrant, and other already marginalized students.²⁵⁴

IDEA’s inclusion directive should have diminished this trend. Ferri and Connor note, however, the mandate “resulted in resistance similar to that expressed in response to school desegregation shortly after *Brown*.”²⁵⁵ As a result, “racially segregating schooling practices have given way to largely under-acknowledged and more covert forms of racial segregation, including some special-education practices.

²⁴⁹ See *supra* Part I.

²⁵⁰ A correlation reinvigorated by the end of the desegregation mandate, and the gradual return—sometimes under legislative direction—to “neighborhood schools.” See Robert L. Hayman Jr. & Leland Ware, *The Geography of Discrimination: The Seattle and Louisville Cases and the Legacy of Brown v. Board of Education*, in CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE 312, 322-30 (Robert L. Hayman Jr. & Leland Ware, eds., 2009).

²⁵¹ See *supra* Part II.

²⁵² See generally ROBERT L. HAYMAN JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* (1998) (critiquing standardized measures of “intelligence,” and their correlations with race); Zeus Leonardo & Alicia A. Broderick, *Smartness as Property: A Critical Exploration of Intersections Between Whiteness and Disability Studies*, 113 TCHR. C. REC. 2206, 2225 (2011) (examining the practical and ideological connections between race and “ability”).

²⁵³ See *supra* Part II.

²⁵⁴ Ferri & Connor, *supra* note 11, at 457-58 (internal citations omitted).

²⁵⁵ *Id.* at 453.

Since the inception of special education, the discourses of racism and ableism have bled into one another, permitting forms of racial segregation under the guise of ‘disability.’”²⁵⁶

Data from the *31st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act* also substantiates the claim.²⁵⁷ In its statistical summary on inclusion, the DOE noted,

[F]or each racial/ethnic group, the largest percentage of students ages [six] through [twenty-one] was served under IDEA, Part B, inside the regular class 80% or more of the day. The students who were served inside the regular class 80% or more of the day accounted for at least 50 percent of the students in each of the racial/ethnic groups *except for the black (not Hispanic) group*. The percentages of students in the racial/ethnic groups who were served inside the regular class 80% or more of the day ranged from 48.2 percent to 60.8 percent.²⁵⁸

African-American students were at the bottom of the inclusion scale: less than half, 48.2%, of African-American students were in regular classrooms more than 80% of the day.²⁵⁹ In comparison, white student were at the top of the inclusion scale: 60.8% of Caucasian students were in regular classrooms more than 80% of the day.²⁶⁰ Further, 11.9% of Caucasian students were inside the regular class less than 40% of the day, whereas 21.7% of African-American students were inside the regular class less than 40% of the day.²⁶¹

Thus, it certainly appears, as Ferri and Connor assert, that special education operates “as a tool for...racial resegregation.”²⁶²

c. Stereotypes

The disability paradox is also consistent with a succession of racial stereotypes, which portray African-Americans as less industrious and intelligent than Caucasian Americans. Those two stereotypes have proven to be remarkably durable.

As to the first, a review of the General Social Surveys from 1977 to 2008 revealed, “[L]ack of ‘motivation or will power’ is the most commonly endorsed explanation of black disadvantage[.]”²⁶³ Additionally, a 2012 Associate Press survey, conducted with researchers from Stanford University, the University of Michigan and the National Opinion Research Center at the University of Chicago, found respondents were less likely to agree that “determined to succeed” or “hard-

²⁵⁶ *Id.* at 454.

²⁵⁷ See DOE Report, *supra* note 111.

²⁵⁸ *Id.* at 63. (emphasis added).

²⁵⁹ See *id.* at 63 fig 20.

²⁶⁰ See *id.*

²⁶¹ See *id.*

²⁶² See Ferri & Connor, *supra* note 11, at 454.

²⁶³ Bobo, *supra* note 245, at 61.

working” described “most blacks” as compared to “most whites[;]” respondents were more likely to agree that “most blacks” were well-described as “lazy.”²⁶⁴ The survey also found 33% of all respondents agreed “if blacks would only try harder, they could be just as well off as whites[;]” 36% of all respondents agreed “[b]lacks are demanding too much from the rest of society[;]” and 39% of all respondents responded “[m]ost blacks who receive money from welfare programs could get along without it if they tried[.]”²⁶⁵

The disproportionate denial of SSD benefits is consistent with these views. Explicit in the denial is the determination that the claimant is not sufficiently impaired as claimed and is able to work; implicit in the denial is the normative conclusion that the claimant should be more self-reliant and less dependent on government assisted benefits.²⁶⁶ And if those conclusions are embedded with special force or frequency in the case of black claimants, those conclusions reinforce many Americans’ perception of “most blacks.”

Regarding the second stereotype, the presumed intellectual inferiority of African-Americans has long remained a staple of racist ideology and, even today, supports a small cottage industry of pseudo-scientific claptrap.²⁶⁷ While Caucasians today are less likely than their forebears to explicitly embrace the presumption, it has not disappeared entirely. In 1990, more than half of the Caucasian respondents to the General Social Survey reported their belief that whites were more intelligent than African-Americans.²⁶⁸ By 2008, that percentage had dropped precipitously; still, approximately one-fourth of all Caucasian respondents explicitly asserted the intellectual superiority of whites over blacks.²⁶⁹

Disability determinations in the IDEA context reinforce these views. For African-American students receiving benefits under IDEA, the highest risk ratio reported by the DOE was for “intellectual disabilities,” while for white students, the *lowest* risk ratio was for “intellectual disabilities.”²⁷⁰ The history of intellectual disability, or of “mental retardation,” the term that preceded it, is a history of

²⁶⁴ See *The Associated Press Racial Attitudes Survey*, 18-22 (Oct. 29, 2012), available at http://surveys.ap.org/data%5CGfK%5CAP_Racial_Attitudes_Topline_09182012.pdf. Among the respondents, 59% believed that “determined to succeed” described blacks “moderately well,” “very well” or “extremely well,” while 81% thought the same of whites; 66% believed that “hard-working” described blacks “moderately well,” “very well” or “extremely well,” while 82% thought the same of whites; 14% believed that “lazy” described blacks “very well” or “extremely well,” while just 5% thought the same of whites.

²⁶⁵ See *id.* at 23-24.

²⁶⁶ Thus, the most recent assault on Social Security, in the form of a complaint is “the recent American flight from work has largely been a flight to government disability programs.” Eberstadt, *supra* note 10, at 15.

²⁶⁷ For a critique of these racialist theories, see Hayman, *supra* note 253.

²⁶⁸ See Bobo, *supra* note 245, at 60.

²⁶⁹ See *id.*

²⁷⁰ See DOE REPORT, *supra* note 111, at 57 tbl 16.

exclusion; it is no coincidence that it largely tracks the history of race in America.²⁷¹ The histories of “race” and “mental retardation” are, more than parallel; they have a common history; they were made similarly, and they were made together.²⁷²

Leonardo and Broderick observe,

[L]ike race, ability is a relational system. In terms of race, the category, White, cannot exist without its denigrated other, such as Black or people of color generally; in terms of ability, constructs such as smartness only function by disparaging in both discursive and material ways their complement, those deemed to be uneducable and disposable. In both cases, the privileged group is provided with honor, investment, and capital, whereas the marginalized segment is dishonored and dispossessed. And each of these ideological systems (of Whiteness and of smartness) tends to operate in symbiotic service of the other in their mutual (though not exclusive) constitution of “the normative center of schools.”²⁷³

Further, [i]mplicit in the discourse of exclusion,” note Ferri and Connor, “are perceptions of black and disabled people as unequivocally inferior.”²⁷⁴ Such perceptions “are deeply entrenched in the cultural imagination and are evident in oppressive legislation, educational practice, as well as in the distorted portrayals of ‘others’ in academic scholarship, literature, media, and film.”²⁷⁵

These perceptions also appear to be present in disability determinations under the SSA and IDEA.

CONCLUSION

Viewed through the lens of the interest-convergence thesis, the disability paradox is essentially no paradox at all. Although the racial disparities in SSD and IDEA disability determinations run in opposite directions, each has the effect of promoting white racial advantages by favoring white economic and educational opportunities; by promoting racial segregation; and by reinforcing racial stereotypes that depict Caucasians as more industrious and more intelligent than African-Americans.

These consequences are both inter-related and mutually-reinforcing aspects of the racial hierarchy, which is, in turn, integrally related to the ability hierarchy. Ferri and Connor explain,

[B]locking the access of Black people and people with disabilities to all levels of society rests on a central, but often unarticulated,

²⁷¹ See Hayman, *supra* note 252.

²⁷² See *id.*

²⁷³ Leonardo & Broderick, *supra* note 252, at 2208 (citation omitted).

²⁷⁴ Ferri & Connor, *supra* note 11, at 469.

²⁷⁵ *Id.* (citation omitted).

assumption of superiority by the dominant group. This very superiority is threatened by integration, which historically has evoked many fears, including an increased competition for jobs, miscegenation, and “pollution” of the nation’s gene pool. Thus, access appears to literally diminish White and able-bodied presence, and therefore, power.²⁷⁶

Restricting that access preserves the hierarchy in another critical way: by disrupting the possibilities for interest convergences along egalitarian lines. “Once blackness becomes the face of failure,” notes Professor Guinier, “race then influences and constrains social, economic, and political opportunities among and between blacks and whites and between blacks and other people of color.”²⁷⁷

Despite these constraints, opportunities still exist for people with disabilities of all races to seek and secure greater opportunity and more inclusion, for racial minorities with and without impairments to seek and secure freedom from the disabling effects of “race,” for all Americans to seek and secure a more egalitarian future, one liberated from structural and ideological constraints—from the policies and practices, from the myths and biases—of the past.

Striving to fulfill those opportunities begins with understanding.

²⁷⁶ *Id.* at 470; *See also* Leonardo & Broderick, *supra* note 252, at 2214 (noting “the ways that the ideology of smartness operates in the service of the ideology of Whiteness and vice versa.”).

²⁷⁷ Guinier, *supra* note 199, at 108-09.