

Introduction

I Want My Ham

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“And because white people have never experienced the lower end of the stick of racism, they can’t fully recognize when it is and isn’t happening . . . yet they have so much to say about whether or not it still exists. The victim blaming of unarmed black bodies shows that white people aren’t really tired of racism. White people are tired of “talking” about racism. They want us to shut up about it. They want us to pretend like it’s not happening. They want us to look at Barack Obama, Michael Jordan, and Oprah Winfrey and believe that everything is okay with us because those three made it . . . therefore . . . we should be able to as well. We’ve had a black president, so racism must be over.”

—“Superiority Fantasy,” *Hands Up*¹

“He gonna give me my ham. He gonna give me my ham. I want my ham. He gonna give me my ham.”

—*Two Trains Running*²

Just three years before his death, as Derrick Bell was preparing the sixth edition of his landmark text *Race, Racism, and American Law* for publication, the United States was on the verge of a major historical moment: the nomination and election of the first African American President of

the United States. Bell wrote about this during Barack Obama's presidential campaign in 2008, candidly observing what he thought an Obama presidency would mean for Black people in America: "It is unlikely, even if Senator Obama survives the many challenges to his nomination and election that this historical first will alter significantly the racial barriers that most people of color face."³ Such statements about racism in America were familiar refrains for Bell, and until he died in 2011, so many of his theoretical insights proved accurate. For example, one can argue—as Bell himself did in 2010—that the election of Barack Obama is a classic example of Bell's theory of interest convergence: the notion that what appears to be racial progress for African Americans actually would not happen but for the need to also further some coexisting and, in the view of whites at least, more important white interest. So, Bell's argument goes, notions of racial "progress" are badly misguided and are mere racial symbols—trinkets that, as Bell's fictional character, Jesse B. Semple points out, are more an expression of white influence than Black progress:

From the Emancipation Proclamation on, the Man been handing us a bunch of bogus freedom checks he never intends to honor. He makes you work, plead, and pray for them, and then when he has you either groveling or threatening to tear his damn head off, he lets you have them as though they were some kind of special gift. As a matter of fact, regardless of how great the need is, he only gives *you* when it will do *him* the most good! And before you can cash them in . . . the Man has called the bank and stopped payment or otherwise made them useless—except, of course, as symbols.⁴

Again, the 2008 American presidential election is an example of what Jesse B. Semple calls a racial "symbol," and an example of Bell's theory of interest convergence. Some historical detail will be useful here. Recall that the 2008 presidential election between Senator Barack Obama and the late Senator John McCain was rather close, and the gap did not begin to widen until the Wall Street financial collapse shortly after Labor Day, as the fall election season intensified. Upper class and upper-middle-class whites began to bleed large sums of money from their retirement accounts because of profligate Wall Street spending. The financial collapse was so bad that reports surfaced of many people—most of them white—who retired toward the end of the Clinton presidency, some as millionaires,

needing to return to work. So attention in the presidential election quickly turned to which of the two candidates was more competent to stop the bleeding. As Senator McCain proclaimed that “the fundamentals of the economy are strong,” and Governor Sarah Palin waxed not so eloquently about how she could keep an eye on Russia from Alaska, the American electorate began to see Obama’s opposition as incompetent to deal with the financial crisis, and their attention turned to the junior Senator from Illinois, whose intellect and competence they thought would be the best prescription for the financial crisis facing the nation. And the financial crisis was not the only crisis facing America. There were wars in Afghanistan and Iraq, the economy was steadily losing jobs, and the American auto industry was on the brink of total collapse. Juxtaposing the relative competence and skill of the two candidates, the American people made their choice, electing Barack Hussein Obama the 44th President of the United States of America on Tuesday, November 4, 2008.

When President-elect Obama took the stage in Chicago the night of the election to give his victory speech, I was watching on live television from Memphis, Tennessee. I was a graduate student studying philosophy at the University of Memphis, and I could not help but think, as I watched Obama say that “change has come to America,” that maybe he was right. After all, just across town was the National Civil Rights Museum at the Lorraine Motel where Dr. Martin Luther King Jr. was assassinated. Dr. King’s dream for America, along with the hopes and dreams of so many other African Americans, was perhaps embodied in the candidacy of the now President-elect, the child of an American white mother and a Kenyan father, and married to an African American woman from the south side of Chicago. Maybe, just maybe, I thought, this moment in time would be the change that President Obama proclaimed had come to America.

But my rapture in this historical moment was short lived. I began to think of how the National Civil Rights Museum across town stood as a monument to battles for racial equality in America still being fought to that very day, with little sustainable progress. I thought of how Dr. King’s challenge to America’s symbiotic triad of racism, militarism, and poverty left him dead from an assassin’s bullet on the terrace at the Lorraine Motel on April 4, 1968; and how this America was the same America that elected Barack Obama just a little more than forty years later on November 4, 2008. It was then that I thought that the election of Barack Obama had less to do with America turning the corner on race relations

and more with which candidate could best aid the American economy in a time of crisis—an economy whose white participants were in dire need of help from what they thought would be competent, intelligent, and otherwise strong leadership. So it is that in that very moment, as I watched Obama make his victory speech, I saw his election as a classic case of Bell's notion of interest convergence: the financial interests of upper-class and upper-middle-class whites coincidentally converged with the hopes and dreams of African Americans—hopes and dreams that were longstanding because they were long deferred. What for many was a turning point, I, inspired by Bell, understood as a mere racial symbol—a symbol that, as Bell predicted when he wrote the preface to *Race, Racism, and American Law*, would do little to nothing to help the plight of African Americans and other people of color in the United States.

And throughout the Obama presidency, Bell could not have been more correct in his assessment. Indeed, socially and politically speaking, things seemed to worsen for African Americans during Obama's tenure in the White House. From court decisions that curtailed voting rights⁵ to a spate of police and vigilante violence directed at African Americans, the Obama presidency, in stark contrast to initiating a new era of so-called "post-racial" politics that marked an end to racism, showed that racism in America is alive and well. What was especially troubling about the police killings was that so many of them were captured on video and widely disseminated through electronic and social media. This transformed the tragic loss of human life at the hands of state actors into a spectacle. Aggravating this spectacle was a complete lack of legal accountability for the killings, as police officers who undisputedly killed unarmed African Americans were routinely put on some sort of administrative leave only to be unindicted, or, after immense public pressure brought the cases to trial, acquitted. This lack of accountability has done little to promote African American confidence in the American criminal justice system. Add to these realities the election of President Trump, who stirred up racial resentment of African Americans from disaffected whites during his 2016 presidential campaign, and the behavior of today's America demonstrates racial attitudes that harken back to the post-Reconstruction era, when newly freed black slaves could be arrested for vagrancy pursuant to the Black Codes. This point is not far-fetched, as whites have recently been using emergency police services as a means of social control of African Americans. Whether it is innocently waiting for a business colleague in a Starbucks in Philadelphia, peacefully having a barbeque in a public

park in Oakland, or a little girl selling water to raise money for a trip to Disneyland in San Francisco, African Americans have been reported to police for the most innocuous of ordinary activities.

Among the most bizarre of these incidents involving police and African Americans is the case of Byron Ragland. Mr. Ragland is a nine-year veteran of the U.S. Air Force and court-appointed supervisor of noncustodial parents during court-ordered visitation hours. Mr. Ragland's job as an employee of the court system requires his in-person supervision. In November 2018, while supervising a noncustodial parental visit at a yogurt shop in the Seattle area, the owner called the police after his employees reported Mr. Ragland as looking suspicious because he had not bought anything and was looking at his cell phone and would periodically look up at them. When the police arrived, they asked Ragland to "move along," despite the fact that his job—again, a job with the legal system—required him to be there. Consider the maddening, absurd, and oppressive relationship between African Americans and the American legal system that Mr. Ragland's situation represents: the legal system that demanded Mr. Ragland's *presence in the yogurt shop* for court-appointed supervision is the same legal system that demanded Mr. Ragland's *absence from the yogurt shop* because the employees were "uncomfortable." Mr. Ragland thus had to solve the problem of how to be both present in and absent from the exact same location at the exact same time. After all, it is what "the law" required of him. Such Kafkaesque, existentialist notions of the absurd as depicted in Mr. Ragland's case abound in African American life because of the ongoing influence of white supremacy and its entrenchment in American law, politics, and culture. So much for the Obama presidency ushering in a new era of "post-racial" politics and culture, a notion that is laughable considering America's current racial climate. Hence Bell's robust criticism of the social and political foundations of American law, its connection to—and perhaps its dependence upon—racism.

Voting Rights, Criminal Justice, and the Permanence of Racism

Aside from the racist social dysfunction at the level of the quotidian that leads some whites to engineer police interventions to exert social control over Black people, African Americans face deep structural inequities in myriad areas of both constitutional and civil rights. Bell's landmark text,

Race, Racism and American Law provides a comprehensive treatment of race and the law in the areas of education, employment discrimination, criminal justice, voting rights, housing, interracial relationships, public facilities, and protest. Bell presents a detailed historical treatment of the law and its state of affairs in each of these areas of law as it existed in 2008, the year that the sixth edition of *Race, Racism, and American Law* was published. Since I cannot duplicate such a treatise-length, detailed treatment of each of these areas in this introduction, I want to emphasize some recent (within the last decade) legal developments in the area of voting rights, and, with some discussion of the American constitutional doctrine of federalism, connect voting rights to certain historical trends in the administration of criminal justice as it relates to African Americans. These trends are arguably inconsistent with the original aims and purposes of the United States Department of Justice, which was a product of American Reconstruction intended to enforce laws prohibiting white racial violence against newly freed slaves (freedmen). My aim here is to provide some explanatory force to Bell's claim that racism is permanent and his claim—consistent with Ralph Bunche—that reliance on civil rights litigation alone has proven and will continue to prove itself ineffective in the pursuit of racial equality in America.

The Fifteenth Amendment of the United States Constitution secured the right to vote for freedmen and was ratified in 1870. As if this “second founding” of America was not embarrassing enough (slaves had no voting rights secured in the 1787 Constitution that emerged from the Philadelphia convention), the embarrassment only worsened in the United States Supreme Court's Reconstruction jurisprudence, which left African Americans with only nominal voting rights for nearly a hundred years, from 1870 to 1965. Throughout this ninety-five year time period, the Supreme Court, in the *Slaughterhouse Cases*,⁶ *United States v. Cruikshank*,⁷ and the *Civil Rights Cases*⁸ helped to secure the legacy of chattel slavery through its doctrine of federalism, allowing for extensive and unchecked state autonomy, enabling southern states to not only deny Black suffrage but also to enact Black codes, Jim Crow, and to practice lynching with impunity. Such judicial complicity in and outright support of white racial domination began in the *Slaughterhouse Cases*, decided in 1873, which, on one hand, declared that both the Thirteenth and Fourteenth Amendments applied exclusively to freedmen—and not to the Louisiana butchers who brought their constitutional claims to court—but, on the other hand, ruled that the constitutional protections of these amendments only applied to actions of

the federal government—not to the actions of state government. According to Justice Miller, the Thirteenth and Fourteenth Amendments were only enforceable against a federal deprivation of such rights as access to ports and waterways, international travel, and the right to run for federal office. But such rights had no real practical implications for freedmen. Indeed, historian Eric Foner points out that few of such rights “were of pressing concern to the majority of black Americans.”⁹ Foner continues, summing up the duality of the decision in the *Slaughterhouse Cases* as it related to African Americans: “Thus, in the guise of affirming the freedmen’s status as national citizens,” the *Slaughterhouse Cases* “severely limited the rights for which they could claim federal protection.”¹⁰ The *Slaughterhouse Cases*, then, achieved a jurisprudential sleight of hand that was truly remarkable: the Supreme Court managed to secure protection for freedmen from the actions of the federal government that was plainly unnecessary, as the federal government was actively trying to help freedmen through the robust federal legislative and executive protections of Reconstruction, while the Court provided freedmen virtually no constitutional protection from the actions of state governments, which were aggressively out to harm freedmen in southern states through the proliferation of Black Codes, Jim Crow, the denial of suffrage, and lynching. The stage was thus set for *United States v. Cruikshank* in 1876. The *Cruikshank* case declared that federal indictments against white defendants charging them with violations of the constitutional rights of African Americans were deficient in that they failed to allege violations of enforceable federal rights pursuant to the terms of the Enforcement Act of 1870. In the *Cruikshank* case, then, the Court reasoned that the alleged violations of federal constitutional rights in the indictment—a predicate for the application of the Enforcement Act—were not violations of federal rights at all because, consistent with the ruling in the *Slaughterhouse Cases*, the rights alleged to have been violated were only enforceable against the federal government, not state governments or private citizens. So, the Court dismissed the indictments. The *Cruikshank* decision resulted in the exoneration of otherwise culpable whites who participated in the notorious Colfax massacre on April 13, 1873, in Louisiana that left nearly 100 African Americans dead. Then came the *Civil Rights Cases*, an 1883 decision, declaring that the Civil Rights Act of 1875, which was intended to protect freedmen from private acts of racial discrimination—what the Civil Rights Act of 1964 eventually did some eighty-one years later—was an unconstitutional assertion of federal power over private individuals. So troublesome was the decision in the

Civil Rights Cases for African Americans that it led Black journalist, T. Thomas Fortune, just four days after the decision, to write:

The colored people of the United States feel to-day as if they had been baptized in ice water . . . Public meetings are being projected far and wide to give expression to the common feeling of disappointment and apprehension for the future . . . Having declared that colored men have no protection from the government in their political rights, the Supreme Court now declares that we have no civil rights—declares that railroad corporations are free to force us into smoking cars or cattle cars; that hotel keepers are free to make us walk the streets at night; that theatre managers can refuse us admittance to their exhibitions for amusement of the public—it has reaffirmed the infamous decision . . . of Chief Justice Taney that a “black man has no rights that a white man is bound to respect.”¹¹

Fortune’s reference to Chief Justice Taney is significant, for Taney wrote the majority opinion in *Dred Scott v. Sandford*, which claimed that Blacks were never intended to be American citizens because they were brought to America as slaves. Taney thus concluded that Blacks had no cognizable legal rights, constitutional or statutory. Although *Dred Scott* is universally condemned today, in theory at least, for its anti-Black views, Bell argues that its widespread disregard in contemporary legal education impedes our understanding of the depths of American anti-Black racism. Bell writes that because law students are so poorly informed about cases like *Dred Scott*, “students receive little background as to how much of politics and how little of morality” was poured into seemingly valiant efforts such as the Constitution’s Reconstruction Amendments.¹² According to Bell, despite the Reconstruction Amendments’ theoretical voiding of *Dred Scott*, “As black gains slipped away in the 1870s, The Supreme Court and the lower courts confirmed what blacks had feared, that the citizenship they had been granted . . . was citizenship in name only.”¹³ Bell was right, for although the Reconstruction Amendments “voided” *Dred Scott*, they ultimately brought nothing to African Americans except a reaffirmation of that decision in practice despite its rejection in theory; hence Fortune’s and the Black community’s consternation in the wake of the Supreme Court’s decision in the *Civil Rights Cases*.

Next in this line of restrictive Supreme Court jurisprudence was *Plessy v. Ferguson* and the infamous “separate but equal” doctrine, which ensured that the Fourteenth Amendment—an Amendment ratified to help freedmen—would guarantee their social and political inferiority for the foreseeable future. Through these restrictive interpretations of both the Reconstruction Amendments and the congressional authority to enforce them, the Supreme Court enabled a reign of terror on African Americans that lasted from the end of Reconstruction until deep into the twentieth century. Jim Crow, lynching, and the denial of suffrage under state law would be the status quo in the American south for nearly one hundred years until President Lyndon Johnson signed the Civil Rights Act into law in July of 1964 and the Voting Rights Act into law in August of 1965. To put this status quo into greater historical perspective, recall that Medgar Evers was assassinated for registering Black voters in Mississippi in 1963. And, as I discuss below, much of this social and political oppression arguably persists today in the forms of mass incarceration, state-sanctioned police violence against Black people that occurs with seeming impunity—as did lynching—and voter suppression efforts, not just in southern states, but in states throughout the union.

What did the Voting Rights Act of 1965 actually do? It contained a preclearance provision (§5) that required southern states with a history of racial discrimination in voting determined by a formula in §4(b) to submit any plans for changes in their voting laws to the Department of Justice for approval. This was the standard for forty-eight years, from 1965 until 2013, when the United States Supreme Court, in *Shelby County, Alabama v. Holder*, declared the 2006 Congressional renewal of the preclearance provision of §5 under the constraints of §4(b) of the Voting Rights Act of 1965 unconstitutional. Writing for a five member majority, Chief Justice John Roberts reasoned that the formula of §4(b) used to determine which states had to comply with the preclearance requirements of §5 was outdated in that it failed to account for the changed political circumstances between 1965 and 2013. But it was the very application of the formula in §4(b) that led to the changed circumstances in the first place. Justice Ruth Bader Ginsburg points this out in the first sentence of her dissenting opinion in the *Shelby County* case, when she wrote that “In the Court’s view, the very success of §5 of the Voting Rights Act demands its dormancy.”¹⁴ The nullification of §4(b) has, for all practical purposes, resulted in the nullification of §5 because the two sections

work together: §4(b) determined which states needed to comply with the preclearance requirements of §5. So without §4(b), §5 can never be applied. Not surprisingly, the constitutional challenge to the law came from Alabama, a southern state with a history of denying the franchise to African Americans. Although the Court struck down the pre-clearance provision based on what it considered to be an outdated formula from the 1960s, Chief Justice Roberts's majority opinion was laden with language suggesting that Congress exerted too much federal power over state autonomy. For example, as the opinion opens, Chief Justice Roberts refers to the Voting Rights Act as "extraordinary," and as "strong medicine." To his credit, Chief Justice Roberts recognized that the enforcement of the Fifteenth Amendment was a failure, that voting rights litigation was "slow and expensive," and that "Voter registration of African-Americans barely improved" since the ratification of the Fifteenth Amendment and before the Voting Rights Act of 1965. Chief Justice Roberts writes:

In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African-Americans from voting. Congress passed statutes outlawing some of these practices and facilitating litigation against them, but litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved.¹⁵

But conspicuously absent from Chief Justice Roberts's recitation of the legal history of voting rights for African Americans is the complicity of the Supreme Court in the denial of African American suffrage. The Chief Justice never mentions the *Slaughterhouse Cases* and how they laid the foundation for restrictive interpretations of the Reconstruction Amendments based on limited federal authority over state law, effectively both allowing for state-sponsored literacy tests and immunizing such racist practices from appellate review based on principles of federalism, as I have been discussing here. Aside from this omission in the Chief Justice's opinion, his restrictive view of federal power, as its earlier iterations have done, can be profoundly injurious to African American suffrage. As the Court's Reconstruction jurisprudence indicates, such a view of federalism has a troubling history in its application in cases involving African

American constitutional and civil rights. And failing to acknowledge this troubling history and engage with it more than Chief Justice Roberts does in his opinion not only reflects poorly on the Court's ability to come to grips with its own role in maintaining American chattel slavery's social and political vestiges of Black inferiority but also is an erasure of a history that, if not both remembered and resisted, may repeat itself; federalism is an integral part of this history.

Why is federalism so significant? And what is its impact on racism and American law, specifically on voting rights? Legal historian and constitutional scholar Mary Frances Berry points out in her important text, *Black Resistance White Law* that the policy of federal inaction as it relates to racial violence against African Americans is a "pattern of constitutional interpretation, which has been successfully utilized to maintain the continued social, economic, and political subordination of black people."¹⁶ Berry also points out that the concept of federalism, "the division of power and responsibility between the central and local governments, which arrived in America with the first colonists, has become a handy philosophical tool for maintaining white superiority."¹⁷ Berry writes:

Federalism as a policy has been advanced to explain national noninterference when state agencies refused to protect nonconforming blacks from white violence intended to keep them in their place; and then, it has been cited to explain the compulsory use of national force when state agencies found themselves unable to successfully ward off black attacks on white persons or their property.¹⁸

Berry's observation that federalism was a theory that "arrived in America with the first colonists" is significant, for following federalism's arrival with the colonists was an implementation of federalism that established an enduring connection between American constitutional law and the maintenance of white supremacy. Consider W.E.B. Du Bois's essay *The Suppression of the African Slave Trade*, in which he observes that northern delegates to the Philadelphia Convention of 1787 relied on notions of federalism to maintain chattel slavery. Du Bois points out that there was a series of moral arguments against slavery that were made during the debates at the Philadelphia Convention, but these arguments were to no avail, as they were overcome by arguments grounded in both federalism and those grounded in rank expediency. Du Bois writes:

The difficulty of the whole argument from the moral standpoint, lay in the fact that it was completely checkmated by the obstinate attitude of South Carolina and Georgia . . . In such a dilemma the Convention listened not unwillingly to the *non possumus* arguments of the States' Rights advocates. The "morality and wisdom" of slavery, declared Ellsworth of Connecticut, "are considerations belonging to the States themselves;" let every State "import what it pleases;" the Confederation has not "meddled" with the question, why should the Union? It is a dangerous symptom of centralization, cried Baldwin of Georgia; the "central States" wish to be the "vortex for everything," even matters of "a local nature." The national government said Gerry of Massachusetts, had nothing to do with slavery in the States; it had only to refrain from giving direct sanction to the system.¹⁹

Du Bois's observations not only bolster Berry's point about federalism being a "handy philosophical tool" that maintains white supremacy but they also show that the constitutional doctrine of federalism and white supremacy in the form of American chattel slavery are inextricably linked at the founding of the American constitutional republic. The depth of a connection such as this ought not to be dismissed, as it has serious implications for the social and political oppression of African Americans throughout American history and into the present day.

Considering this link between the maintenance of white supremacy and the constitutional doctrine of federalism, one may raise serious questions about the efficacy of using the legal system to bring an end to the social and political oppression of African Americans, as Bell has done. Many will point to *Brown v. Board of Education* as a victory against racial oppression, but Bell has argued at length that *Brown* is a classic illustration of interest convergence. Moreover, before Bell, Bunche argued against the use of the American legal system as an effective strategy against racism because of the Supreme Court's penchant for abstraction when it comes to the cases involving the political and civil rights of African Americans. Bunche wrote at length about how the Supreme Court, in specific voting rights cases, rather than consider concrete realities, resorted to a form of legal reasoning that was, in his view, way off in the "dialectical stratosphere," instead of securing voting rights for African Americans based on their concrete political realities. Bell cites Bunche's work in *Race, Racism,*

and *American Law*, and Berry is reasoning in a manner similar to both Bunche and Bell when she writes of federalism and its role in maintaining white supremacy. In *Black Resistance White Law*, Berry is interested in the invocation of federalism in two ways that are oppressive toward African Americans: first, as a doctrine of inaction when African Americans are the victims of white racial violence, and second, as a doctrine of action when considered necessary to quell any perceived Black “rebellion.” Consistent with Berry’s thesis, what results from this sort of inconsistent and arguably bad-faith adherence to federalism as a legal doctrine is, on one hand, a voting rights policy that limits federal action to protect African American suffrage, and, on the other hand, a criminal justice policy that asserts federal authority, through the Department of Justice, to criminalize African Americans with a variety of legal practices that are arguably inconsistent with the purposes of the Department of Justice, founded in 1870, to help protect freedmen from white racial violence.

Berry’s thesis from *Black Resistance White Law* is shown in the hands-off approach with states as it relates to voting rights for African Americans in the wake of the *Shelby County* decision as compared with federal criminal justice policy of the Reagan Administration Justice Department and moving forward into the twenty-first century.²⁰ Again, the concept of federalism embraces a hands-off approach from the federal government that allows states to maintain racist practices of disenfranchisement against African Americans. But in criminal justice administration, the federal government has been hands-on, and what a heavy federal hand it has been! Beginning in the mid-1980s, federal mandatory minimum sentencing and mandatory sentencing enhancements in the Federal Sentencing Guidelines, which effectively divested federal judges of discretion in sentencing, led to the phenomenon that Michelle Alexander has referred to as “mass incarceration”—a new form of institutional racism that, while not directly attributable to race, nevertheless has the same effects as Jim Crow, exemplified in the exclusion of Black people from jury service, voting, housing, and other important civil rights. Interestingly, the same Department of Justice that was founded to protect African Americans—the most vulnerable members of American society—was the same Justice Department whose criminal justice policy executed a new Jim Crow. A corollary of Berry’s argument, then, is that abstract, formalist, applications of law (i.e., legal principles of federalism) become little more than euphemisms for the juridical maintenance of white domination as federalist principles are applied in ways that allow for state deprivations of African American vot-

ing rights in the name of “federalism,” while a vigorous enforcement of federal law will be considered essential as a means of social control over African Americans in the name of criminal justice administration, again, all from a federal Justice Department that was founded to protect African Americans from racial violence. Berry, it seems, was correct. And it is this sort of uneven enforcement of federal law that I contend helps explain Bell’s claim about the permanence of racism.

Racism is permanent not only because of an uneven adherence to the constitutional “principle” of federalism but also because of the political muck and mire of public policy. Consider the notion of “voter suppression.” This phrase has been popularized since the *Shelby County Alabama* decision because that decision paved the way for not only southern states with a history of racial discrimination in voting to do as they please but also other states. Meanwhile, the John Lewis Voting Rights Advancement Act, introduced as a Senate Bill in 2020 by Senator Patrick Leahy of Vermont, has arguably changed the formula from §4(b) of the Voting Rights Act in a manner that would pass constitutional muster, thus enabling the application of the preclearance provisions of §5. But the Senate bill has taken a backseat to several other domestic legislative initiatives such as COVID-19 relief, infrastructure legislation, and now, inflation reduction and climate change. Moreover, despite adjusting the coverage formula of §4(b) so as to help it pass constitutional muster under the *Shelby County Alabama* case, recent restrictive interpretations of the Voting Rights Act portend even greater difficulty to secure the franchise in federal law for African Americans.²¹ It is not far-fetched to be concerned that if voting rights legislation and police reform legislation are not enacted—and soon—the pre-1965 status quo will prevail, and that America will find itself entrenched in the mire of slavery’s legacy deeper than ever before. But this should not be surprising, because, as Bell repeatedly claimed, American anti-Black racism has a way of reasserting itself at every turn. So here we are, in the twenty-first century, more than one-hundred fifty years after the ratification of the Fifteenth Amendment, and African Americans have had the right to vote secured in law for a grand total of forty-eight years, which is both shocking and untenable. It is in this historical and legal context; a context thoroughly infused with anti-Black racism and white supremacy, that Bell’s claim that racism is a permanent fixture of American social and political life rings true.

The expanse of Bell’s oeuvre is impressive. It is indeed worthy of extensive scholarly treatment in law, philosophy, social and political theory, and theology. Moreover, Bell’s discussion of racism in America

and his trenchant critique of liberalism as a handmaiden in maintaining the structural and material conditions of white supremacy such that white supremacy is made “legal” is so extensive that to discuss both in one book—and *a fortiori*, one introduction to a book—is a task far beyond what I can do here. Indeed, any scholarly endeavor that purports to be a comprehensive treatment of Bell’s work ought to be a multivolume treatise, which, though on my long-term research agenda, is not my goal here. Instead, this volume has the much more modest aim of providing a serious scholarly treatment of one aspect of Bell’s thought, namely his thesis of Racial Realism. The other contributors and I attempt to accomplish this narrow task through this collection of essays concentrated on various interpretations of Bell’s theory of Racial Realism along legal, philosophical, rhetorical, and theological lines.

Structure and Chapter Summaries

There are four parts to this book. Each part has two chapters related more broadly to different aspects of Bell’s racial realism. Part I, “Racial Realism, Religion, and the Negro Problem,” lays the groundwork for racial realism as discussed throughout the remainder of the book. The first chapter lays the foundation for the essays in the book that discuss Bell and theology (Keri Day’s essay on Bell and womanist theology, my essay on Bell and Kierkegaard, and Vincent Lloyd’s essay on Bell’s view of the *Brown* decision and theological hope). And the second chapter gives the permanence thesis of racial realism an explanatory force that lays the foundation for the essays on legal theory (Audra Savage’s essay on interest convergence and the racial-religious minority, and my essay on Bell’s Racial Realism as situated in and moving beyond the American Legal Realist tradition), and hope (Desiree Melton’s essay on hope and interracial relationships). Part I thus provides a broader background for the discussion of the more detailed aspects of racial realism and its connection to other disciplinary and conceptual frameworks.

George Taylor, the author of chapter 1, “The Last Decade of Derrick Bell’s Thought,” taught a course called “Race, Religion, and the Law” with Bell at the University of Pittsburgh School of Law in the fall of 2006. This chapter discusses the substantive themes of that course. Taylor argues that the themes of the course that he co-taught with Bell—race, religion, and law—give insight into the themes most prominent in the last decade of

Bell's thought. Taylor also draws from some of Bell's later work, *Ethical Ambition* and *Silent Covenants*, and some later unpublished speeches to show that Bell's interest in religion in the last decade of his thought extends more generally to a theme that Bell engaged throughout his work: the conclusion that racism itself is an article of faith that includes religion but is not limited to it. On this point, Taylor engages Bell's reading of African American theologians George Kelsey and Howard Thurman to conclude that Bell's understanding of racism as an article of faith not only helps to explain racism's resiliency and its permanence, but also provides, in Taylor's words, "a missive of continuing vitality for the struggles toward racial justice in the changing landscapes of today and tomorrow." For Taylor, we can thus better appreciate the uniqueness of Bell's enduring contribution both to the methodology of critical race theory and to critical race theory itself.

In chapter 2, "Derrick Bell and the 'Negro Problem,'" Bill E. Lawson aims to situate Bell's "racism is permanent" thesis in the context of the "Negro Problem," which is the problem of what to do with African Americans whose labor can no longer be legally forced. In other words, what is to be done with newly freed slaves? Lawson links Bell's position with the American historical problem of what to do with the Negro. He reads Bell's view on the permanence of racism as Bell's response to how Bell believes America has attempted to solve the "Negro Problem," and how that attempt has helped to cause the permanence of racism. Viewed in this way, Racial Realism problematizes our understanding of public policy initiatives designed to achieve social equality. The intransigence of anti-Black racism in America results from a tragically false but profoundly influential belief that Black people are inferior, a belief that Lawson asserts is at the foundation of racism's permanence because of its connection to the Negro Problem, or what to do with Black people, who are good for nothing but forced labor because of their inferiority. Lawson concludes his essay with the insight that what has prevented the oppression of Black people from being a "fait accompli" is the resistance that all people of good will—Black and white—have offered against that oppression. But despite our best efforts at resistance, the belief in Black inferiority stemming from the Negro problem abides, and it is in this context that Bell develops his theory of racial realism.

Part II, "Racial Realism and Legal Theory," has a chapter on Bell's Racial Realism and American Legal Realism and a chapter on an analysis of interest convergence as applied to the hybrid case of racial-religious

minorities. Both essays explore resources that Racial Realism brings to bear on the analysis of adjudication. Chapter 3, “From Psychology to Resistance: Racial Realism and American Legal Realism,” presents my analysis of Racial Realism in both its descriptive and normative dimensions. In this chapter, I situate Bell’s Racial Realism within the broader tradition of American Legal Realism and argue that Racial Realism extends beyond it. I read Bell with Brian Leiter to conclude that Racial Realism’s reliance on social science data and folk psychology puts him squarely within the American Legal Realist tradition. I then go further to argue that Racial Realism transcends a descriptive account of adjudication—where realists argue that judges simply base their decisions on the stimulus of the facts of a case rather than on any a priori notion of law. Instead, I submit that Bell’s Racial Realism is a culturally informed understanding of Black subjectivity rich in African American thought that accounts for the permanence of racism through an incessant and trenchant critique of liberalism’s abstract reliance on “rights” and “equality,” both of which cause American law to support power relations that maintain white dominance. Responding to the permanence of racism, Racial Realism prescribes an ethic of resistance to anti-Black racism that is as perpetual as institutionalized racism itself.

A major reason for Bell’s Racial Realism is his notion that genuine racial progress in American law is illusory because African Americans benefit from law and the political process only when their interests converge with those of white Americans. This insight, known as Bell’s theory of interest convergence, is taken up in chapter 4, “A Rock and a Hard Place: Interest Convergence for the Racial-Religious Minority,” where Audra Savage examines interest-convergence theory in the hybrid case of minorities who are both racial and religious. Through a study of the religious practices of the Yoruba-based Santeria, Savage argues that the Supreme Court decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, despite its unanimity, is not actually a robust affirmation of constitutional rights for a racial-religious minority, but rather only a decision that does not adversely affect the interests of white Christians. Savage points out through a critical discussion of First Amendment Free Exercise jurisprudence that Bell’s notion of interest convergence helps one to “better appreciate the fragility of rights for the racial-religious minority.”

Part III, “Racial Realism and Hope,” addresses questions of hope in the context of the permanence of racism; that is, what is hope and what sort of hope may one have? The first essay in part III considers

hope in the rhetoric of U.S. Supreme Court decisions and the second presents an argument for hope in interracial relationships. In chapter 5, “The Authority of Hope: Hopeful Illusions in *Brown v. Board of Education* and Beyond,” Vincent Lloyd analyzes hope as found in *Brown* and other Supreme Court decisions. In this chapter, Lloyd examines the rhetorical trope of the child to conclude that inscribed in the cultural logic of *Brown* is an image of a child that provides hope. According to Lloyd, this image of the child helps to maintain the status quo, for the child of *Brown* does not emerge from the reflections of a marginalized community on its experiences with injustice. Instead, this image of the child is the product of a bourgeoisie, integrationist consciousness of white Supreme Court Justices. This, Lloyd submits, is the false nature of juridical hope, born of a bourgeoisie vision for America. When this false hope is juxtaposed to Bell’s much richer notion of hope that is rooted in the despair and oppression of those in marginalized communities, one can see how the former is an illusion that maintains the status quo, while the latter is an authentic expression of a justice-oriented ethos that demands resistance to the status quo, not with any naïve hope of overcoming it, but instead with a wakeful vigilance to keep fighting against all odds.

Chapter 6 titled “Between Hope and a White Body: The Challenge of Racial Realism and Interracial Love,” interrogates Racial Realism from within the context of interracial romantic relationships. Desiree Melton argues that although Racial Realism is a legitimate stance to take against systematic racial oppression, it presents difficulties for someone who is in a healthy romantic relationship with a white person. On an institutional level, it is understandable that equality is elusive. Melton claims, however, that equal treatment in a healthy romantic relationship with a white person undermines the claim of racism’s permanence. Melton contends that the interpersonal relationship may generate a hopefulness for racial equality on a much broader political scale. In the tradition of storytelling so characteristic of Bell’s work in critical race theory, and drawing from Bell’s claim in *Ethical Ambition* that his relationship to his first wife was his “most important relationship,” Melton tells the story of Deidre and Sean, an interracial couple whose romantic relationship is thoroughly egalitarian, to emphasize that an interracial relationship offers something that the larger society does not offer: a partnership where a Black person is treated equally. Interracial relationships can thus be a source of hope for one who embraces Racial Realism, making it a challenge to continue to hold the racial realist stance.

Part IV, “Racial Realism and Theology,” has two essays that discuss the relationship between Racial Realism and Christianity. The first discusses Racial Realism and womanist theology, and the second is a discussion of Bell’s use of fiction to articulate Racial Realism, and its relationship to art and Christian theology. In chapter 7, “Rethinking Hope: The Importance of Radical Racial Realism for Womanist Theological Thought,” Keri Day discusses a compelling analysis of hope in relationship to womanist theology. Day argues that Bell’s understanding of the permanence of racism may actually support rather than problematize the womanist eschatological vision of a world where love and justice reign. Day points out that conceiving of Bell’s Racial Realism as hope can diversify the womanist eschatological vision. If we understand Bell’s notion of hope as defiance, then oppressed groups of people can derive meaning from resistance to incurably racist structures of injustice. Day concludes that understanding defiance as hope in this way has a transformative effect on the oppressed who resist inasmuch as such persons refuse to allow the racist structures to constitute or define their subjectivity. Thus diversified when read with Bell’s Racial Realism, the womanist eschatological vision has room for a defiant hope in the face of injustice rather than exclusively emphasizing the eradication of injustice.

Finally, chapter 8, “Liberalism, Christendom, and Narrative: Paradox and Indirect Communication in Derrick Bell and Søren Kierkegaard,” is my analysis of Bell’s use of fiction and its resonance with certain aspects of Christian theology. Here, I argue that as a member of what Richard Delgado has called an “outgroup,” it is essential for Bell to create a counternarrative that disrupts the narrative of the white “dominant group.” But I argue that Bell does much more than just create a counternarrative. Beginning with George Taylor’s insights that Racial Realism is fundamentally paradoxical and that Bell’s narratives are parables that “manifest” new insight rather than hypotheticals that seek “adequation” to existing norms, I build upon Taylor’s work by reading Bell with Søren Kierkegaard. I conclude that the concept of paradox that Taylor argues is at the core of Bell’s Racial Realism becomes the catalyst for a radical rethinking and reclamation of the moral and political difficulties of American anti-Black racism through the parabolic-styled medium of what Kierkegaard called “indirect communication.” In Kierkegaardian terms, the paradox at the core of Bell’s Racial Realism becomes the “passion” of a radical and perpetual resistance to anti-Black racism in America. Even as Kierkegaard used indirect communication to remove what he thought was the deceptive influence of Hegelian theology

on Christendom, I argue that Bell's use of narrative can be interpreted as a form of indirect communication to remove what I believe to be the deceptive influence of color-blind legal formalism. For Kierkegaard, indirect communication through pseudonyms reinvigorates a moribund, objective-oriented Christianity, and Bell's use of narrative does something similar for moral and political obligation: it removes liberalism's and formalism's deceptions of racial progress, awakening us from a dogmatic slumber of moral complacency to a robust life of perpetual moral action—a move that represents a sort of teleological suspension of the prevailing racist social and legal ethics of American life and jurisprudence.

Art and the Struggle for Justice

Bell understood the importance of art to African American life. Indeed, as I argue in my chapter on Bell and Kierkegaard, Bell's use of fictional narrative is essential to help disabuse people of liberalism's false idea of racial progress in America. Inspired by Bell, I too have come to understand how vital art—especially Black art—is to the African American pursuit of racial justice. There is something divine about the creative dimension of artistic endeavors; something akin to the Judeo-Christian notion of a God who brings order out of chaos through the spoken word as portrayed in the opening passages of the book of Genesis. The chaos of Black life in America—its ongoing tragedy and relentless disappointment—are certainly part of human experience in general. But American Blacks must deal with the added burden of facing racial violence in myriad forms almost daily, with seemingly no end in sight. Artistic creations like Bell's fictional, revisionist narratives behold such chaos and, at the very least, offer some clarity on the African American predicament of what it means, in the words of Du Bois, “to be a problem.”²² Art thus speaks into the chaos of American anti-Black racism and says, as did God to a void, terrifying and chaotic Earth: “Let there be light.”²³

Recognizing this divine dimension of creativity has led me to perform professionally as an actor. The epigraphs for this introduction are taken from two characters I have portrayed on stage. Part of what makes art so powerful is its capacity to reach people in ways that the formality and rigor of academic discourse simply cannot. So I perform as an actor in an attempt to augment my work as an academic. I do so by indulging my creativity through the portrayal of characters on stage. These characters tell stories that can transform and bring healing to an America that has