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Law, Religion, and Racial Justice: A Comment on Derrick Bell's Last Article

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LAW, RELIGION, AND RACIAL
JUSTICE: A COMMENT ON DERRICK
BELL'S LAST ARTICLE

Jean Stefancic[†]

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INTRODUCTION

In his last article, *Law as a Religion*,¹ Derrick Bell sketched out his reflections on law and religion. In short, he concludes that religion is implausible, but fervently believed and that law, especially the U.S. Constitution, is idealized but does not deserve to be. In addition, both bodies of thought, he believes, have been compatible with racism, indeed can easily incline a true believer to adopt and espouse white supremacy—sometimes in a mild disguised form and on other occasions in an outright and dangerous way.

This essay examines Bell's reflections on religion and law and his exploration of how blind faith in either can incorporate racism. I offer two examples from Alabama's legal history to show how this can happen.² I then posit that his rejection of a fundamentalist approach to

† Professor and Clement Research Affiliate, University of Alabama School of Law. Thanks to Richard Delgado for his comments and suggestions. Thanks as well to my fellow panelists, Steven Ramirez, Neil Williams, and Joseph Grant and to the participants of the 2018 Midwest People of Color in the Law Conference, at Case Western Reserve University, School of Law, April 2018.

1. Derrick Bell, *Law as a Religion*, 69 CASE W. RES. L. REV. 265 (2018).
2. See *infra* notes 52–73 and accompanying text.

both religion and law led to his adoption of racial realism as a way to live a life of meaning and worth.

I. BELL ON RELIGION, LAW, AND RACISM

In accord with Bell, I believe that religion and law, the two great ordering principles of social and human experience, need to maintain their distance from each other. Each does not much benefit from incorporating ideas, or frameworks, or habits of mind from the other. Religion can point us to knowledge and principles going beyond human experience. It can inspire us to live better, more ethical lives. Beyond that, if religion serves as a foundational cornerstone of life, it may lead one to intuit the divine. According to German philosopher and theologian Rudolf Otto, religion contains elements of mystery enabling apprehension of the numinous—the *mysterium tremendum*.³

Law is a radically different ordering principle. Pragmatic in nature and aiming to create and enforce a system of rules that allow us to lead fruitful and productive lives together, it aims to reduce violence and antisocial behavior. It encourages reliable transactions and business exchanges. It formalizes families, town councils, and other small organizations that provide security, services, and reciprocity.⁴ Laws are published in case reports and statute books, where everyone can find them, or find a lawyer who can do so on one's behalf.

In *Law as a Religion*, Bell states that many people hold superficial beliefs about religion and law, but fail to question where these ideas come from or whether they are worthy of respect.⁵ What we call religion developed many thousands of years ago when people first questioned the purpose of life and the meaning of death.⁶ Religion's use of stories effectively serves these two functions. Bell, raised as a Christian, uses the Bible to illustrate his point. The New Testament provides stories

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3. RUDOLPH OTTO, *THE IDEA OF THE HOLY: AN INQUIRY INTO THE NON-RATIONAL FACTOR OF THE IDEA OF THE DIVINE AND ITS RELATION TO THE RATIONAL* 5–30 (John W. Harvey trans., 2d ed. 1950) (1923) (describing the *numen*, *numinous*, and the *mysterium tremendum*). See DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* 41–42, 77 (2003) (discussing Paul Tillich, a theologian who was deeply influenced by Otto's concept of the divine).
 4. See Samuel D. Brickley & Brian M. Gottesman, *Chapter 3: Purposes and Functions of Law*, *BUSINESS LAW BASICS* (2017), <http://www.businesslawbasics.com/chapter-3-purposes-and-functions-law-1> [<https://perma.cc/A8CW-A2SL>].
 5. Bell, *supra* note 1, at 265–68.
 6. See JOHN F. HAUGHT, *THE NEW COSMIC STORY: INSIDE OUR AWAKENING UNIVERSE* 9 (2017); ROBERT N. BELLAH, *RELIGION IN HUMAN EVOLUTION: FROM THE PALEOLITHIC TO THE AXIAL AGE* xiv (2017).

of Jesus: the miracles, the virgin birth, the resurrection. Membership in Christian churches requires belief in these stories.⁷ Scientific explanations and historical exegesis—critical interpretation of scripture—find scant welcome there, especially among the more fundamentalist devotees.

A. *Sacred Texts, Interpretation, and Ethical Behavior*

The Old Testament, if literally believed and accepted, provides rationales for opposing homosexuality, same-sex marriage, and even advocates slavery.⁸ Yet, Christianity and other religions aspire to ethical living and offer codes of moral behavior—the Ten Commandments, for example. The contradiction between what religion teaches and the way many churchgoers lead their lives, then, stands in sharp opposition, which Bell and many others have noted.

Bell then confronts the inconsistencies of religion found in Christian theology and practice. For example: What is the meaning of *The Word?*—the Gospel of John says that the Word (Logos) was made flesh.⁹ Theology libraries contain a multitude of volumes exploring how to interpret *this* particular word.¹⁰

The examination of texts, however, can lead down a thorny path.¹¹ Legal scholars face this dilemma when engaging in constitutional interpretation.¹² What is the meaning of *a word*, any word? Meaning derives from a word's relation to other words, or from the framework of the surrounding words written during a particular historical time. Hermeneutics, the study of interpretation, examines how the intent of the author, or how the experience of the reader or listener shapes

7. Bell, *supra* note 1, at 266.

8. *Id.* at 268.

9. *John* 1:14. From the Greek—Logos means reason, wisdom, and the expression of God to Man. See generally *Logos*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/logos> [<https://perma.cc/3F5Y-35JC>] (last visited Feb. 2019).

10. See generally SHARON H. RINGE & FREDERICK C. TIFFANY, *BIBLICAL INTERPRETATION: A ROADMAP* (1996) (discussing the relationship of texts, contexts, and readers in the interpretive process).

11. See generally JAROSLAV PELIKAN, *INTERPRETING THE BIBLE AND THE CONSTITUTION* (2004) (discussing different approaches to interpreting revered texts).

12. *E.g.*, ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES*, at xxi (5th ed. 2015) (“Constitutional principles can and must be evaluated from a myriad of perspectives: issues of interpretation and how meaning should be given to the document; questions of institutional competence . . . normative visions about theories of government . . . [and] the meaning of a just society and how best to achieve it.”).

interpretation of the words.¹³ Postmodernism, however, builds on these observations to show that meaning is indeterminate, that there cannot be any one absolute meaning.¹⁴

So, how should we think about religious texts? Bell posits that “religious belief is based on faith, a description that tends to end rather than advance discussion.”¹⁵ He was attracted to the writings of Bishop John Shelby Spong, who had been called a “rogue priest” and a “nightmare” by a member of the conservative wing of the Episcopal Church.¹⁶ During the 1980s, Bishop Spong began to question literal interpretations of the Bible and to espouse views some of the most traditional members of his church abhorred, e.g., gay rights, same-sex marriage, and women as bishops, to name a few.¹⁷

B. *Legal Realism*

What was Derrick Bell writing at this time? In 1980, he had just published the second edition of *Race, Racism, and American Law*, his groundbreaking casebook on race and law,¹⁸ as well as *Brown v. Board of Education and the Interest-Convergence Dilemma*.¹⁹ In this, his most famous article, he showed that legal breakthroughs for blacks tended to arrive only when the breakthrough also advanced the interests of elite whites, such as with *Brown*, which supplied a dramatic and short-lived victory for school desegregation in order to demonstrate the superiority of Western values to those of our opponents—Cold War Russians.²⁰

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13. See Gary C. Leedes, *The Latest and Best Word on Legal Hermeneutics: A Review Essay of Interpreting Law and Literature: A Hermeneutic Reader*, 65 NOTRE DAME L. REV. 375, 375–79 (1990) (reviewing INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steve Mailloux, eds. 1988)).
 14. See CHRISTOPHER BUTLER, POSTMODERNISM: A VERY SHORT INTRODUCTION 21 (2003).
 15. Bell, *supra* note 1, at 267.
 16. See *id.* at 270; see also *id.* at nn. 2, 7, 14. For comments about the bishop, see Wayne Jackson, *John Shelby Spong: American Nightmare*, CHRISTIAN COURIER (Jan. 23, 2019), <https://www.christiancourier.com/articles/735-john-shelby-spong-anglican-nightmare> [<https://perma.cc/8FFN-C38H>] (accusing Spong of espousing paganistic “pantheism” and Darwinism).
 17. See David Gibson, *An Aging Maverick, Episcopal Bishop John Shelby Spong Has No Regrets*, NAT’L CATH. REP. (Oct. 12, 2013), <https://www.ncronline.org/news/people/aging-maverick-episcopal-bishop-john-shelby-spong-has-no-regrets> [<https://perma.cc/6N8Z-DDD6>].
 18. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (2d ed., 1980).
 19. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).
 20. *Id.* at 523–24.

C. *Narrative Scholarship*

The Harvard Law Review Supreme Court Foreword, which he titled *The Civil Rights Chronicles*,²¹ arrived a few years later. In 1985, Bell created the mighty and mysterious character, Geneva Crenshaw,²² his interlocutor who enabled him to put forth his radical views on race in narrative form. If *Interest-Convergence* met much resistance, *The Civil Rights Chronicles* provoked astonishment. Critique was in the air: critical legal studies had caused consternation in the legal academy,²³ deconstruction reigned in English departments,²⁴ and critical race theory was soon to anger the defenders of the meritocracy.²⁵

Like many committed Christians, Bell felt the need to reconcile the faith he acquired early in life with analytic reasoning and scientific understanding that one acquires with education. He found the work of Elaine Pagels whose path-breaking study of the Gnostic Gospels²⁶—especially the Gospel of Thomas—a way to reconcile the literal teachings of early Christianity, which he had learned as a child, with the numinous experience of the divine he felt as an adult. He acknowledged that many people cannot cope with the anxiety and uncertainty of an open-ended approach to religion that did not depend on following unquestioned rules. He rejected fundamentalism in its many guises, in religion and in law.²⁷

Though I do not presume to know what personal religious beliefs guided Derrick Bell's life,²⁸ I turn now to another faith that Bell

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21. Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).
 22. *Id.* at 13.
 23. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* ii (1983) (urging his followers to tackle the iniquities and inconsistencies of law school and legal education).
 24. Gregory Jones-Katz, *Deconstruction: An American Tale*, BOSTON REV. (Sept. 30, 2016), <http://bostonreview.net/books-ideas/gregory-jones-katz-deconstruction-america> [<https://perma.cc/ZM3G-4QDH>].
 25. *E.g.*, DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).
 26. *See* ELAINE PAGELS, *THE GNOSTIC GOSPELS* (1979); ELAINE PAGELS, *BEYOND BELIEF: THE SECRET GOSPEL OF THOMAS* (2003). *See* BELL, *supra* note 3, at 88–91 (2003) for his attraction to Pagel's work, as well as to that of Nikos Kazantzakis.
 27. Bell, *supra* note 1 at 268 (“While most Christians accept the Bible as a testimony of faith by those whose beliefs and sacrifices mark the Church's origins, a great many fundamentalist Christians focus on what is written there with a blinding fervency.”).
 28. For an in-depth analysis of Bell's Christian existentialism, see George Taylor, *Racism as 'the Nation's Crucial Sin': Theology and Derrick Bell*, 9 MICH. J. RACE & L. 169 (2004); *The Later Thought of Derrick Bell*, in

examines: faith as racism and its connection to religion and law. About various religions, Bell says “beyond their adherence to views that surpass belief and can lead to much evil, these religions can proffer inspirational guidelines for honorable and ethical living.”²⁹ He might have asked: is law similar, and can it do likewise?

II. HOW FAITH CAN LEAD TO RACISM

Bell does not offer in this last article explicit proof that racism as a faith taints both religion and law.³⁰ He relies instead on George Kelsey’s *Racism and the Christian Understanding of Man* to assert that proposition. Kelsey maintains that “racism served as an ideological justification for . . . political and economic power expressed in colonialism and slavery.”³¹ One does not have to go far to find examples of this justification in Western European history or the doctrine of American Manifest Destiny. Consider, for example, the notions of the

RACISM AND RESISTANCE: ESSAYS ON DERRICK BELL (Timothy Golden, ed., SUNY Press forthcoming).

29. Bell, *supra* note 1, at 267.

30. *But see id.* at 269 (observing that “[t]he uses of religion to justify racism are too obvious to require explanation, but it is worth mentioning the paradoxical connection between racism and Christianity”). For further analysis of this connection, see MATTHEW BOWMAN, *CHRISTIAN: THE POLITICS OF A WORD IN AMERICA* (2018) (describing how various political visions of liberty and equality embedded in differing Christian belief systems lead to disputes over what function law should serve in American society and government). On the ways in which the legal system can easily lend itself to racism, see JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (3d ed. 2015). In a recent example, Attorney General Jeff Sessions quoted a Biblical text (*Romans* 13:1–14) to justify the Trump administration’s policy of separating children from their detained parents at the US-Mexico border for an undefined period. *See* Kyle Swenson, *Sessions Says the Bible Justifies Separating Immigrant Families. The Verses He Cited Are Infamous*, WASH. POST (June 15, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/15/sessions-says-the-bible-justifies-separating-immigrant-families-the-verses-he-cited-are-infamous/?noredirect=on&utm_term=.8ec21e8934d0 [<https://perma.cc/J45H-AZRQ>] (admonishing his critics to “obey the laws of the government because God has ordained the government for his purposes”). Southern preachers used the same passage to defend slavery and the Fugitive Slave Act. *Id.*

31. *See* Bell, *supra* note 1, at 269 (quoting GEORGE KELSEY, *RACISM AND THE CHRISTIAN UNDERSTANDING OF MAN: AN ANALYSIS AND CRITICISM OF RACISM AS AN IDOLATROUS RELIGION* (1965)).

white man's burden,³² darkest Africa,³³ dirty Mexicans,³⁴ and lazy blacks.³⁵ As well, nineteenth century U.S. settler history and fiction is rife with stereotypes and subjugation of indigenous, enslaved, and non-white people residing in or immigrating to the United States.³⁶

In law one can also find abundant examples of punitive statutes, proclamations, and programs that embody white supremacy: the Constitution's 3/5s clause,³⁷ the fugitive slave clause,³⁸ the 1790 Naturalization Act,³⁹ Indian Removal Act,⁴⁰ the Conquest of Mexico⁴¹ (and later Puerto Rico⁴² and the Philippines⁴³), *Dred Scott*,⁴⁴ the

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32. Rudyard Kipling, *White Man's Burden* (1899), <https://sourcebooks.fordham.edu/mod/Kipling.asp> [<https://perma.cc/79AM-V384>] (urging the United States to impose colonial status on the Philippines, which it acquired from Spain during the Spanish-American War, 1898).
 33. See JOSEPH CONRAD, *HEART OF DARKNESS* (1899); For another example, see HENRY MORTON STANLEY, *THROUGH THE DARK CONTINENT* (1876) in which the author, an explorer, in his travels through Africa, attributes savage characteristics to people who were darker than and unfamiliar to him.
 34. See Raymund A. Paredes, *The Mexican Image in American Travel Literature, 1831-1869*, 52 N. MEX. HIST. REV. 5, 5-29 (1977).
 35. On stereotypes of African Americans, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261-67 (1992).
 36. On stereotypes of minority groups generally, see *id.* at 1261-75. On subjugation, see JUAN PEREA ET AL., *supra* note 30 (discussing the histories and legal constructions of the four principal races of color, and ethnic whites).
 37. U.S. CONST. art. I, § 2, cl. 3.
 38. U.S. CONST. art. IV, § 2, cl. 3.
 39. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).
 40. Indian Removal Act, ch. 148, 4 Stat. 411-12 (1830).
 41. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 147-66 (1993).
 42. See generally JOSE TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997); see also Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).
 43. See GREGG JONES, *HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA'S IMPERIAL DREAM* (2012).
 44. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

Chinese Exclusion Act,⁴⁵ the one-drop rule,⁴⁶ *Plessy v. Ferguson*,⁴⁷ Virginia's Racial Integrity Act,⁴⁸ the internment of Japanese and Japanese Americans,⁴⁹ and Operation Wetback—the 1950s government program for repatriation and deportation of Mexicans and Mexican Americans⁵⁰—to name a few.

III. TWO EXAMPLES FROM ONE STATE'S HISTORY

Technically, joining religion and law violates the Establishment Clause of the Constitution.⁵¹ In practice it often results in a perversion and confinement of both, and a doubling of the adverse consequences of which Bell warned. Adding racism, especially white supremacy, to either, complicates and compromises them even more. Consider two instances of how that took place in Alabama, one in 1901, the other a hundred years later. Here, the mixing of law and religion with white supremacy bound them together, just as Bell worried that it could.

A. The First Example—Alabama's 1901 Constitution

The Reconstruction era (1865–1875) brought amazing and sudden gains for African Americans in the South: enfranchisement, education, property ownership, and political office to name a few.⁵² Somewhat like the jubilation in Chicago's Grant Park on the night of the Obama election,⁵³ blacks felt free at last. But neither step forward was to last.

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45. Chinese Exclusion Act, ch. 120, 22 Stat. 58–61 (1882).
 46. See Lawrence Wright, *One Drop of Blood*, THE NEW YORKER, July 25, 1994, at 46.
 47. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).
 48. An Act to Preserve Racial Integrity, VA. CODE ANN. §§ 1, 5 (1924) (repealed 1967).
 49. See PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1983); see also ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II (1993).
 50. JUAN R. GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 (1980).
 51. See *Everson v. Bd. of Educ.* 330 U.S. 1, 15–16 (1947) (extending the Constitution's Establishment Clause (separation of church and state) to the states in a landmark U.S. Supreme Court decision).
 52. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877 (Perennial updated ed., 2014).
 53. Monica Davey, *Celebrating Obama in Grant Park*, N.Y. TIMES (Nov. 5, 2008, 1:55 AM), <https://thecaucus.blogs.nytimes.com/2008/11/05/waiting-for-obama-in-grant-park/> [<https://perma.cc/37YM-DCCCK>] (describing the crowd's reaction at Grant Park); see also Kim Coons, *Days of Jubilee and Strife: Emancipation and Reconstruction in Chattanooga*, NAT'L

Because of a political compromise, most of the Reconstruction gains came to a halt less than a decade later when the Ku Klux Klan ushered in Jim Crow.⁵⁴ Blacks continued to make small gains, however, even challenging the status quo all the way up to the Supreme Court in *Plessy v. Ferguson* in 1896.⁵⁵ By 1900 the city of Montgomery, Alabama's state capital, passed an ordinance to ensure segregation on the city's streetcars.⁵⁶ Then, fifty-five years before Rosa Parks sat down in the front of the bus, Montgomery blacks staged a boycott—unsuccessful but determined.⁵⁷

Meanwhile, support for a revised Alabama state constitution had been growing among those desiring to suppress the black and poor-white vote. John Knox, a corporate lawyer who became president of Alabama's Constitutional Convention, posed a key question in his opening address: "And what is it that we want to do?" He answered himself by saying:

Why, it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. This is our problem, and we should be permitted to deal with it unobstructed by outside influence There was, in the white man an inherited capacity for government, which is wholly wanting in the Negro. Before the art of reading and writing was known, the ancestors of the Anglo-Saxon had established an orderly system of government . . . the Negro on the other hand, is descended from a race lowest in intelligence and moral perceptions of all the races of men.⁵⁸

These words opened the Alabama Constitutional Convention and reminded the delegates of their solemn duty.

In 1901, according to the 1900 U.S. Census, the black population of Alabama numbered 827,307 (45.2 percent), the white 1,001,152 (54.7

PARK SERV. (June 3, 2015), <https://www.nps.gov/chch/learn/news/juneteenthprogram.htm> [<https://perma.cc/8ABX-GSTE>].

54. See, e.g., C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966); Gregg Huffman, *The Group Behind Confederate Monuments also Built a Memorial to the Klan*, *FACING SOUTH* (June 8, 2018), <https://www.facingsouth.org/2018/06/group-behind-confederate-monuments-also-built-memorial-klan> [perma.cc/Q5J7-5JZ7] (describing actions taken by some white Southerners to terrorize blacks during the Jim Crow era after Reconstruction).

55. 163 U.S. 537 (1896).

56. Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 70–71 (2001).

57. *Id.*

58. *Id.* at 71–72.

percent).⁵⁹ African American numbers had begun to increase after the end of the Civil War.⁶⁰ After 1900, however, whites increased their ascendancy while the black population diminished.⁶¹ The 1901 Constitution, no doubt, contributed to the vast out-migration of blacks from the South,⁶² just as Alabama's anti-immigrant HB56 law drove many Latinos out of the state a hundred years later in 2011.⁶³

Before the convention, a newspaper urged delegates to adopt a constitution with "room to grow in." Instead they drafted and ratified a document that was "more like a code of laws than a constitution," designed to slow down or prevent change rather than promote it.⁶⁴ The 1901 Alabama constitution, still in effect today, is the longest and most amended one in the entire world. With over 900 amendments and well over 300,000 words, it effectively strangles home rule. It established authority to this day over counties and towns to tax, spend, fund, and regulate things like mosquito control, the location of pig farms, and the removal of dead farm animals.⁶⁵ For a state with deeply held convictions about states' rights, this constitution acts in exactly the opposite manner in regard to local autonomy.

Only a few years later, in 1904, the Alabama Democratic Party added the words "white supremacy" to its logo where they remained

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59. BIRMINGHAM PUB. LIBRARY, ALABAMA'S POPULATION BY RACE, tbl.2, <https://www.bplonline.org/resources/government/AlabamaPopulation.aspx> [<https://perma.cc/2K2U-T8FF>] (last visited Sept. 11, 2018).
 60. *See id.* (comparing "% Black" in years 1860, 1870, 1880).
 61. *See id.* (comparing "% White" in Census years 1900 through 1960 to "% Black" in same years). Present figures from the 2010 Census show that blacks now make up 26.2 percent of the total population of Alabama while whites stand at 68.5 percent. The remaining 5.3 percent is unaccounted for. *Id.*
 62. *See* ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 9–10 (2010).
 63. Campbell Robertson, *After Ruling, Many Latinos Flee an Alabama Town*, N.Y. TIMES (Oct. 3, 2011), <https://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html> [<https://perma.cc/7BTX-FD2Y>].
 64. Harvey H. Jackson III, *Alabama's 1901 Constitution: "Supremacy" and the Stolen Vote*, ALA. MONUMENTS, <http://www.alabamamoments.alabama.gov/sec37det.html> [<https://perma.cc/K5J2-DXAQ>] (last visited Sept. 11, 2018).
 65. Susan Pace Hamill, *Constitutional Reform*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-2925> [<https://perma.cc/WJ7R-PT44>] (last updated Jan. 9, 2018). For the current number of amendments, see *Amendments 900 and Above, Alabama Constitution*, BALLOTPEdia, https://ballotpedia.org/Amendments_900_and_above,_Alabama_Constitution [<https://perma.cc/Y6TN-XSBQ>] (last updated Feb. 2018).

for sixty-two years.⁶⁶ Interests converged in 1966 that made it pragmatic to try to hold onto black voters, who had been newly enfranchised by the Voting Rights Act of 1965, which had removed various voter suppression tactics, including the poll tax. The logo at that point disappeared.⁶⁷ Shortly afterward, however, Richard Nixon's "southern strategy" effectively transformed white Democrats into Republicans, leaving a lesser number of liberal whites and the majority of blacks to the moribund Democratic Party.⁶⁸

B. The Second Example—Ten Commandments in the Courthouse

A second example of the unpromising alliance of law and religion is a more familiar one to those who follow political developments in the South. In August 2001, a century after the 1901 Constitution, Judge Roy Moore, recently elected chief justice of the Alabama Supreme Court, arranged for a two and a half ton concrete replica of the Ten Commandments to be placed in the rotunda of the Judicial Building in Montgomery, where he held court.⁶⁹

District Court Judge Myron Thompson, a local African American hero, was then faced with the question of whether Moore's monument merely represented the Judeo-Christian foundation of American law, as Judge Moore maintained, or was unconstitutional and violated the separation of church and state. He ruled the latter, writing that the monument crossed the Establishment Clause line; the 11th Circuit upheld the decision and ordered the monument be removed.⁷⁰ The Judge declined. Shortly afterward, the Alabama Court of the Judiciary removed Moore from office.⁷¹

66. See, e.g., David Emery, *Did a State Democratic Party Logo Once Feature the Slogan 'White Supremacy'?*, SNOPE (Sept. 25, 2017), <https://www.snopes.com/fact-check/dem-party-logo-white-supremacy/> [<https://perma.cc/2Y9Q-FQAC>]; Patrick R. Cotter, *Democratic Party in Alabama*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-1561> [<https://perma.cc/2T6P-G5C3>] (last updated May 3, 2017).

67. Emery, *supra* note 66.

68. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 1, 13–34, 216–17 (2014) (showing how coded political messages serve as “dog whistles,” alerting followers to the racial repercussions of a course of action).

69. For a review of the Ten Commandments controversy, see *Short History of the Battle Over the Ten Commandments in Alabama*, WFSB 12 NEWS (Aug. 1, 2001 11:03 PM), <http://www.wfsb.com/story/421482/short-history-of-the-battle-over-the-ten-commandments-in-alabama> [<https://perma.cc/R84L-JN8J>].

70. *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1319 (M.D. Ala. 2002), *aff'd*, 335 F. 3d. 1282 (11th Cir. 2003).

71. *Alabama Chief Justice Ousted from Office*, PBS NEWSHOUR (Nov. 13, 2003, 4:12 PM), <https://www.pbs.org/newshour/politics/law-july-dec03->

The people of Alabama, however, sent him back to his former position as Chief Justice in 2012, where again he suffered removal, this time because of his rulings against same-sex marriage.⁷² Determined not to abandon his personal campaign to establish moral law in government, he proclaimed: “We have to return the knowledge of God and the Constitution of the United States to the United States Congress.”⁷³ In 2017, he ran for the U.S. Senate but was soundly defeated by Democratic candidate Doug Jones, a former U.S. Attorney in Alabama who, in 1997, had won convictions of the two surviving arsonists of the 1963 bombing of the Sixteenth Avenue Baptist Church in Birmingham.⁷⁴ Many Alabamians hope this turn heralds a new day for the state.

What lessons should we draw from these two examples? Earlier I mentioned that Derrick Bell wrote that “beyond their adherence to views that surpass belief and can lead to much evil, religion . . . can proffer inspirational guidelines for honorable and ethical living.”⁷⁵ Bell’s open-ended approach to a Christianity, which rejected fundamentalism but kept the faith, may well have led him to his adoption of “racial realism.”⁷⁶ He observed that “living a faithful life means, as the slave singer urged, ‘Keep your hand on the plow. Hold on.’” “Hold on,” Bell said, “during periods of life when our confidence in ourselves and our faith is the weakest. It is faith in our fate and foresight about our future that provides us with the endurance, dexterity, and flexibility required to live a life of meaning and worth.”⁷⁷ In *Ethical Ambition*, he finds

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- alabama-judge_11-13 [https://perma.cc/F5TK-EBY8]; ABPnews, *Alabama Court Votes Unanimously to Remove Roy Moore from Office*, BAPTIST NEWS GLOBAL (Nov. 12, 2003), https://baptistnews.com/article/alabama-court-votes-unanimously-to-remove-roy-moore-from-office [https://perma.cc/RG49-TP5H].
72. Campbell Robertson, *Roy Moore, Alabama Chief Justice, Suspended Over Gay Marriage Order*, N.Y. TIMES (Sept. 30, 2016), https://www.nytimes.com/2016/10/01/us/roy-moore-alabama-chief-justice.html [https://perma.cc/5UCY-UJ8E].
73. Jack Jenkins, *Christian Nationalism Can No Longer Be Ignored. Roy Moore’s Win Proves It.*, THINKPROGRESS (Sept. 27, 2017, 10:25 AM), https://thinkprogress.org/christian-nationalism-helped-roy-moore-win-c90a50e5d86f [https://perma.cc/UJ9J-8TGR].
74. JUDGE MOORE FOR US SENATE, https://www.roymoore.org [https://perma.cc/6TZT-PKZT] (last visited Sept. 18, 2018); see Steven Thrasher, *People Say Identity Politics Are Killing the Democratic Party. I Think They’re Saving It.*, ESQUIRE (Dec. 15, 2017), https://www.esquire.com/news-politics/politics/a14436467/identity-politics-alabama [https://perma.cc/PKQ5-XFPQ].
75. See *supra* note 29 and accompanying text.
76. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).
77. BELL, *supra* note 3, at 92.

existential meaning in the act of protest. Participation in protest against a racist establishment, he wrote, “enriched my life and provided me with the perhaps unrealistic but no less satisfying sense that I was doing God’s work.”⁷⁸ Mrs. MacDonald, his unsung heroine, would agree.⁷⁹

Ethical Ambition was not the only place Bell wrote about religion, or of its relationship to law, or that of each to the other. In *Silent Covenants*, he wrote that American society worshipped *Brown v. Board of Education* with a near religious zeal.⁸⁰ But, somewhat like Christianity, *Brown* turned into a “magnificent mirage” of considerable use to American policymakers and diplomats, but ultimately hurtful to the black community.⁸¹ In *And We Are Not Saved* and *Gospel Choirs*, Geneva Crenshaw, along with her Celestial Curia, engaged her mentor, the book’s narrator, in hard conversations about race, civil rights litigation, and black hopes.⁸²

Bell wrote even more about law and its role in advancing the cause of justice, at times deeming it a possible force for good, and at other times considering it of little value for the oppressed, except perhaps when their fortunes also coincided with those of powerful whites.⁸³ He and others have been even more caustic about strict constructionists, who profess to be hewing closely to the Constitution’s original text or intention, an approach he considered a form of fundamentalism and idolatry. He states that “the Constitution is this nation’s secular religion,” with some referring to it as “our secular Bible.”⁸⁴ You can see his impatience with this adoration in his emphatic rejection of colorblindness, neutral principles, and a constitutionalism that deemed any taking account of race, even for a remedial purpose, tantamount to racism.

78. *Id.* at 4.

79. See Bell, *supra* note 76, at 378–79 (recounting a time when Biona MacDonald, an elderly woman in Harmony, Mississippi, told Bell, when he encountered her during civil rights struggles, that she found meaning in continuing to confront power and oppression in the face of white hostility, and even guns).

80. DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 1–4 (2004).

81. *Id.* at 4–10 (2004).

82. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 51–74 (1989); DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* 113, 186–87 (1996).

83. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

84. Bell, *supra* note 1, at 269.

CONCLUSION

As we have seen, Bell wrestled with the relationship between law and religion, deeming law in danger of over-preoccupation with empty form, and religion in danger of slipping into rote repetition and empty ceremony. Bell believed that religion does not benefit from codification. The more one reduces religion to complex codes of daily conduct, such as diet, hours or days of prayer and worship, adherence to literal interpretation of sacred texts, or obeisance to a priestly caste, the less one's opportunities to experience the mysteries of life and the numinous side of human experience. Religion, in short, does not benefit from becoming law-like.

By the same token, law does not benefit from becoming a fetish, worshipped in whole or in part for its own sake. It needs, instead, to be constantly evolving, subject to scrutiny and reflection, as social and individual needs change over time. Treating a source of law, even the Constitution, as a holy relic of a foregone age, freezes and forfeits its ability to do justice. Bell suggested both of these truths in numerous passages, and I believe he was right. The right way to see law, then, is as an ongoing effort, not a blind faith frozen in time.

In keeping with racial realism Derrick Bell might say to us today: "Keep your hand on the plow, hold on It is faith in our fate and foresight about our future that provides us with the endurance, dexterity, and flexibility required to live a life of meaning and worth." We are in his debt. He informed and inspired us until the very end.