

# As *Brown* Has Waned

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## I. BELL'S PROBLEMATIC

Toward the end of the 1970s, the pioneering scholar and advocate Derrick Bell published two landmark articles. Both reflected critically on the school-desegregation litigation he had pursued as a young NAACP lawyer. First, in a 1976 piece, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, he wrestled with the conflicts of interests between the cause-oriented lawyers of the NAACP (who single-mindedly pursued the larger project of school desegregation) and individual Black parent-litigants (whose desire for high-quality education for *their* children was on the line).<sup>1</sup> Four years later, in *Brown v. Board of Education and the Interest Convergence Dilemma*, Bell posited a “convergence” of interests between Black parents and “middle and upper class whites” to explain the federal judiciary’s willingness to supply remedies in race discrimination cases; he also pointed to the subsequent waning of that convergence to explain judges’ later reluctance to step into the breach.<sup>2</sup>

“Interest”—not “law,” not “principle,” and certainly not “neutral principle”<sup>3</sup>—worked as the keyword in Bell’s dismal accounting of *Brown*’s<sup>4</sup> faltering legacy. But what counted for Bell as an “interest”? Not everything, it seemed. For Bell, that term certainly encompassed the desire of successive presidential administrations to gain “immediate credibility” for “America’s struggle

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<sup>1</sup> See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

<sup>2</sup> Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>3</sup> *Id.* at 519–21 (discussing Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)).

<sup>4</sup> 347 U.S. 483 (1954).

with Communist countries” by desegregating Southern schools.<sup>5</sup> It included whites’ desire to quell Black discontent, sometimes violently.<sup>6</sup> It swept in firms’ hope to modernize the agrarian Southern economy.<sup>7</sup> Less powerful but still relevant were the interests of “middle class blacks and whites who believe[d] fervently in integration” and so fed the NAACP’s coffers.<sup>8</sup> But barely registering at all in the calculus Bell sketched, in contrast, was one concern: the demand from Black parents for “education-oriented remedies”<sup>9</sup> to lift their children’s life chances. By ruthlessly stripping the desegregation debate down not just to interests (excluding both principles and values) and bearing down on the interests that *in fact counted*, Bell sought to capture an unromantic essence of a moment that judges and scholars had relentlessly and recklessly romanticized.

In aligning and tallying countervailing interests, Bell hence hoped “to explain the disappointment of *Brown*.”<sup>10</sup> But an interest-focused analysis also fostered prescription. In particular, he proposed “educationally oriented remedies” in light of “the frequent and often complete failure of programs which concentrate solely on achieving a racial balance.”<sup>11</sup> A better understanding of the cartography of interests, he suggested, pointed toward a new remedial order in which school desegregation no longer operated as a lodestar for social reform.

There is a great deal of methodological and substantive insight in these two rich and complex essays.<sup>12</sup> The interest-convergence thesis, in particular, has had abiding influence, even though it originally took up only a few pages in the second article.<sup>13</sup> Both pieces combine moral seriousness with analytic rigor. Together, they yield clear-sighted critiques of ideological distor-

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<sup>5</sup> Bell, *supra* note 2, at 524.

<sup>6</sup> *See id.* at 524–25.

<sup>7</sup> *Id.* at 525.

<sup>8</sup> Bell, *supra* note 1, at 489.

<sup>9</sup> *Id.* at 512.

<sup>10</sup> Bell, *supra* note 2, at 519.

<sup>11</sup> *Id.* at 532.

<sup>12</sup> Similar themes are sounded in Bell’s subsequent books. *See, e.g.*, DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 7 (1992); DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 85 (2004). I focus on the essays here, given this Issue’s purpose. So I henceforth put that later work to one side.

<sup>13</sup> *See* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 154–56 (2011) (collecting sources).

tions cloaking the author's previous career as a litigator and contemporaneous scholarly law. Both, in short, are exemplars of morally committed, analytically insightful scholarship.

To a contemporary reader, perhaps one of the most striking things about these papers is the way in which Bell casts doubt on whether the substantive content of law has any causal efficacy. Doctrine doesn't matter in his analysis. Absent from either piece is any attention to the particulars of Supreme Court legal reasoning, the specific textual elements of the Fourteenth Amendment, or the resolution of conflicts over constitutional theory more generally. The law, in its guise as formal doctrine and casuistic reasoning, is irrelevant to the fate of *Brown*.

In resounding contrast to this silence about the content of substantive legal "rights" is Bell's sedulous attention to the choice of "judicial remedy."<sup>14</sup> These do not emerge from any mechanical doctrinal matrix. Like the Chancellor's foot, they are a "Roguish thing."<sup>15</sup> Bell's attention to remedies starkly contrasts with the contributions of constitutional law's current elite, who worry relentlessly about the reticulated inward-facing technologies of rights adjudication and constitutional theory.<sup>16</sup> They take law seriously only at the cost of forgetting to ask, with Bell, when and how it matters on the ground.

No such sentimental legalism qualifies Bell's approach. He instead accurately anticipated the stalling of *Brown* as an instrument of racial transformation even though he was writing at school integration's historical high-water mark. In 1980, about a third of Black students attended 90% Black schools—an oceanic improvement from the early 1960s, when over half of black students attended 90% Black schools.<sup>17</sup> Further integration after 1980, however, would be modest at best, thanks to the federal courts' growing hostility to any sort of racially remedial project.<sup>18</sup> So Bell's pessimism about the litigation's prospect as an instrument of social change was prescient.

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<sup>14</sup> Bell, *supra* note 2, at 523.

<sup>15</sup> H. Jefferson Powell, "Cardozo's Foot": *The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7, 7 (1993) (quoting seventeenth-century jurist John Selden).

<sup>16</sup> See, e.g., JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART, at xxii–xxiii (2021) (advancing the claim that the failure of the Supreme Court to use proportionality review leads to greater social conflict).

<sup>17</sup> Sean F. Reardon & Ann Owens, *60 Years After Brown: Trends and Consequences of School Desegregation*, 40 ANN. REV. SOCIO. 199, 202–03 (2014).

<sup>18</sup> See *id.* at 203–06.

Similarly perceptive was his flagging of class stratification among white Americans—especially the role of “poorer whites who feared loss of control over their public schools and other facilities”—as pivotal to *Brown’s* fading fortunes.<sup>19</sup> It is thus not at all true to say (as critics have) that Bell accorded “insufficient attention to the intraracial cleavages that divide the interests of black people and white people.”<sup>20</sup> This critique misses the careful attention that Bell gave to the possibility of cross-racial alliances.<sup>21</sup> Indeed, racial “cleavages” did load-bearing work in his analysis.

Here again, he was rather prescient. Four decades later, class as figured by tertiary education has become a “key marker of social status.”<sup>22</sup> Interracial and intraclass alliances have also fractured decisively. Of special importance, “the white working class’s participation in presidential elections has been slowly and steadily changing . . . in ways that have favored Republican candidates”<sup>23</sup> and in ways that are predictably adverse to the projects that Bell espouses. The surprising victory of Donald Trump in the 2016 presidential election cannot be understood apart from long-term political demographic changes of which Bell perceived some of the first stirrings. Today, the robust subfield of political science laboring away to unpack white working-class attitudes to race and privilege is a testament to his foresight.<sup>24</sup>

Surprisingly, Bell’s predictive acumen faltered somewhat in respect to the Black community. *Serving Two Masters* meticulously dissected interclass tensions in Black alliances. Its distinction between the NAACP’s “clients” and its “constituents” captured class-based fractures among Black Americans.<sup>25</sup> But Bell’s emphasis on Black class divisions arguably proved less prophetic

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<sup>19</sup> Bell, *supra* note 2, at 525.

<sup>20</sup> Driver, *supra* note 13, at 165.

<sup>21</sup> See Bell, *supra* note 2, at 528 (considering the possibility of interracial alliances based on convergent interests).

<sup>22</sup> ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 3 (2020).

<sup>23</sup> Nicholas Carnes & Noam Lupu, *The White Working Class and the 2016 Election*, 19 PERSP. ON POL. 55, 66 (2021).

<sup>24</sup> For a superlative example, see generally ASHLEY JARDINA, WHITE IDENTITY POLITICS (2019).

<sup>25</sup> Bell, *supra* note 1, at 490–91 (quoting Ron Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 178 (1974)).

than his observations about white Americans.<sup>26</sup> Subsequent research finds that political heterogeneity within Black communities has not risen even though its class stratification has increased.<sup>27</sup> This research instead finds that “well-established group norms” and “likely social consequences for defection from the group norms” can generate significant levels of political conformity.<sup>28</sup> For example, small Republican gains in the 2020 election notwithstanding, Black voters remain overwhelmingly aligned with Democratic candidates despite their quite varied policy preferences.<sup>29</sup>

This mismatch between prediction and future developments, however, is hardly evidence of Bell’s analytic myopia. In the early decades of the twentieth century, class-conscious mobilizations among Black communities were mainly focused on economic issues, such as employment and housing, rather than official discrimination.<sup>30</sup> With that history in mind, it was reasonable for Bell to see intra-Black divisions as an important element of political cartography. The idea that “race operates independently of class” came to dominate both the progressive and the moderate wings of Black political mobilization only later in the twentieth century.<sup>31</sup>

For all that, Bell’s diagnoses of faltering racial solidarities remain unsatisfying and merely tantalizing along other margins. There are missing terms in his analysis. These gaps render his underlying materialist epistemology ambiguous, even suspect. Bell’s project, we might say, implicitly deploys ideas about three underexamined concepts: “interests,” “alliances,” and “conjunctions.” In respect to each of these key terms, what is implicitly

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<sup>26</sup> Professor Justin Driver complains that Bell’s convergence theory takes an “exceedingly simple approach to what constitutes ‘black interests.’” Driver, *supra* note 13, at 168. Respectfully, I do not think this is a fair reading of Bell’s work, as the main text suggests.

<sup>27</sup> For the classic exploration of why “African Americans remained politically homogenous even while becoming economically polarized,” see MICHAEL C. DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS* 6 (1994).

<sup>28</sup> Ismail K. White, Chryl N. Laird & Troy D. Allen, *Selling Out?: The Politics of Navigating Conflicts Between Racial Group Interest and Self-Interest*, 108 AM. POL. SCI. REV. 783, 784 (2014).

<sup>29</sup> Hakeem Jefferson & Alan Yan, *How the Two-Party System Obscures the Complexity of Black Americans’ Politics*, FIVE THIRTY EIGHT (Oct. 6, 2020), <https://perma.cc/53J8-4A7E>.

<sup>30</sup> See TOURÉ F. REED, *TOWARD FREEDOM: THE CASE AGAINST RACE REDUCTIONISM* 25 (2020).

<sup>31</sup> *Id.* at 164.

stipulated would perhaps have been better articulated as a problematic on its own terms that needs far more analysis.

First, Bell asserts rather than establishes the materialistic character of interests by careful consideration of their construction and evolution. In a 2011 critique, Professor Justin Driver fairly observed that Bell seemingly rejected the possibility that people might even “believe that racial equality is inherently a just cause.”<sup>32</sup> I would put his point a little differently: Bell does not explain how people come to hold the interests that he (rightly or wrongly) ascribes to them. Nor does he illuminate how specific interests come to be politically efficacious, while others remain sterile.

Second, Bell offers a glimpse of a complex political landscape in which varying alliances are being struck and unraveled; middle-class lawyers of different races are depicted trying to build working coalitions with middle-class and working-class parents under fraught conditions, sometimes presenting themselves as having aligned interests and sometimes litigating against parents’ wishes.<sup>33</sup> Mandarin foreign-policy experts are imagined as working hand in glove with district court judges implementing *Brown*.<sup>34</sup>

Yet Bell’s essays are barren of a more general account of how any of those alliances form or unravel. He has no sociology of allegiance or enmity nor indeed any theory of leagues, alliances, coalitions, or their betrayals. There is no account, that is, of the manner in which Cold War interests came to align with middle-class Black opposition to segregated schools or of how tensions between conjoined interests would be navigated.

Finally, apart from a fleeting mention of inflation’s constraining bridle,<sup>35</sup> Bell’s work is innocent of any serious engagement with the period’s larger economic, political, or discursive context. A complex matrix of material, social, and ideological currents necessarily impinges upon and constrains political action (including judicial action) at any given moment. Call this the *conjunction* in which any analysis of a complex social phenomenon necessarily unfolds. Its absence from Bell’s analysis means that legal conflicts

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<sup>32</sup> Driver, *supra* note 13, at 170.

<sup>33</sup> See, e.g., *supra* note 1, at 485–87 (describing conflicts, erupting into litigation, between the national NAACP and Atlanta lawyers and parents).

<sup>34</sup> Bell, *supra* note 2, at 524.

<sup>35</sup> Bell, *supra* note 1, at 471.

unfold in splendid isolation from larger socioeconomic and political developments.

Again, none of these criticisms is ground to ignore the genuine and powerful insights of Bell's work. More modestly, they provoke the question of how it can be complemented, or reinforced, in ways that render his interest-based account richer and more plausible. It is to identify unanswered questions and loose ends that beg to be pursued. To that end, we can profitably look across the Atlantic at another Black theorist struggling, at almost exactly the same moment as Bell, to grasp the failure of postwar racial liberalism—albeit upon a rather different terrain of contestation.

## II. HALL'S CONJUNCTURES

Around the same time that Derrick Bell was making his dismaying reckoning with *Brown*, a Black scholar of race relations in the United Kingdom named Stuart Hall was coming to terms with the persistence of racial conflicts in Great Britain's postimperial fade. In the course of this stocktaking, Hall would find a rich seam of critical theory useful for taking stock of racial subordination in Britain. Rather than mimicking the bromidic orthodoxies of orthodox Marxists, he took them as spurs to fashion something new, wholly hybridized and adapted to the divergent circumstances of a postimperial, postindustrial, and postmonoracial island teetering on the cusp of neoliberal puncture.

The resulting work—until recently largely out of print and available only by photostats online<sup>36</sup>—is well worth recuperating as a complement to Bell's work, and also for its own sake. It serves as a theoretical frame for specifying interests, alliances, and conjunctions in intellectually fruitful ways. When read alongside Bell's work, moreover, it is a way to “renounce the easy claims of African-American exceptionalism in favour of a global, coalitional politics.”<sup>37</sup> It opens transnational vistas at odds with the domestic legal academy's overly parochial gaze.

Unlike Bell, Hall is an unfamiliar figure in the pages of law reviews. Appreciation of his contribution therefore benefits from a measure of biography. Having plotted briefly Hall's trajectory

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<sup>36</sup> Duke University Press cannot be praised enough for the elegant and comprehensive collected editions of Hall's work that they have published of late.

<sup>37</sup> PAUL GILROY, *THE BLACK ATLANTIC: MODERNITY AND DOUBLE CONSCIOUSNESS* 4 (1993).

from postcolonial Jamaica to the University of Birmingham in England, I home in on two specific articles published almost concurrently to *Serving Two Masters* and *Interest Convergence*. Those pieces provide an enriching counterpoint to Bell's two essays and generate new theoretical tools fit for more general application. As such, the analytic yield from Hall's work does not answer the open questions left by Bell so much as supply a newly generative grammar for better investigation.

Whereas Derrick Bell was the first in his family to attend college (Duquesne University) and law school (University of Pittsburgh),<sup>38</sup> the cultural theorist and public intellectual Stuart Hall was born to privilege, albeit of a dubious and subordinate variety. His middle-class Jamaican family pitched him high in the nation's pigmentocracy. He attended tweedy Jamaica College in Kingston, acquired a taste for modern jazz, and listlessly, vaguely dreamt of postcolonial grandeur.<sup>39</sup> After attending Merton College, Oxford, he became a founding editor of the *New Left Review*, a member of the Centre for Contemporary Cultural Studies at the University of Birmingham, and finally head of sociology at the Open University.<sup>40</sup>

Like anyone phenotypically marked as alien in midcentury Britain, Hall maintained an acute sense of otherness throughout his long career.<sup>41</sup> This sense infuses his work on popular culture, on policing, on racial politics, and on the collapse of the postwar settlement and the rise of Thatcherism. In particular, his conception of cultural studies as "a way of investigating politics through culture" has proved influential (despite being subsequently marred by dilettantism) in the social sciences and in nonscholarly cultural work.<sup>42</sup>

One of the pioneering works in that view, a collectively produced volume called *Policing the Crisis*, investigated public perceptions of a "crisis" of muggings in the late 1970s, deploying the

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<sup>38</sup> Fred A. Bernstein, *Derrick Bell, Law Professor and Rights Advocate, Dies at 80*, N.Y. TIMES (Oct. 6, 2011), <https://perma.cc/DQL2-MWY4>.

<sup>39</sup> STUART HALL, FAMILIAR STRANGER: A LIFE BETWEEN TWO ISLANDS 3–4, 16, 97, 112–13, 127 (Bill Schwarz ed., 2017).

<sup>40</sup> For a summary, see Henry Louis Gates, Jr., *Foreword* to STUART HALL, THE FATEFUL TRIANGLE: RACE, ETHNICITY, NATION, at xvii–xviii (Kobena Mercer ed., 2017).

<sup>41</sup> When he says, "I feel less English now than when I first arrived," I feel certain that Hall is speaking for many migrants to the British Isles—and their children. HALL, *supra* note 39, at 210.

<sup>42</sup> David Morley, *Introduction* to STUART HALL, 1 ESSENTIAL ESSAYS 10 (David Morley ed., 2019) (citation omitted).



now-familiar notion of a “moral panic” and tracing the formative role race can play in the formulation and dissemination of new ideas about crime.<sup>43</sup> Another important work, a posthumous series of 1994 Harvard lectures called *The Fateful Triangle*, delicately situated race as “the centerpiece of a hierarchical system that produces differences” despite, and indeed in spite of, the lack of biological or phenotypical guarantee.<sup>44</sup> These lectures offer fertile analyses of how the “sliding signifier” of race is deployed in the service of larger projects of social or political transformation.<sup>45</sup> Both works are tangential to the pieces I consider here. I raise them, rather, because they exemplify the breadth and curiosity of Hall’s oeuvre.

A specific pair of Hall’s essays usefully counterpoints and complements Bell’s investigation of desegregation and its limits. They do so by supplying a theoretical framework for analyzing interests, alliances, and conjunctions that Bell lacks. The framework, I contend, contains more general implications for understanding legal developments and the role of courts in political and social change or stasis.

A first essay, published in 1979 under the title *The Great Moving Right Show*, provides a model for conceptualizing the political circumstances in which ideas about race are deployed to either create or fragment political alliances and hence to induce downstream legal change.<sup>46</sup> Focusing on Prime Minister Margaret Thatcher’s rise, the essay illustrates how specific understandings of “interest,” and hence given alliances between social groupings, come into being through creative political action.

A second essay, *Gramsci’s Relevance for the Study of Race and Ethnicity*, published in 1986, works at a higher level of generality.<sup>47</sup> It deploys the ideas of the Italian Marxian theorist Antonio Gramsci to formulate a general model of social conflict in which race can be situated.<sup>48</sup> This second essay both provides a

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<sup>43</sup> *Id.* at 11; STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 18 (2013).

<sup>44</sup> HALL, *supra* note 40, at 32–37.

<sup>45</sup> *Id.* at 79.

<sup>46</sup> The essay was originally published as Stuart Hall, *The Great Moving Right Show*, 23 *MARXISM TODAY* 14 (1979). It is also republished in STUART HALL, *SELECTED POLITICAL WRITINGS: THE GREAT MOVING RIGHT SHOW AND OTHER ESSAYS* 172 (Sally Davison et al. eds., 2017).

<sup>47</sup> See generally Stuart Hall, *Gramsci’s Relevance for the Study of Race and Ethnicity*, 10 *J. COMMUN INQUIRY* 5 (1986), reprinted in 2 HALL, *supra* note 42, at 21.

<sup>48</sup> See *id.* at 23–25.

more general framework and is also more specific in application. Neither is an exercise in mere mechanical application of Gramsci or any other theorist. In particular, Gramsci left behind a fragmentary miscellany of writings, largely written in prison under a minatory censor's eyes, that only obscurely reflects the "true, obliterated text of his thought."<sup>49</sup> Hall is rightly candid that he is transforming, and not simply reproducing, Gramsci's analytic lens. One of its supervening lessons is that a useful model of social conflict must always be "delicately dis-interred from [its] concrete and specific historical embeddedness [in which it was created] and transplanted to new soil with considerable care and patience" to yield insight into a later conjunction.<sup>50</sup>

In *Gramsci's Relevance*, Hall posits a general model of political struggle arising out of a necessarily provisional, "unstable," and "tendential balance in the relations of force[s]" within society.<sup>51</sup> Nothing guarantees the outcome of such a struggle. The "forces" roiling a society are not reducible to class or economic bases. Rather, class identity, alongside race, "has to be *produced*" through "specific economic, political and ideological practices."<sup>52</sup> Class and race then interact in "historically specific" ways to generate different hierarchies and forms of exploitation that layer, or cut across, one another.<sup>53</sup>

Instead of positing a fixed and predictable "interest," therefore, Hall suggests that an individual or a group comes to understand their "interest" through a complex, historically situated process. He also rejected the orthodox Marxist view that interest follows predictably from material determinants.<sup>54</sup> And, important here, he does not adopt Bell's approach of simply taking interests for granted. In Hall's account, there is instead nothing that stipulates in advance how a group "behave[s] politically."<sup>55</sup> Instead, it is through "organization" and conscious effort that interests arise. They are "a consequence of the relationship between 'the self' and

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<sup>49</sup> PERRY ANDERSON, *THE ANTINOMIES OF ANTONIO GRAMSCI* 30 (2017). Anderson's text—one of the most important twentieth-century treatments of the Italian—treats him as "proof against any sort of reformism." *Id.* at 135. Obviously, this is rather distant from Hall's usage.

<sup>50</sup> Hall, *supra* note 47, at 6–7.

<sup>51</sup> *Id.* at 13–14.

<sup>52</sup> *Id.* at 14 (emphasis in original); *see also id.* at 24–25 (underscoring the "culturally specific quality of class formations in any historically specific society").

<sup>53</sup> *Id.* at 24–25.

<sup>54</sup> *Id.* at 14–15.

<sup>55</sup> Hall, *supra* note 47, at 25.

the ideological discourses which compose the cultural terrain of a society.”<sup>56</sup> What counts in the end is what works politically.

Once interests have been fashioned, Hall suggests, actual outcomes at any given moment depend on “the coordination of the interests of a dominant group with the general interests of other groups and the life of the state as a whole.”<sup>57</sup> This is a matter of alliances. It is also, more subtly, a question of dominance and leadership—i.e., a matter of hegemony. The latter is not a result of “coercive means” alone, although violence will often be implicit in the relations between social groups.<sup>58</sup> Hall instead emphasizes persuasion and ideology. He maps the way that “philosophical currents enter into, modify and transform the practical, everyday consciousness or popular thought of the masses,” leaving behind a “sediment of ‘common sense.’”<sup>59</sup>

Hall uses the term “hegemony” to describe the necessarily transient and fragile moment in which a dominant group is able to exercise a degree of “mastery” across several different domains “at once” (e.g., economic, cultural, national-political, etc.).<sup>60</sup> It does so by gaining a “substantial degree of popular consent” such that it can impress upon society a new “historical agenda.”<sup>61</sup>

Any hegemony is fleeting. It is constantly at risk of subsidence or collapse. A dominant group fights a never-ending “war of position,” in which it rallies material, ideological, and cultural forces from both state and civil society to keep its hegemony in place as long as possible.<sup>62</sup> “Hegemony,” in short, is a contingent and not a necessary term used to characterize a hard-won primacy within the framework of an unstable social alliance. There are many moments, Hall implies, at which no group is able to achieve a hegemony, and the latter cannot be assumed to last.<sup>63</sup> This understanding is subtly different from Professor Kimberlé Crenshaw’s well-known account in which hegemony is understood as a static, and not a dynamic, formation.<sup>64</sup>

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<sup>56</sup> *Id.* at 21–22.

<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 16–17.

<sup>59</sup> *Id.* at 20 (citing ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 326 n.5 (Q. Hoare & G. Nowell Smith eds., 1971)).

<sup>60</sup> Hall, *supra* note 47, at 15.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 17.

<sup>63</sup> Hall is drawing the concept of hegemony from GRAMSCI, *supra* note 59, at 161.

<sup>64</sup> Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370–71 (1988).

In *The Great Moving Right Show*, Hall deploys his conjunctural analysis to interpret the collapse of a postwar consensus in Britain around the welfare state and a broadly egalitarian social democracy. The term “conjuncture,” for Hall, captures a “condensation, in any particular historical moment,” of “related but distinct contradictions” in terms of economic, political, and cultural forces.<sup>65</sup> Out of a historical conjuncture of economic crisis and a “succession of defeats . . . imposed on the working class” by a political form ostensibly devoted to the latter’s interest, Hall perceived a dissolution of a prior hegemony of welfare-state liberalism.<sup>66</sup> From its ashes rose a new “authoritarian populism” embodied in a “striking weakening of democratic forms and initiatives” but also, paradoxically, in the creation of “an active popular consent.”<sup>67</sup> (Could not the same be said of the last half century of U.S. political history?)

To understand how new interests and alliances were forged under the aegis of this new authoritarian populist banner, Hall mapped the “terrain on which the debate is being conducted,” especially in respect to questions of education and policing.<sup>68</sup> On the first, a “panic over falling standards and working class illiteracy” and, on the second, a racialized perception of “social disintegration” provided soundstages for new identities and alliances between working-class and middle-class voters.<sup>69</sup> These discourses, Hall underscores, arose in a specific venue—as a drumbeat of stories in the British tabloid press. He is careful not to fall back upon the inchoate and abstract idea of a “discourse” in the air, and he is careful not to suggest that these stories merely meant to “dupe” the “unsuspecting.”<sup>70</sup> Rather, a hegemonic discourse is a way to represent successfully “real and lived experiences” within a “logic” that “pulls [people] systematically into line with policies and class strategies” of the hegemonic political right.<sup>71</sup>

In this emergent hegemony, Hall explains, “contradictory strands of monetarist neoliberalism and organicist Toryism,” which identify “freedom with the market and order with moral

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<sup>65</sup> Hall, *supra* note 46, at 14.

<sup>66</sup> *Id.* at 15–17; *see also id.* at 18 (cataloging features of postwar social democracy).

<sup>67</sup> *Id.* at 15. Hall’s observation that democratic forms can be corroded while actual popular “consent” is maintained is a vitally important one for understanding contemporary antidemocratic populism.

<sup>68</sup> *Id.* at 18.

<sup>69</sup> *Id.* at 18–19.

<sup>70</sup> Hall, *supra* note 46 at 18, 20.

<sup>71</sup> *Id.* at 20.

tradition,” could be bound together into a “single package for popular consumption.”<sup>72</sup> It is the power of hegemony to write rules of permissible ideological conjugation for politics. (Again, the parallel to contemporary American politics is too plain to need spelling out.)

Hall’s framework provides a set of tools for thinking through the origin of “interests,” the forging of “alliances,” and the shaping relevance of the “conjuncture.” These enable a sharper account of the post-*Brown* moment that Bell sought to capture. It is not quite that these ideas are simply missing from Bell’s analysis. It is rather that where Bell takes interests, alliance, and the conjuncture for granted, Hall stops to examine and interpret each of those elements as opening gambits in a broader process of social alliance-building and conflict.

Applied to Bell’s problematic, Hall’s analytical framework isolates a number of unresolved and interesting questions. First, it underscores a puzzle about how “interests” come to be. For instance, Hall’s analysis prompts the question of why Black families understood their interests in terms of individual children’s education alone, not in light of racial minorities’ shared fate in a context of residential and labor-market segregation. Whereas Bell takes for granted that Black clients of the NAACP understood themselves first and foremost as “parents,” Hall’s work denaturalizes this “interest.” The latter raises questions as to whether plaintiffs’ internalization of middle-class norms respecting parenting diluted racial solidarity, paradoxically limiting alliances with middle-class NAACP “constituents.” Hence, Hall’s framework raises the possibility that NAACP clients’ identification of their interests in terms of the role as parents may well have limited, rather than expanded, the array of alliances they could make—and whether other terms of self-identification might have been conducive to more effective political action,<sup>73</sup> even ones that avoided the sense of a zero-sum conflict with white parents over integration or busing.

Second, Hall’s framework raises questions about which party within an alliance exercised hegemonic power and what, precisely, the terms of that hegemonic arrangement were. His work puts pressure first on Bell’s assumption that the federal interest

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<sup>72</sup> PERRY ANDERSON, *THE H-WORD: THE PERIPETEIA OF HEGEMONY* 87 (2017) (summarizing Hall’s work on Gramsci).

<sup>73</sup> Cf. REED, *supra* note 30, at 25–28 (discussing working-class Black mobilization as workers).

in desegregating schools in the 1950s was purely a matter of foreign policy and domestic interests.

That is, Bell does not explain how it was that official decision makers came to understand Cold War imperatives as requiring not so much actual desegregation but merely a high-profile judicial decision ostentatiously gesturing toward the possibility without much by way of implementation. Nor does he explain why an alliance between the federal government and middle-class Blacks could be powerful in the 1950s, only to wane by the 1970s.

Further, Bell also does not explore the relative strength and priority of the alliance's competing interests—i.e., the extent to which the NAACP shared and was driven by anti-Communist goals or the degree to which establishment figures adopted the NAACP's view of Jim Crow as “contradictory to the nation's fundamental commitment[s].”<sup>74</sup> Nor, indeed, does he capture the full range of concerns that bound together this hegemonic formation. As Professor Kevin McMahon has suggested, the earlier judicial receptiveness to a measure of racial desegregation must also account for shifting coalitional politics within the Democratic Party.<sup>75</sup> Electoral structures and the demands they impose upon winning legislative and electoral-college coalitions, McMahon shows, shaped alliances in legal and ideological conflicts over desegregation.

Bell's analysis, in short, does not illuminate the specific hegemonic matrix out of which *Brown* and its progeny arose. As such, it can neither fully illuminate the causes of successful school reform efforts nor predict the terms under which support for those efforts will decompose.

The lexicon of interests and the terms of hegemonic alliance are obviously intertwined. Hall's framework draws attention to the difficulty (glimpsed but not developed by Bell) of why white working-class parents did not perceive their interest to lie in well-funded schools for all. As in the United Kingdom, the role of moral

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<sup>74</sup> *Id.* at 54–55 (emphasizing, also, the effect of anti-Communism on civil rights coalitions).

<sup>75</sup> KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* 100–02, 191 (2004).

panics over education and crime (including, in particular, perceived threats of sexual violence) likely contoured those interests to an extent that Bell does not register.<sup>76</sup>

It would have been useful for Bell to consider, in particular, whether the Justices themselves in part produced or reinforced white working-class identities, and hence the resistance to desegregation themselves. One year before Bell wrote *Brown v. Board of Education* and *the Interest-Convergence*, for example, then-Associate Justice William Rehnquist would write an angry dissent in *United Steelworkers v. Weber*,<sup>77</sup> bemoaning the fate of senior white employees of firms that had affirmative action plans.<sup>78</sup> A decade after *Serving Two Masters* was published, Justice Antonin Scalia would write in vivid terms of white men as the “the only losers” from affirmative action, who—“predominantly unknown, unaffluent, unorganized—suffer [ ] injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.”<sup>79</sup>

Obviously, these writings cannot retroactively explain the impasse that Bell described. But they do resonate with Hall’s point that the “modern state exercises moral and educative leadership” in ways that shape people’s self-understanding and that can, under propitious circumstances, engender hegemony.<sup>80</sup> They suggest ways in which the Court can play an active role in the construction of hegemony by offering a “‘system of ideas and representations’ by means of which men understand and ‘live’ an imaginary relation to their real conditions of existence.”<sup>81</sup>

Finally, Hall’s work calls attention to the question of how the larger conjunction of economic and political events figured into the way in which the hegemonic alliance around *Brown* decomposed. This larger project would situate the strategic problem of intracoalitional conflicts that Bell addressed in terms of the overlapping macroeconomic crisis of the 1970s from the oil shock, to

<sup>76</sup> Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 ARK. HIST. Q. 42, 42 (2003).

<sup>77</sup> 443 U.S. 193 (1979).

<sup>78</sup> *Id.* at 240 (Rehnquist, J., dissenting).

<sup>79</sup> *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

<sup>80</sup> Hall, *supra* note 47, at 19.

<sup>81</sup> STUART HALL, *Culture, the Media, and the “Ideological Effect”*, in 1 HALL, *supra* note 42, at 288, 298, 321 (quoting LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses: Notes Towards an Investigation*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS 85, 107 (Ben Brewster trans., 1971)).

the deceleration of productivity, to the emergence of stagflation. How the changing terms of a labor market caught in these throes, and pressured further by the globalization of manufacturing, altered the feasibility of the hegemony around desegregation is a tale yet to be told.

### III. *BROWN'S TWILIGHT*

“History shifts gears. . . . You are in a new moment,” for suddenly there is a new conjuncture.<sup>82</sup> By the time of Bell’s death in 2011, *Brown* had shifted from a deeply controverted touchpaper for violent social conflict into a verbal condensation of the nation’s notional (if not actual) commitment to racial equality. Just four years earlier, the Supreme Court had clashed sharply over whether the liberal or conservative Justices were in fact “more faithful to the heritage of *Brown*.”<sup>83</sup> The latter decision, rather than guiding precedent, instead played the part of a “foundational authority.”<sup>84</sup> But, as Hall prophesized, this hegemony was not to prove enduring. A mere decade later, more than two dozen federal judicial nominees during the Trump administration would decline to affirm the decision’s validity.<sup>85</sup> What once was gospel now trembles with uncertainty.

The intellectual and material commitments that comprise this new conjunction remain subject to negotiation. The precise contours of a new racial hegemony remain in doubt and subject to painful contestation. A conjuncture in which Black Lives Matter and Trumpian populism coexist as powerful formations is unlikely to be stable, or characterized by any clarifying hegemony. We hence abide now not in hegemony but in the tumultuous ideological and violent interregnum between one ideological regime and another. Morbid symptoms abound.

I believe that the rich analytic possibilities sparked by bringing Bell and Hall into conversation will continue to illuminate this transition. An unsentimental anatomization of interest, following Bell, can be usefully enriched by Hall’s model for tying interests to alliances and hegemony, and nesting all of these in

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<sup>82</sup> STUART HALL, *Gramsci and Us, in THE HARD ROAD TO RENEWAL: THATCHERISM AND THE CRISIS OF THE LEFT* 161, 162 (1988).

<sup>83</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007); *id.* at 803 (Breyer, J., dissenting).

<sup>84</sup> Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 3 (2013).

<sup>85</sup> *Trump Judicial Nominees and ‘Brown v. Board of Education’*, NPR (May 19, 2019), <https://perma.cc/PL6G-2VF4>.



larger socioeconomic contexts. These tools, to be sure, do not instantaneously resolve the uncertainties of the present conjunction.

But they are instruments that are well fitted for comprehending the ideological and political riptide of race that pulls, hazardously and to destabilizing effect, on the tenuous path toward racial equity that Bell and his generation of advocates and allies built. That they are so rarely deployed, even as Bell's work has been canonized, is proof—if proof were needed—of how we can celebrate texts and scholars even as we suppress, or forget, precisely what makes them so insightful in the first instance.