

TWO AMERICAS

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The insurrection at the Capitol on January 6, 2021, designed to prevent Congress from certifying the results of the 2020 presidential election,¹ was a jarring reminder that the *United States* of America has always been a fragile proposition, one that demands constant attention and care. The tendency to abbreviate the nation's name, to speak and write and eventually to think only of "America," can induce forgetfulness: division is in our bones. As the flag partially represents, we are a *federal* republic, made up of several States and the quasi-sovereign Indian Nations, all of which have marked physical and legal borders. We are a *liberal* democracy, founded on the premise that there would be religious and political pluralism, and on the embrace of private property and free market principles. It is often said that liberal democracy is messy business, but it has become especially so as the nature and extent of our heterogeneity has exploded in the last century; like "good trouble" is still trouble, good pluralism is still inherently fractious.² Finally, regardless of our sex, race, ethnicity, or national origin, we are all burdened by the *exclusionary* legal legacy left by the founders: white not also black, fathers not also mothers, citizens not also immigrants. As many others have written in some form over the last year, it is a mistake to assume that we know the ties that bind us and that they will obviously hold.

These admonitions are not new, of course. To talk about multiple Americas is to take part in the perennial critique of two closely-related claims: The first is that despite our federalism, our liberalism, and the legacy of exclusion, all of which built in division, our political community is, as Barack Obama insisted, not "red states or blue states, just the United States,"³ or, as the Pledge of Allegiance

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1. Melissa Morgan, *The Legacy of January 6*, STANFORD FREEMAN SPOGLI INST. FOR INT'L STUD. (Jan. 5, 2022), <https://fsi.stanford.edu/news/legacies-january-6>; *Photos: A look back at the Jan. 6 insurrection*, NPR (Jan. 6, 2022), <https://www.npr.org/sections/pictureshow/2022/01/06/1070610129/photos-one-year-later-a-look-back-on-the-jan-6-insurrection>. See Robert A. Pape, *The Jan. 6 Insurrectionists Aren't Who You Think They Are*, FOREIGN POL'Y (Jan. 6, 2022), <https://foreignpolicy.com/2022/01/06/trump-capitol-insurrection-january-6-insurrectionists-great-replacement-white-nationalism> (suggesting that the insurrectionists were improperly characterized as "economically destitute" and "often unemployed" given that many were "middle-class professionals motivated by the 'great replacement' conspiracy theory.").

2. Linda Earley Chastang, *Opinion: Remembering John Lewis' noble cause of 'good trouble'*, ATLANTA J.-CONST. (Mar. 9, 2022), <https://www.ajc.com/opinion/opinion-remembering-john-lewis-noble-cause-of-good-trouble/TMEXWI3EVNH2REWHGJOWN7KU5A>.

3. Ronn Blitzer, *Biden Channels Obama in declaring there are 'no red states, no blue states, just the United States'*, FOX NEWS (Oct. 18, 2020), <https://www.foxnews.com/politics/biden-channels-obama-in-declaring-there-are-no-red-states-no-blue-states-just-the-united-states>.

details, we are “one nation, under God, indivisible, with liberty and justice for all.”⁴ The second is that this particular collection of values and commitments—under God, liberty, and justice for all—generally describes a shared idea, one that defines our country specifically. Others may also hold one or more of these values and commitments, but America does so exceptionally. Not only do we respect the free exercise of religion and cultivate liberty, justice, and equality separately; but also, among political systems, we do the combination uniquely well. Barack Obama’s words and the Pledge’s refrain might sound like political pablum to lazy ears, but they are substantive, declarative, and prescriptive: they recognize that these propositions are not obviously strong, that they need constant tending.

What seems to be different in this moment is the view that we can somehow survive as “America” without doing this work. As we are going about the personal, political, and economic business that is empowering ourselves and our respective tribes—a project that is entirely compatible with the nation’s political and legal commitments to “under God” (as free exercise), liberty (as the freedom to be left alone but also as private property and free markets), justice (as the rule of law), and “for all” (as equality)—we are often not paying attention to what we continue to share as a political community. In this moment, in many communities, it sometimes seems almost anti-American to talk about and work on the ideological commitments we have in common, those that define us beyond our shared geography and basic domestic market. Indeed, even those are contested.⁵

In the older iteration of America, the one with a lot less pluralism and a lot more concentrated power, this also is not new. But in this newer iteration, the one with a lot more pluralism and a lot less concentrated power, it probably is.⁶ Those who were responsible for and took part in the January 6 insurrection pay specially close attention to this; indeed, a rejection of racial, ethnic, and political

4. For a brief history of the origins of the Pledge, see Jeffrey Owen Jones, *The Man Who Wrote the Pledge of Allegiance*, SMITHSONIAN MAG. (Nov. 2003), <https://www.smithsonianmag.com/history/the-man-who-wrote-the-pledge-of-allegiance-93907224>. For a summary of the Supreme Court’s Pledge cases, which mostly involve the phrase “under God,” see Scott Bomboy, *The history of legal challenges to the Pledge of Allegiance*, NAT’L CONST. CTR. (June 14, 2021), <https://constitutioncenter.org/blog/the-latest-controversy-about-under-god-in-the-pledge-of-allegiance>.

5. See, e.g., Joe Eskenazi, *SF is now boycotting most of the United States*, MISSION LOC. (Mar. 14, 2022), <https://missionlocal.org/2022/03/san-francisco-is-now-boycotting-most-of-the-united-states> (describing a San Francisco ordinance “boycotting and forbidding official travel to *most* other states” because of their anti-abortion, anti-LGBT, and voter suppression laws) (emphasis in original); Nico Lang, *Masterpiece Cakeshop owner in court again for denying LGBTQ customer*, NBC NEWS (Apr. 15, 2020), <https://www.nbcnews.com/feature/nbc-out/masterpiece-cakeshop-owner-court-again-denying-lgbtq-customer-n1184656> (detailing how the owner of a custom cake shop denied “a transgender woman . . . a trans-themed birthday cake” on free exercise and speech grounds); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct 1719 (2018) (examining the case of an owner of a custom cake shop who refused to design a wedding cake for a gay couple on the grounds that doing so would violate his religious and speech rights).

6. See generally Elizabeth Kolbert, *How Politics Got So Polarized*, NEW YORKER, (Dec. 27, 2021), <https://www.newyorker.com/magazine/2022/01/03/how-politics-got-so-polarized>; Michael Dimock & Richard Wike, *America is exceptional in the nature of its political divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide>.

diversity and their response to the diffusion of power largely motivated their enterprise.⁷ By contrast, those who embrace these developments generally think of them as such obviously positive goods—either without negative effects on others or else best on balance—that they tend not to focus on the fact that they still make the unification project harder. They ignore, for example, that the rule of law cannot handle competing liberty and equality claims when both are held out as *the* first principle, and compromise itself is deemed unprincipled. When they do recognize the difficulty inherent in the American project, they tend to put off the hard work necessary to maintain common ground.⁸ It is clearly not enough anymore simply to say that this common ground exists; *that* is political pabulum.

Approaches to forging one America in light of division including toleration,⁹ public education¹⁰ and civics,¹¹ the Americanization movement,¹² melting pot theory¹³ and multiculturalism,¹⁴ colorblindness and critical race theory,¹⁵ among others, are misunderstood, rejected, or de-valued rather than learned, updated, and reconciled. What replaces this iterative process tends not to be a new, productive idea, but rather an illiberal, anti-democratic power grab: you must comply with my version of America, or more specifically my version of “under God,” of “liberty,” of “justice,” or of “equality,” and with my approach to how these sit in relation to each other, or “violence”—physical or more broadly defined—is reasonably foreseeable. These days, ripping up the Constitution and its tradition of ordered and ordering liberty is not just hyperbole and does not only come in the form of eyebrow-raising exercises of executive, legislative, and judicial authority—although those too are plentiful.

7. Pape, *supra* note 1.

8. Everyone is responsible for doing this work, of course, not only those who are in a position to challenge tradition and the status quo. My point here is simply that those who are challenged tend immediately to see and react to the divisiveness, whereas the challengers tend only to recognize the justice inherent in their cause.

9. See, e.g., Jack Knight, *Institutionalizing Toleration*, in *TOLERATION ON TRIAL* 31 (Ingrid Creppel et al. eds., 2008) (examining the institutional requirements for toleration and addressing arguments about the negative effects of diversity on social and political life); MICHAEL WALZER, *ON TOLERATION* (1997) (arguing that toleration is necessary in a democratic society and defending the value of social difference(s)).

10. Richard D. Kahlenberg & Clifford Janey, *Putting Democracy Back into Public Education*, THE CENTURY FOUND. (Nov. 10, 2016), <https://tcf.org/content/report/putting-democracy-back-public-education/?session=1>.

11. Sarah Shapiro & Catherine Brown, *The State of Civics Education*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), <https://www.americanprogress.org/article/state-civics-education>.

12. Mike Wallace, *Against the “Melting Pot” Metaphor: On Arguments Over Americanization and Homogenized Culture*, LITERARY HUB (Oct. 30, 2017), <https://lithub.com/against-the-melting-pot-metaphor>.

13. *Id.*

14. *Id.*

15. Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>; Rashawn Ray & Alexandra Gibbons, *Why are states banning critical race theory?*, BROOKINGS INST. (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/>.

Nevertheless, doing more than merely sharing a certain unruly geography and a basic market remains an attractive proposition; so does the idea of America as a place characterized by what Duke University's Terry Sanford once called "outrageous ambition."¹⁶ It is indeed outrageously ambitious in the historical and global sense to think that we can deal honestly and productively with our racist, sexist, and classist history *and* pull off a thriving heterogeneous liberal democracy. Lest we be tempted to minimize the extent of the task, moving from the world of theory and ideas to how things really are, I add these four perhaps non-standard examples to the frame within which we are tasked with operating. The first two are historical, but their legacy effects continue to cut through the modern landscape. The second two are modern but with the deepest historical roots.

In a reversal of the standard common law rule, [the legal doctrine of] *partus sequitur ventrem* was designed to ensure that an enslaved woman's "increase" would belong to her enslaver, and thus provided that the status of the newborn child followed that of its mother. . . . [P]artus applied whether the child's father was black and living in slavery or white and living in freedom. . . . From January 1, 1808, when it became illegal to import Africans destined for bondage from a foreign country, until Emancipation [in 1865], the sustainability of the country's slave population depended on domestic trading of already-born slaves and by its "increase" through the operation of *partus* doctrine. In an extraordinarily cynical and devastating irony, the law had enslaved black women not only producing slaves, but also in the process condemning their children to a life in bondage.¹⁷

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In 1941 a real estate developer built a six-foot high wall right across Detroit's 8 Mile district. He had to build it to qualify for subsidized loans from the Federal Housing Administration. The loans were to be given out for construction only on the side of the wall where the residents were mainly white. In the predominantly black part of town, there was to be no federal lending. . . . It was part of a system that divided the whole city, in theory by credit rating, in practice by colour.¹⁸

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On October 27, 2018, eleven Jews were gunned down as they prayed at their synagogue in Pittsburgh. It was the deadliest attack on Jews in American history. For most Americans, the massacre at Tree of Life came as a total shock. But anti-Semitism is the oldest hatred, commonplace across the Middle East and on the rise for years in Europe. . . . No longer the exclusive province of the far right, the far left, and assorted religious bigots, anti-Semitism now finds a home in identity politics, in the renewal of "America First" isolationism and the rise of one-world socialism. . . . [A]nti-Semitism is migrating toward the mainstream, amplified by social media and a culture of conspiracy that threatens us all.¹⁹

16. See generally HOWARD E. COVINGTON, JR. & MARION A. ELLIS, *TERRY SANFORD: POLITICS, PROGRESS, AND OUTRAGEOUS AMBITIONS* 417 *et seq.* (1999).

17. Doriane Lambelet Coleman, *Sex Neutrality*, 85 *LAW & CONTEMP. PROBS.*, no. 1, 2022, at 244–45.

18. NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* 229, 221–229 (2d ed. 2018) (describing America as the first "property-owning democracy" and explaining that "[t]here was only one catch. Not everyone in American society was entitled to join the property-owning party.").

19. Bari Weiss, *How to Fight Anti-Semitism*, BARI WEISS, <https://www.bariweiss.com/book>; See

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The Ole Bus Stop Diner is the only restaurant in the tiny Appalachian town of Booneville that is still open for business. The others have long since closed down. Tucked between the tree-specked mountains in southeastern Kentucky, Booneville is the seat of Owsley County, an almost uniformly white community and one of the most food stamp-dependent counties in the United States. . . . On [a] wall hangs a wooden plaque glorifying the Constitution's Second Amendment – the one that guarantees the right to bear arms – along with a US flag and the silhouette of a rifle-toting soldier. . . .

A few kilometres outside of town, . . . a 30-year-old single mother of three, sits on the porch of the Baptist Church near the hollow where she lives in a rundown trailer. Her three-year-old daughter Theresa rests in her lap, alternating between fiddling with a tiny pair of pink-rimmed, flower-printed sunglasses and taking swigs from a plastic bottle of Mountain Dew. [Theresa's mother] is one of the 52 percent of Owsley County residents who rely on welfare and food stamps to survive, drawing \$649 a month to feed her children and herself. Without a car or an education, she has been unable to land a job and cannot easily make it to town to search for work.

Like others with no opportunities and little hope, she has struggled to put enough food on the table for her children as food stamps have been cut time and again in recent years. Single mothers, she says, feel the cuts more than anyone else. . . . “[Food stamps] don't last the whole month. It really does [scare] me. I raise my kids alone since they been born. It's harder for a parent to do anything now.” The food stamps last “probably till the middle of each month”, [she] says. For the rest of the month, she relies on the goodwill of neighbours and relatives to feed her daughter and two sons. Often faced with choosing between feeding herself or her children, [she] frequently goes to bed hungry. “The grown-ups can do without [food] more than kids. I love my kids; I want the best for my kids,” she concludes.²⁰

To continue to meet the challenge that is melding together a single nation amidst this complicated legacy of inhumanity and exclusion, with both federalism and liberalism as necessary predicates, we need to operate simultaneously on two (different) tracks: We need to focus *not only* on our own interests and what divides us *but also* on imagining and establishing unity amidst this division. Applying these examples, although of course there are others: we need to focus *not only* on the fact that sexism, racism, religious discrimination, and deep economic division are in our bones, and that we need to own up to this if we want to move forward honestly and productively, *but also* on embracing approaches to this process that don't themselves burn the house down. As the putative Tsar and his domestic acolytes figured out in advance of the 2016 election, exploiting our

generally “How to Fight Anti-Semitism” with Bari Weiss, HENRY JACKSON SOC'Y (Mar. 4 2020), <https://henryjacksonsociety.org/members-content/48997-2> (seeing anti-Semitism as a conspiracy theory makes it possible to “understand how under Soviet communism, the Jews are the arch-capitalists, how under Nazism, we are the race contaminators, [and] how today on the far-right . . . we are . . . the greatest trick that the devil has ever played.”).

20. Patrick Strickland, *Inside Owsley: America's poorest white county*, AL JAZEERA (Nov. 8, 2016), <https://www.aljazeera.com/features/2016/11/8/inside-owsley-americas-poorest-white-county>. In this piece, Strickland makes the point that the people he encountered do not believe elections matter to them. This is a refrain we hear in this period even outside of such desperate circumstances. See, e.g., Yoni Appelbaum, *Americans Aren't Practicing Democracy Anymore*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/losing-the-democratic-habit/568336>.

historical fault lines—race, sex, religion, class, and national origin—too easily serves to diminish us and our ability to succeed.²¹

We all have a role to play in doing this work, from how we curate ourselves as individual Americans, to how we proceed in our everyday personal and institutional interactions, to the commitments we make to and the curricula we implement in our public schools, to the doctrine we develop to resolve competing rights claims. That this is the case, that some of those in a position to make both expressive and substantive contributions are taking up the cause, and that there is reason for guarded optimism is in evidence in advertising,²² the arts,²³ the financial sector,²⁴ journalism,²⁵ religion and politics,²⁶ among public intellectuals,²⁷ at the Supreme Court,²⁸ and in the academy.²⁹ The reader does not have to agree that there is reason for guarded optimism in all of these settings, or about the

21. See, e.g., Julian E. Barnes and Adam Goldman, *Russia Trying to Stoke U.S. Racial Tensions Before Election, Officials Say*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2020/03/10/us/politics/russian-interference-race.html>; Tom McCarthy, *How Russia used social media to divide Americans*, THE GUARDIAN (Oct. 14, 2017), <https://www.theguardian.com/us-news/2017/oct/14/russia-us-politics-social-media-facebook>.

22. Alexandra Bruell, *Jeep Superbowl Ad Enlists Bruce Springsteen to Unite America*, WALL ST. J. (Feb. 7, 2021), https://www.wsj.com/articles/jeep-super-bowl-ad-enlists-bruce-springsteen-to-unite-america-11612674060?mod=hp_minor_pos2.

23. My illustration here is the 2018 film *The Green Book*, which won Best Picture at the 2019 Oscars. THE GREEN BOOK (Universal Pictures 2018). It is indicative of the fact that movie critics are critics that I was not able to find a review that captured the proposition for which I am using it here—that is, that in the arts as in other domains, there are people who are working to identify and describe the ties that bind Americans together even as against our deepest divisions; and that Americans themselves apparently appreciate that. Even if the critics are not buying it.

24. See, e.g., Emilie Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077 (2021); Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 VA. L. REV. 937 (2020).

25. See, e.g., COMMON SENSE, <https://www.commonsense.news/about?sort=about> (2022).

26. See, e.g., *About the Poor People's Campaign: A National Call for Moral Revival*, POOR PEOPLE'S CAMPAIGN (2022), <https://www.poorpeoplescampaign.org/about>; Brown, Portman, Peters, Braun Reintroduce 'Build America, Buy America' Legislation, OFF. OF SEN. SHERROD BROWN (Apr. 22, 2021), <https://www.brown.senate.gov/newsroom/press/release/brown-reintroduce-build-america-buy-america-legislation>.

27. See, e.g., JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021); Heather C. McGhee, *The Way Out of America's Zero-Sum Thinking on Race and Wealth*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/opinion/race-economy-inequality-civil-rights.html>.

28. See, e.g., Jonathan H. Adler, *This is the Real John Roberts*, N.Y. TIMES (July 7, 2020), <https://www.nytimes.com/2020/07/07/opinion/john-roberts-supreme-court.html>; Safaa Aly, *Religious Freedom or Pandemic Safety?*, REGUL. REV. (Mar. 25, 2021), <https://www.theregreview.org/2021/03/25/aly-religious-freedom-pandemic-safety>; Nina Totenberg, *Supreme Court Rules for Worshipers and Against California COVID Restrictions*, NPR (Apr. 10, 2021), <https://www.npr.org/2021/04/10/986010977/supreme-court-rules-for-worshippers-and-against-california-covid-restrictions>.

29. This volume is illustrative of related work in the academy, as is the program “Discourse for Democracy” at Polis, the Center for Politics housed at Duke University’s Sanford School of Public Policy. See *Discourse for Democracy*, DUKE SANFORD POLIS: CTR. FOR POL., <https://polis.duke.edu/discourse-for-democracy> (2022). See also Francesca Polletta, *Bridging America's divides requires a willingness to work together without becoming friends first*, THE CONVERSATION, (Sept. 9, 2020), <https://theconversation.com/bridging-americas-divides-requires-a-willingness-to-work-together-without-becoming-friends-first-143648>.

particular examples I have included below the line; my point is simply that not everyone has retreated to their corner and that is a good thing.

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To develop aspects of these and related ideas, this volume brings together a multidisciplinary group of writers and scholars whose work and interests center on aspects of the Two Americas critique. They all share an affiliation, direct or through a co-author, with Duke University, and membership in our national polity. They are also diverse in many of the respects that matter to an appropriately pluralistic take on the questions presented: What is the idea of America? What stories do we not understand, or have not been told, about the ways in which we are two or multiple Americas? What are the different dimensions along which we are divided? How have approaches to the disconnect between the idea and the reality worked and not worked to ameliorate the divides? How might these approaches be updated or new ones developed that would do better work? Finally, how might we recommit to a shared idea of America so that our outrageous ambition is met?

The collection as a whole touches on several of the most important themes within this discussion, including race, criminal justice, income and wealth inequality, education, and the role of the Constitution. It is by no means comprehensive of these issues, the topics that could be covered, or the voices that must be heard.³⁰ The expectation is merely that the collection as a whole will contribute to the broader project, even as the essays and articles themselves stand on their own, with their authors making valuable in-field contributions.

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H. Jefferson Powell is Professor of Law at Duke Law School. His extensive body of scholarship has addressed the history and ethical implications of American constitutionalism, the powers of the executive branch, and the role of the Constitution in legislative and judicial decision-making, among other subjects. For this volume, Powell has written an essay titled *Imagining the United States: Reflections from Constitutional Law*. He begins with the proposition that “Americans have been . . . sketching portraits of the America of the mind and heart, since the beginning,” and that “the America of the mind and heart” has traditionally been based in “‘the American dream,’ a society marked by ‘industry, good living, selfishness, litigiousness, country politics, the pride of a freeman, religious indifference.’” He argues that without this or “some substantial, shared understanding of what a country is and stands for, the ‘nation’ can only be a political contrivance held together by circumstance or force.” He adds that:

The possibility of serious controversy on the imaginative as well as the policy levels of national life is not in itself a bad thing. Indeed, I believe that this possibility—which the

30. In terms of the issues that divide in the moment, as they have throughout or at various points in our history, immigration, religion, sex, and guns are particularly notable omissions, as are discussions centered on our predicates, i.e., federalism and heterogeneous liberal democracy.

American commitment to freedom of thought and speech fosters—is one of the most important and central enduring attractions of America as we can and should imagine it. But disagreement over how to name the idea and the ideals of the United States—and how to act on those ideals—creates a risk that is beyond what is likely to result from debate which remains on the level of policy. Along with many others, I believe that our current divisive political climate displays this more fundamental level of disagreement.

Ultimately, Powell “propose[s] that United States constitutional law has a role to play in resolving the current impasse in American political life *on the level of the imagination.*” Specifically, his “claim is that constitutional law can be a resource for Americans of every political and ideological persuasion who seek an answer to the question of how we should imagine the United States that reaches across our divisions. . . . who believe that there is—or can be—an idea and an ideal of what it is to be Americans, and to be America, that is not the private possession of a particular party or ‘ism.’”³¹

H. Timothy Lovelace, Jr., the John Hope Franklin Research Scholar and Professor of Law at Duke Law School, is a legal historian of the civil rights movement. His essay for this volume is *Xenophobic Conspiracy Theories and the Long Roots of January Sixth*. He begins with a description of the racial polarization that followed the Supreme Court’s decision in *Brown v. Board of Education*, taking the reader through the foreign interference conspiracy theories that proliferated during the civil rights period, before turning to the lessons this history teaches those who would seek to understand the events of January 6, 2021 in their broader context. Most basically, he argues that “racial progress is not linear” and “racist regress can be a reality.” Lovelace concludes with this prescription:

The country needs a full reckoning not merely of January 6, but also of how the country got to such a state that millions of Americans falsely believed that Venezuelan voting machines helped a U.S. presidential candidate steal the election. Our democracy did not get to this dangerous point overnight. It is past time for Americans, across the ideological spectrum, to tell the truth about the centrality of white nationalism in U.S. politics and indeed of all of American life. We will not be able to build the democracy we need if we cannot be honest about the one we have.³²

Darrell A.H. Miller is the Melvin G. Shimm Professor of Law at Duke Law School where he writes and teaches in the areas of civil rights, constitutional law, civil procedure, state and local government law, and legal history. His contribution is called *Estoppel by Nonviolence*. He begins with a description of the history of the “two traditions of political change in America, violent and non-violent.” He then develops the two-part argument that “one group—African Americans—have found the most success by using non-violence, even though they, as a group, have the most historical and moral justification to take freedom by force” and that “in pursuing a successful political strategy committed to non-violence—despite every moral right to use violence—African Americans have

31. H. Jefferson Powell, *Imagining the United States: Reflections from Constitutional Law*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 1.

32. H. Timothy Lovelace, Jr., *Xenophobic Conspiracy Theories and the Long Roots of January Sixth*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 19.

delegitimized any lesser claim to force as a weapon in American politics.” “Because of them,” Miller concludes, “non-violence sets the baseline for fundamental constitutional change in America.”³³

Lawrence Zelenak is the Pamela B. Gann Professor of Law at Duke Law School where he specializes in tax law and policy. His essay, titled *The Two “Two Americas” of Trump and Romney*, begins with a reflection on the different ways we might describe the American divide, and how time and circumstances affect those we consider most salient. He then focuses on the contrast between the deep divisions created by the “primarily anti-reality, or primarily anti-democracy” claim that Donald Trump was the “*legitimate* winner of the [2020] election,” with one that held our attentions eight years earlier at the close of the G.W. Bush presidency: Mitt Romney’s division of America into “forty-seven percent of Americans who ‘pay no income tax’ and who ‘believe that government has a responsibility to care for them,’ and the slim majority who pay income tax to support both the government and the forty-seven percent.” Zelenak argues that “[i]t is not merely that the two Americas of 2021 have become a much more urgent division than Romney’s income-taxpaying division; rather, Romney’s division has simply vanished as a topic of political interest.” The “overwhelming [and welcome] evidence of its demise[.]” Zelenak explains, lies in “recent political debates over the size of recovery rebates.”³⁴

Sara Greene, Professor of Law at Duke Law School, and Pamela Foohey, Professor of Law at Indiana University Maurer School of Law, have together contributed an article titled *Credit Scoring Duality* which focuses on divided economic citizenship, specifically the circumstances of those who are credit invisible and those with low credit scores. In an economy in which access to credit is a prerequisite, not only for necessities but also to have a meaningful chance at liberty and the pursuit of happiness, having a credit score in the first place, and then not a low score, can make all the difference between living on the margins and living a version of the American good life. Beginning from the position that the policies of the credit scoring industry and the laws that regulate that industry are flawed gatekeepers to both, Greene and Foohey describe a recent avenue of reform, alternative credit scoring, which they explain is a “veil of inclusiveness [which]. . . . distracts from the prospect that alternative credit scoring will become a mechanism for the industry to make even more profit while continuing to maintain a product that serves to separate Americans into two groups based on criteria reflective of past injustices and life situations rather than future financial prospects.” They conclude that:

Without widescale reforms of public policies, pointing to credit scoring, of any variety, as a way to help the economically disenfranchised will perpetuate the idea that merely ranking people has the potential to improve access and financial outcomes. In reality, the range of credit scoring techniques serve as another cog in wealth and economic inequality. People, more broadly, need comprehensive access to economic equality.

33. Darrell A.H. Miller, *Estoppel by Nonviolence*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 69.

34. Lawrence Zelenak, *The Two “Two Americas” of Trump and Romney*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 87.

Until then, credit scoring will continue to be a vehicle of economic exploitation and will continue to divide America in two: one of financial opportunity and growth and one of financial struggle and exclusion.³⁵

Brandon Garrett is the L. Neil Williams Jr. Professor of Law at Duke Law School and the Director of the Wilson Center for Science and Justice. His work focuses on criminal justice outcomes, evidence, and constitutional rights. His essay titled *Unified Criminal Justice Reform* focuses on the “two Americas in criminal justice”—the crime control (or “safety”) model and the due process (or “fairness”) model. Beginning from the summer of 2020, when “the largest protests in American history responded to police brutality, racialized policing, and incarceration” in the aftermath of the brutal police killing of George Floyd, he asks, “[i]s America now united around a new due process-oriented vision for criminal justice?” Questioning “a two-Americas framing of criminal justice,” he suggests that national “attitudes have long been far more complex, but also more unified, than often supposed.” Most people, Garrett argues, “in fact care about both criminal control and due process. As a result, a range of reform approaches may bridge social, partisan, and identity-based divides to accomplish lasting change.” These include “three of the areas that have attracted some common ground focus in recent years: accuracy and prevention of wrongful convictions; equity and reduction of unfairness and racial disparities; and needs, including behavioral and physical health.”³⁶

Stephen Smith is Professor of the Practice of African and African American Studies at Duke University. Formerly Africa editor of the French daily newspapers *Libération* and *Le Monde*, his scholarship focuses on France and Africa, conflict analysis in Africa, and Africa’s youthful population age structure. His latest book, *THE SCRAMBLE FOR EUROPE: YOUNG AFRICA ON ITS WAY TO THE OLD CONTINENT*, won the Grand Prix of the French Academy in 2018. Géraldine Faes-Smith is a French journalist whose early work was also mostly focused on Africa. She is the author of numerous books including two focused on cultural collisions, the latest called *SEEN IN AMERICA, SOON IN FRANCE*. They have titled their co-authored essay for this volume *Race in the United States: A View from Outer Space*. A comparative reflection on the “idea of ‘race’” as it has been constructed and used in Europe, Africa, and America, they remark that “[a]fter many years in the United States, we still fail to see ‘race’ through American eyes.” They explore the ways in which the American version of the idea is constitutive of our national identity and both divisive and productive. Throughout, Smith and Faes-Smith ask whether “the good end that is being sought”—racial equality—“can redeem the bad means employed to attain it”—which, in their view, capitulate to race as defining human groups genetically. Their answer in the end is “no.”³⁷

35. Pamela Foohey & Sara Sternberg Greene, *Credit Scoring Duality*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 101.

36. Brandon L. Garrett, *Unified Criminal Justice Reform*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 123.

37. Stephen W. Smith & Géraldine Faes-Smith, *Race in the United States: A View from Outer Space*,

James E. Coleman, Jr. is the John S. Bradway Professor of the Practice of Law at Duke Law School, where he directs both the Center for Criminal Justice and Professional Responsibility and the Wrongful Convictions Clinic. His essay, *Living in the Shadow of American Racism*, focuses on the relationship among race, education, and individual and community welfare. Beginning from the broadly held American view that “education [i]s the key to a better life,” the essay is part personal memoir, part reflection on Justice Clarence Thomas’s affirmative action opinions, and part prescriptive in light of the Court’s upcoming affirmative action cases.³⁸ He explains that what made his education work for him despite the cleavages that characterized his early years were teachers in both his racially segregated public schools and the elite private educational institutions he attended after high school who “instilled in me the self-confidence necessary to compete against classmates . . . not burdened with the weight of racism”; “never doubt[ing] that I was equal to my classmates” in part because no one “ever suggested I was mismatched”; and “a sense at the schools I attended that affirmative action was good for the country.” Coleman argues that it is wrong to understand ensuring the inclusion of black students in elite institutions—both public and private—as being about diversity for the benefit of the majority. Rather, it is best understood as being for the benefit of the individuals concerned *and* for the multiracial communities that characterize America. Because of this, he concludes,

[i]t would be a mistake for the Supreme Court to decide that the Constitution bars consideration of race when institutions of higher education are trying to identify talented students of color. The only rationale that would support such a decision is that ultimately it is not important whether people of color are educated when a state establishes a college or university or when a private institution receives public funds. This is wrong for the individual students who would be excluded, it is wrong for their communities, and it is wrong for the country.³⁹

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85 LAW & CONTEMP. PROBS., no. 3, 2022, at 141.

38. See *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* (Docket No. 20-1199) consolidated with *Students for Fair Admissions, Inc. v. University of North Carolina* (Docket No. 21-707).

39. James E. Coleman, Jr., *Living in the Shadow of American Racism*, 85 LAW & CONTEMP. PROBS., no. 3, 2022, at 155.