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Racial Transition

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RACIAL TRANSITION

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ABSTRACT

The United States is a nation in transition, struggling to surmount its racist past. This transitional imperative underpins American race jurisprudence, yet the transitional bases of decisions are rarely acknowledged and sometimes even denied.

This Article uncovers two main ways that the Supreme Court has sought "racial transition." While Civil Rights era decisions focused on "reckoning" with the legacies of racism, more recent decisions have prioritized "distancing" the United States of today from its antebellum and Jim Crow histories. With this shift, civil rights measures that were once deemed necessary and urgent have been declared inappropriate and outdated. By rereading opinions concerning school desegregation, voting rights, affirmative action, and disparate impact in terms of reckoning and distancing, this Article provides key insights into racial equality law's history as well as a glimpse into its likely future under the Roberts Court.

Because both reckoning and distancing approaches claim to advance transition, this Article evaluates these approaches from the perspective of transitional justice, a field that helps societies to overcome histories of oppression. This analysis highlights how the Supreme Court's inadequate treatment of transitional justice values (accountability, redress, non-repetition, and reconciliation) has inhibited America's transition from

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white supremacy. Transitional justice theory further offers a novel account of judicial disagreements and independent criteria for deciding which claims about transition should have purchase.

As protestors demand a reckoning with America's legacies of racism, the Roberts Court appears poised to leave the past behind. A distancing jurisprudence limits not just what the Court sees as constitutionally required, but what it sees as constitutionally permissible in the pursuit of transition. This Article considers how advocates can seek to reorient race jurisprudence toward greater racial reckoning, while simultaneously pursuing reckoning through other means.

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"[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."

—Justice Ruth Bader Ginsburg (2003)[1]

"Nearly 50 years later, things have changed dramatically."

—Chief Justice John G. Roberts, Jr. (2013)[2]

INTRODUCTION

The United States is a nation in transition, struggling to surmount its racist past.[3] After two and a half centuries of indenture and slavery (1619–

1. Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).
2. Shelby County v. Holder, 570 U.S. 529, 547 (2013).
3. This Article focuses on anti-Black racism because of its historical and contemporary significance to the United States. Historian Nell Irvin Painter explains that the construction of race in

1865), Reconstruction (1865–1877) made promises of equality and enfranchisement that were never realized.[4] A century of Jim Crow ensued (1877–1960s), with widespread racial violence and racist laws so oppressive that they became a model for Hitler's Germany.[5] With the Civil Rights Movement and the Second Reconstruction (1950s–1968), the nation again attempted to address abuses against Black people and other racial minorities.[6] Yet, despite the important gains of this era, civil rights for minority groups were met with massive resistance and a long period of racial retrenchment that continues to this day.[7]

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the United States was created through a black/white binary and that "[this] fundamental black/white binary endures, even though the category of whiteness . . . effectively expands." NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 396 (2010). At the same time, it is necessary to grapple with the treatment of other racialized groups, including Indigenous/Native Americans, Latinx/Chicanx Americans, and Asian Americans, in order to redress the past, reimagine the future, and build cross-racial solidarity. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019). While the racial equality opinions analyzed here are principally concerned with African Americans, many address other racial minorities. Future works may build upon this analysis by engaging additional histories and bodies of law such as the Cherokee Cases, the Chinese Exclusion Cases, and the Insular Cases. *See, e.g.*, Blackhawk, *supra* at 1820–25 (discussing the Cherokee Cases); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003) (discussing the Chinese Exclusion Cases); Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, YALE L.J.F. (Nov. 2, 2020), https://www.yalelawjournal.org/pdf/RanaEssay_fiqm5kch.pdf [https://perma.cc/QL7G-8YPU] (discussing the Insular Cases). Scholars may also develop transitional accounts centered on the treatment of women, LGBTQ+ people, or other marginalized communities in the United States. For accounts drawing links between the struggle for civil rights on the basis of race and the struggle of civil rights on the basis of gender, see, for example, Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2014).

4. *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); STEPHANIE M. H. CAMP, CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH (2004); W. E. B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 (1935); JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (9th ed. 2010); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997).

5. JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2017). *See generally* GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920 (1996); EVELYN BROOKS HIGGINBOTHAM, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880–1920 (1993); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

6. *See generally* Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); CHARLES M. PAYNE, I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE (1995).

7. *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); IAN

The Supreme Court has played a leading part in this transition story. For much of its history, the Court's decisions openly enshrined white supremacy.[8] However, particularly since its 1954 decision in *Brown v. Board of Education*,[9] transitional perspectives have shaped the Court's race jurisprudence.[10] Justices across the political spectrum ground arguments in the need to overcome racial wrongdoings and divisions. Recent decisions limiting civil rights, like *Parents Involved v. Seattle*[11] and *Shelby County v. Holder*,[12] are as steeped in transitional reasoning as the landmark decision in *Brown*, although their underlying theories of transition are quite different.

Legal scholarship has yet to focus on these different theories of transition, despite their significance for which wrongs are redressed and which remedies are deemed legitimate. This Article uncovers two main ways that the Supreme Court has sought *racial transition—reckoning with* and *distancing from* the past. Because these two frameworks are more dynamic than the prevailing theories of equal protection, they allow us to see race jurisprudence in a new light.[13]

In the Civil Rights era, the Supreme Court enforced and extended measures designed to address the legacies of historical racism. But with the civil rights retrenchment and conservative appointments starting in the late 1960s, the Court's decisions moved from reckoning toward distancing. In trying to disassociate the United States of today from its antebellum and Jim Crow histories, the Court denounced blatant forms of racism from the past while discounting the racism present today and denying continuities between past and present racism. The Court also became preoccupied with identifying a discrete end point of the transition process—the point at which America's links to its racist past would be deemed severed once and for all

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HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA (2001).

8. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896).

9. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

10. As a result, some of the Court's most important debates about racial *equality* are better understood as debates about *transition*. For instance: Does affirmative action help or hinder transition to a society free of race-based discrimination? Are desegregation plans and voter protections as necessary and appropriate today as when they were first introduced?

11. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

12. Shelby County v. Holder, 570 U.S. 529 (2013).

13. Racial equality opinions are said to reason from two main theories of equal protection: "anti-classification" theory concerned with individual colorblindness and "anti-subordination" theory concerned with group inequalities. *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003). Distancing and reckoning frameworks enrich and extend beyond these theories by weaving in different interpretations of historical memory, understandings of current circumstances, and ideals for the future. *See infra* Part II.A.

and "extraordinary" policies such as voter protections and affirmative action would be cast aside.

With this shift from reckoning to distancing, civil rights measures that were once deemed necessary and urgent were declared inappropriate and outdated—and even antithetical to the project of ensuring a racially just society. Today, this distancing approach dominates the jurisprudence of an increasingly conservative Court, largely relegating reckoning approaches to liberal dissents.[14]

These trends are likely to accelerate with a durable conservative majority on the Supreme Court.[15] The Roberts Court can be expected to use distancing arguments to depart from racial equality precedent, to discontinue or weaken current measures that redress racial harms, and to inhibit the introduction of similar measures in the future. This distancing jurisprudence would constrain efforts to address racial inequality through other channels such as school integration plans, voting rights legislation, affirmative action programs, and disparate impact assessments. How the Court interprets transition thus has consequences not only for the development of legal doctrine, but also for how law affects social spheres from education to housing. This Article offers guidance on how racial justice advocates can seek to reorient a predominantly distancing jurisprudence toward greater racial reckoning, while simultaneously pursuing reckoning through other means.

Furthermore, this Article's *transitional justice* lens places the Supreme Court's efforts within a global conversation. Transitional justice is a field of practice and research concerned with how societies move from oppression and violence toward a more just and peaceful order.[16]

14. Leading scholars have identified some of these features in specific lines of cases without synthesizing trends across bodies of law or theorizing jurisprudential approaches in transitional terms. *See, e.g.*, Kimberlé W. Crenshaw, *"Framing Affirmative Action"*, 105 MICH. L. REV. FIRST IMPRESSIONS 123, 128 (2007) (arguing that "the racial past" in affirmative action opinions "has been pictured as a distant reality disconnected from the present"); Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825, 1826 (2017) (observing with respect to desegregation that opinions "obscure the relationship between present-day racial inequality and past discrimination").

15. This is an account of what could happen given a politically conservative Supreme Court; this account is therefore contingent on the Court continuing to be at least as conservative as the present Court for the foreseeable future, and functioning as it has in recent decades. However, the future of the Court itself is uncertain; Joseph Biden has indicated that he will create a commission to study judicial reform. Alicia Bannon & Zachary Laub, *Court Reform Gets New Attention*, BRENNAN CTR. (Dec. 30, 2020), https://www.brennancenter.org/our-work/research-reports/court-reform-gets-new-attention [https://perma.cc/8Y86-8E9L]. The implementation of either "personnel" or "disempowering" reforms could dramatically change the Court in the coming years. *See* Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. (forthcoming 2021).

16. Transitional justice *practice* involves developing and implementing processes to overcome systematic human rights abuses. Most often, transitional justice is associated with measures such as truth

Transitional justice focuses on promoting accountability for wrongdoings,[17] opening political and social space to marginalized people,[18] providing redress for and ensuring non-repetition of injustices,[19] and facilitating societal reconciliation by alleviating negative emotions[20] and transforming individual and communal identities,[21] to name a few key concerns. Societies pursue these concerns through such measures as truth commissions and reparations programs, with courts often playing a central role.

While the United States has sought a racial transition from slavery and Jim Crow, it has largely eschewed transitional justice in response to racist human rights violations. The United States has advocated truth commissions and other transitional justice measures abroad, yet neglected the need for such measures at home.[22] Recently, the tragic killings of Breonna Taylor, Tony McDade, George Floyd, and countless other Black people have led to increased calls for transitional justice in this country, which is a marked change from the norm of the United States focusing on transitional justice in other countries.[23]

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commissions, criminal prosecutions, reparations programs, and institutional reforms. *See generally What is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/about/transitional-justice [https://perma.cc/6Q82-JV2L]. Transitional justice *research* contemplates questions of "transition" (what constitutes a transition and how a transition should be accomplished) and those of "justice" (what justice requires and what shape justice should take). *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS 31 (2012) [hereinafter *Theorizing Transitional Justice*]; Laurel E. Fletcher & Harvey M. Weinstein, *Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals*, 7 J. HUM. RTS. PRAC. 177 (2015); *see also infra* note 23.

17. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449 (1990); Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997).

18. Alex Jeffrey, *The Political Geographies of Transitional Justice*, 36 TRANSACTIONS INST. BRIT. GEOGRAPHERS 344 (2011).

19. Naomi Roht-Arriaza, *Measures of Non-repetition in Transitional Justice: The Missing Link?*, *in* FROM TRANSITIONAL TO TRANSFORMATIVE JUSTICE (Paul Gready & Simon Robins eds., 2016) [hereinafter *Measures of Non-repetition in Transitional Justice*].

20. MIHAELA MIHAI, NEGATIVE EMOTIONS AND TRANSITIONAL JUSTICE (2016).

21. PAIGE ARTHUR, IDENTITIES IN TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES (Paige Arthur ed., 2010); Nevin T. Aiken, *Rethinking Reconciliation in Divided Societies: A Social Learning Theory of Transitional Justice*, in TRANSITIONAL JUSTICE THEORIES 40, 49 (Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun & Friederike Mieth eds., 2013).

22. For decades, U.S.-based discussions of transitional justice have gazed outward internationally while overlooking the legacies of white supremacy at home. Yuvraj Joshi, *Does Transitional Justice Belong in the United States?*, JUST SEC. (July 13, 2020), https://www.justsecurity.org/71372/does-transitional-justice-belong-in-the-united-states/ [https://perma.cc/J9GW-9EZT] [hereinafter *Does Transitional Justice Belong in the United States?*]. In limited ways, the United States has employed its own versions of transitional justice mechanisms, such as affirmative action. *See generally* Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1 [hereinafter *Affirmative Action as Transitional Justice*].

23. Transitional justice in the United States has gained prominence in two senses. First, racial justice protestors and advocates have reissued longstanding demands that are fundamentally calling for transitional justice. *See Does Transitional Justice Belong in the United States?*, *supra* note 22. Second,

As the United States continues to struggle with the perpetuation of systemic racism in different forms, a transitional justice assessment of Supreme Court decision-making is urgently needed. This assessment reveals the Court's inadequate treatment of transitional justice values (accountability, redress, non-repetition, and reconciliation) that have been considered crucial in other societies.[24] Inadequate attention to these values may be an important reason why the United States has struggled to surmount its racist past. Transitional justice theory provides a basis not only for evaluating American transitional approaches, but also for improving how courts and other segments of society pursue these values.

This Article's transitional perspective thus provides a richer understanding of current racial equality doctrine, insights into its history and

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practitioners and researchers working within the field of transitional justice have directed increased attention to the United States. For example, the International Center for Transitional Justice, which has been based in New York City since 2001, is said to be preparing its first U.S.-focused report. *See* Fernando Travesí, *Here We Are Again: Will Racist Violence in the United States Ever End?*, INT'L CTR. FOR TRANSITIONAL JUST. (June 5, 2020), https://www.ictj.org/news/here-we-are-again-will-racist-violence-united-states-ever-end [https://perma.cc/R462-XUBY]; Jack Herrera, *What Would 'Transitional Justice' Look Like in the United States?*, PRISM (Dec. 9, 2020), https://www.prismreports.org/article/2020/12/9/what-would-transitional-justice-look-like-in-the-united-states.

Even before the most recent protests, a number of advocates and scholars had called for transitional justice approaches in the United States. For instance, Sherrilyn Ifill's 2007 book, *On the Courthouse Lawn*, elaborated transitional justice principles for American struggles with racism. SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY XV (rev. ed. 2018) [hereinafter *On the Courthouse Lawn*]. Ta-Nehisi Coates' 2014 *Atlantic* article reminded Americans that broader reparations are still pending more than two centuries after freedwoman Belinda Royall successfully petitioned for a pension from her former enslaver's estate. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/E7T3-6M7F]. Religion professor Anthony Bradley's 2018 essay applied the "Chicago Principles of Post-conflict Justice" to individual American states. Anthony Bradley, *Finally Healing the Wounds of Jim Crow*, FATHOM MAG. (July 11, 2018), https://www.fathommag.com/stories/finally-healing-the-wounds-of-jim-crow [https://perma.cc/4AQF-HS4R24]. Yet, even as the United States government endorsed economic reparations, truth commissions, and memorial building for countries transitioning out of repressive regimes, it ignored transitional justice at home. *See Transitional Justice Overview*, U.S. DEP'T OF STATE (May 16, 2016), https://2009-2017.state.gov/documents/organization/257771.pdf [https://perma.cc/D2AZ-6CEY]; Anand Giridharadas, *Turning the Call for Racial Reckonings Back on the U.S.*, N.Y. TIMES (July 18, 2016), https://www.nytimes.com/2016/07/19/us/truth-reconciliation-commission-slavery.html [https://perma.cc/2387-M4BF].

This Article looks to transitional justice for descriptive and normative guidance to better understand U.S. Supreme Court jurisprudence. *See generally Affirmative Action as Transitional Justice*, *supra* note 22. It draws on transitional justice research that not only describes various countries' transitional approaches, but also identifies promises and limitations of transitional approaches and distinguishes between desirable and undesirable transitional justice. For critical research on transitional justice, see, for example, Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 J.L. SOC'Y 265 (2008); Kieran McEvoy & Lorna McGregor, *Transitional Justice from Below: An Agenda for Research, Policy and Praxis*, in TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 1 (Kieran McEvoy & Lorna McGregor eds., 2008); Augustine SJ Park, *Settler Colonialism, Decolonization and Radicalizing Transitional Justice*, 16 INT'L J. TRANSITIONAL JUST. 260 (2020).

24. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (Aug. 23, 2004).

likely future, independent criteria for critiquing it, and new ideas for reorienting it. At the same time, court cases serve as valuable case studies for thinking about the racial transition project. Analyzing legal opinions allows us to recognize the Supreme Court as one node in a broader network of agents working toward and against particular kinds of transition. Once we understand how the Court pursues racial transition, we will be in a better position to think about the various spheres and actors involved in this project, the different paths available to transition, and the values at stake.

The Article proceeds as follows. Part I presents a transitional account of racial justice and injustice in the United States, rebutting the argument that the United States is non-transitional. It briefly describes the transition from slavery to the present day and the value of viewing American society and jurisprudence from a transitional perspective.

Part II develops the frameworks of reckoning and distancing to analyze Supreme Court opinions in four areas: school desegregation, voting rights, affirmative action, and disparate impact. The Court in these cases not only makes judgments about racial equality, but offers narratives about the racial past, present, and future and theories of racial change. Rereading landmark cases through the prism of reckoning and distancing reveals how judges have understood racial transition and how judicial accounts of transition have evolved over time. Applying this analysis to the Court's recent decision in *Ramos v. Louisiana* highlights how conservative Justices differ in their transitional approaches not only from their liberal colleagues, but also from one another.

Part III uses transitional justice theory to evaluate the Supreme Court's decision-making around race. This analysis indicates that the Court has underestimated key transitional justice values and that disagreements within race jurisprudence reflect struggles over the ownership of transition and over America's "unmastered past."[25] It further points to how transitional justice frameworks can be used to evaluate the competing claims emanating from the Court and to decide which claims about transition should have purchase.

While the Supreme Court may not be the most important vehicle for racial transition, it is the focus of this Article because its interpretations have far-reaching implications for transition efforts elsewhere. America's transition from white supremacy has been constrained not just by the political decisions of its leaders, but also by the legal decisions of its judges. As protestors demand a reckoning with America's legacies of racism, the Roberts Court seems poised to leave the past behind by declaring that the time for reckoning is over. This distancing approach would complicate an

25. *See* text accompanying *infra* notes 422–424.

already challenging legal and political landscape for transition and inevitably impact ongoing efforts to achieve structural change.[26]

This Article therefore concludes by considering the role that scholars, reformers, decision-makers, and publics can play in the continuing pursuit of transition. Deeper engagement with the idea of racial transition can enable these actors to align laws and policies surrounding race with international human rights norms and American civil rights values.

I. TRANSITION AND THE UNITED STATES

This Article considers the United States as a transitional society, one that like many others is struggling to leave conflict and oppression behind.[27] The United States has sought to move beyond a racial past marked by deep histories and structures of racial domination; it has striven toward a racial future that is different from its racial past, and it has experienced an interim period of transition that is neither exactly the past, nor yet the desired better future.[28]

Despite this, the United States is seldom characterized as a transitional society. American racial exceptionalism depicts this country as the leader in the global struggle for liberty whose own march to racial equality was completed long ago.[29] The United States is exempted from political and legal considerations applied to other transitional societies, despite its centuries-long struggle with state-sponsored racial violence.[30] However, the enduring[31]—and increasingly international[32]—criticisms of the United

26. Ongoing deliberations about whether and how to "save" the Court must account for the ways in which the Court can halt or reverse racial transition. For arguments to "save" the Court, see Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019). For arguments to "disarm" or "disempower" the Court, see Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J. F. 93 (Nov. 4, 2019); Doerfler & Moyn, *supra* note 15.

27. Some scholars have studied the move beyond slavery and segregation in explicitly transitional terms. *See, e.g.*, Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728 (1986); ROBERT MEISTER, AFTER EVIL: A POLITICS OF HUMAN RIGHTS (2010); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1337 n.165 (2011) [hereinafter *From Colorblindness to Antibalkanization*]; TEITEL, *supra* note 16, at 141–43; Andrew Valls, *Racial Justice as Transitional Justice*, 36 POLITY 53 (2003).

28. *See* Joshi, *Affirmative Action as Transitional Justice*, *supra* note 22, at 5.

29. Nicholas De Genova, *Antiterrorism, Race, and the New Frontier: American Exceptionalism, Imperial Multiculturalism, and the Global Security State*, 17 IDENTITIES 613, 621–26 (2010).

30. *Does Transitional Justice Belong in the United States?*, *supra* note 22; *see infra* Part I.B.2.

31. JAMES BALDWIN, THE FIRE NEXT TIME 115 (1963) ("The American Negro has the great advantage of having never believed the collection of myths to which white Americans cling: that their ancestors were all freedom-loving heroes, that they were born in the greatest country the world has ever seen . . . .").

32. *See, e.g.*, *UN Experts Condemn Modern-day Racial Terror Lynchings in US and Call for Systemic Reform and Justice*, UN NEWS CTR. (June 5, 2020), https://www.ohchr.org/EN/NewsEvents/P

States' failures on racism should lead us to consider this country alongside others with conflictual histories.

This Part offers a transitional account of racial justice and injustice in the United States. It briefly describes America's transition from slavery to the present day, underscoring steps forward and back. This overview provides essential historical background[33] and makes original contributions by framing Reconstruction and Civil Rights era processes as early forms of transitional justice.[34] With this history in mind, this Part goes on to explain the value of a transitional analysis—one that explicitly recognizes the United States' struggle to surmount its racist past—and addresses potential objections to such an analysis. This discussion is the foundation upon which this Article later builds a transitional analysis of American race jurisprudence.

A. Racisms, Reconstructions, Retrenchments

Slavery has been called America's original sin, one that still haunts the nation. Starting in 1619, 12.5 million Africans were captured and brought across the Atlantic Ocean; 400,000 of them were sold in the United States.[35] Slavery survived under the Constitution of 1789, and its underlying ideology of innate Black inferiority and difference permeated American life.[36] The Supreme Court further legitimated this racist ideology in its 1857 decision *Dred Scott v. Sandford*.[37]

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ages/DisplayNews.aspx?NewsID=25933 [https://perma.cc/QL2T-DTFP]; E. Tendayi Achiume, *The United States' Racial Justice Problem Is Also an International Human Rights Law Problem*, JUST SEC. (June 5, 2020), https://www.justsecurity.org/70589/the-united-states-racial-justice-problem-is-also-an-international-human-rights-law-problem/ [https://perma.cc/H6QX-2XUH]; *Families, Rights Groups Demand U.N. Investigate U.S. Police Killings, Protest*, ACLU (June 9, 2020), https://www.aclu.org/press-releases/families-rights-groups-demand-un-investigate-us-police-brutality-protest-suppression [https://perma.cc/KHK7-THQP].

33. Such accounts are developed far more extensively in historical and political science literatures. *See supra* notes 4–7. In particular, American political development scholarship on "racial orderings" and "racial formations" has a distinctly transitional tenor. *See generally* Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75 (2005); Joseph Lowndes, Julie Novkov & Dorian T. Warren, *Race and American Political Development*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 1 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008).

34. The claim here is not that the United States has implemented something called "transitional justice," but that prior U.S. processes shared functional similarities with processes that are today recognized as transitional justice.

35. *Trans-Atlantic Slave Trade Database*, SLAVE VOYAGES https://www.slavevoyages.org/voyage/database. For narratives of formerly enslaved people, see LIBRARY OF CONGRESS, *Born in Slavery: Slave Narratives from the Federal Writers' Project, 1936 to 1938*, https://www.loc.gov/collections/slave-narratives-from-the-federal-writers-project-1936-to-1938/about-this-collection/ [https://perma.cc/X898-QFEL].

36. DAVID WALDSTREICHER, SLAVERY'S CONSTITUTION: FROM REVOLUTION TO RATIFICATION (2009).

37. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 393 (1857).

Following the Civil War, Reconstruction attempted to remedy these wrongs. In addition to adopting three constitutional amendments, Congress enacted legislation including the 1866 Civil Rights Act, which was the nation's first federal civil rights law, and the 1865 and 1866 Freedmen's Bureau Acts, which established the nation's first federal welfare agency.[38] From 1866 to 1870, the Freedmen's Bureau opened schools that educated approximately 100,000 students each year.[39] It also provided funding, land, and other assistance to help create colleges and universities for the education of Black students.[40] These policies, and others of the Reconstruction era such as the promise of 400,000 acres of land for Black resettlement,[41] would today be recognized as efforts at transitional justice.[42]

However, Reconstruction lasted for only twelve years. A loophole in the Thirteenth Amendment's abolition of slavery permitted the forced labor of those convicted of a crime, allowing Southern states to tie recently emancipated people to their former enslavers through "Black Codes" that criminalized such "offenses" as loitering and vagrancy.[43] Adding insult to injury, Congress voted to close the Freedmen's Bureau in 1872, after which most of its schools closed down.[44] Five years later, Rutherford B. Hayes gained the presidency by agreeing to withdraw federal troops from the South, bringing Reconstruction to a close. Reconstruction thus left emancipated people with very limited rights, even fewer resources, and the additional pain of unfulfilled promises.

With the end of Reconstruction came a new wave of white supremacist practices.[45] Although Jim Crow laws and policies were concentrated in the South, racism and segregation were present nationwide.[46] Miscegenation

38. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 780 (1985); DU BOIS, *supra* note 4, at 583–84.

39. Schnapper, *supra* note 38, at 781.

40. *Id.* The Freedmen's Bureau did, however, cooperate with the Black Codes by helping place Black "vagrants" into contractual labor. THEODORE BRANTNER WILSON, THE BLACK CODES OF THE SOUTH 58 (1965).

41. Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule'*, THE ROOT (Jan. 7, 2013, 12:24 AM), https://www.theroot.com/the-truth-behind-40-acres-and-a-mule-1790894780 [https://perma.cc/3647-8EBK]; DU BOIS, *supra* note 4, at 537–38.

42. Bernadette Atuahene, *Property and Transitional Justice*, 58 UCLA L. REV. DISCOURSE 65, 86 (2010).

43. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1529 (2019); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105–10 (2019).

44. Schnapper, *supra* note 38, at 783. W. E. B. Du Bois would later write: "A Freedmen's Bureau established for ten, twenty, or forty years, with a careful distribution of land and capital and a system of education for the children, might have prevented such an extension of slavery. But the country would not listen to such a comprehensive plan." W. E. B. DU BOIS, THE NEGRO 211 (1915).

45. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

46. PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1950); DAVISON M. DOUGLAS, JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865–1954 (2005).

laws enforced segregation in marriage and intimate relationships throughout most of the country.[47] Segregation, like slavery before it, perpetuated the idea that non-Whites were different and inferior to Whites. In its 1896 decision in *Plessy v. Ferguson*, the Supreme Court ratified racial segregation under the "separate but equal" principle.[48]

A wide array of state laws and practices, including ostensibly "race-neutral" ones, disenfranchised Black people and other racial minorities.[49] Lynching, rape, and other forms of violence were inflicted with impunity to assert white supremacy.[50] Sherrilyn Ifill observes that "even those [Whites] who did not actively participate in lynching . . . derived benefits from the willingness of their more aggressive neighbors to tend to the more unsavory and violent aspects of maintaining white supremacy."[51]

The Second Reconstruction attempted to complete the unfinished work of Reconstruction.[52] Segregationists responded to *Brown v. Board of Education* by launching a "massive resistance" and signing the "Southern Manifesto," which voiced opposition to the decision.[53] Despite this, Congress enacted the 1964 Civil Rights Act (passed following protests throughout the South), which barred discrimination in federally supported programs;[54] the 1965 Voting Rights Act (passed after the historic marches from Selma to Montgomery), which aimed to remove barriers to voting;[55]

47. IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892); PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2010).

48. Plessy v. Ferguson, 163 U.S. 537, 551–52 (1896).

49. For more about these invidious forms of indirection, see KLARMAN, *supra* note 5, at 28–36, 52–55 (discussing disenfranchisement measures such as grandfather clauses, literacy tests, and poll taxes during the *Plessy* era).

50. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* (2015), https://time.com/wp-content/uploads/2015/02/eji_lynching_in_america_summary.pdf [https://perma.cc/V4ET-ERVP]; AMY LOUISE WOOD, LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940 (2009); Danielle L. McGuire, *"It Was Like All of Us Had Been Raped": Sexual Violence, Community Mobilization, and the African American Freedom Struggle*, 91 J. AM. HIST. 906, 907 (2004); WELLS, *supra* note 47.

51. *On the Courthouse Lawn*, *supra* note 23, at 65.

52. There were other forces driving civil rights progress, including the United States' position in the world. Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW 5, 12 (1976); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 16 (2000).

53. Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from* Brown *to* Grutter, 7 U. PA. J. CONST. L. 809, 811–20 (2005); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1127 (2014).

54. Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 MICH. J.L. REFORM 397 (1979).

55. BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT (2007).

and the 1968 Fair Housing Act (passed amid protests following Dr. King's assassination), which prohibited discrimination in the housing market.[56]

The Civil Rights era saw deliberative processes that might today be labeled as transitional justice. For instance, the 1966 White House Conference on Civil Rights brought together over 2,400 participants and proposed reforms relating to economic security and welfare, education, housing, and administration of justice.[57] In 1968, the National Advisory Commission on Civil Disorders, called the Kerner Commission, cautioned: "Our Nation is moving toward two societies, one black, one white—separate and unequal."[58] These reports proposed holistic approaches to societal transition that find support in contemporary transitional justice theory.[59] However, Lyndon B. Johnson shelved the Kerner Report's recommendations, avoiding a systematic racial reckoning and prolonging racial disparities and discontentment that continue to this day.[60]

Ultimately, the Second Reconstruction yielded to racial retrenchment. The "Southern strategy" to attract Southern White Democrats to the Republican party used coded racist rhetoric, helping elect Richard Nixon in 1968 and 1972 and Ronald Reagan in 1980.[61] Their policies and appointments to the Supreme Court halted and reversed many of the gains made during the Civil Rights era.[62] This backtrack on racial equity took various forms, from the resegregation of public schools after being released from court-mandated desegregation[63] to the development of punitive crime policy that "both responded to and moved the agenda on civil rights."[64]

Despite a long period of racial retrenchment, the pursuit of racial transition continues. Recent waves of anti-racist protests have resurfaced demands for police reform, defunding, and abolition to address police

56. Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149, 149 (1969).

57. "TO FULFILL THESE RIGHTS," WHITE HOUSE CONFERENCE ON CIVIL RIGHTS (1966), https://eric.ed.gov/?id=ED032354; *1950 to Present*, OX. AFR. AM. STUD. CTR., https://oxfordaasc.com/page/1950-to-present [https://perma.cc/8LSX-WBKQ].

58. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

59. *See infra* note 81.

60. On the recent killings of Black people and the racialized impact of and response to COVID-19, see *infra* note 473.

61. ANGIE MAXWELL & TODD SHIELDS, THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS 37 (2019).

62. Crenshaw, *supra* note 7, at 1337–39; ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA 56–65 (2020).

63. Sean F. Reardon, Elena Tej Grewal, Demetra Kalogrides & Erica Greenberg, Brown *Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL'Y ANALYSIS & MGMT. 876, 877 (2012).

64. Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 265 (2007); *see also* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

violence, truth and reconciliation processes to acknowledge historical and ongoing injustices, and reparations for decades and centuries of racist oppression.[65] Memorials and museums dedicated to the histories of racial violence have been created.[66] Some U.S. cities and states have initiated truth, justice, and reconciliation processes, as well as reparations programs.[67] Universities and theological seminaries have offered limited reparations to the descendants of enslaved people from whom they profited.[68] However, attempts to secure broader reparations for slavery, Jim Crow practices, and ongoing discrimination have stalled.[69]

In short, racism did not end with the abolition of slavery and Jim Crow—it endured and evolved. Nor was racial transition completed with the First and Second Reconstructions—it was postponed and prolonged. In this

65. *Does Transitional Justice Belong in the United States?*, *supra* note 22.

66. Keith Schneider, *Revitalizing Montgomery as It Embraces Its Past*, N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/business/montgomery-museums-civil-rights.html [https://perma.cc/Q6HV-TZ45]; A. G. Sulzberger, *As Survivors Dwindle, Tulsa Confronts Past*, N.Y. TIMES (June 19, 2011), https://www.nytimes.com/2011/06/20/us/20tulsa.html [https://perma.cc/3CXQ-9PXH].

67. GREENSBORO TRUTH & RECONCILIATION COMM'N, GREENSBORO TRUTH & RECONCILIATION COMMISSION REPORT 2 (May 25, 2006), http://www.greensborotrc.org/exec_summary.pdf [https://perma.cc/6VJK-36CC]; ILL. TORTURE INQUIRY & RELIEF COMM'N, TORTURE INQUIRY AND RELIEF COMMISSION DECISIONS, https://www2.illinois.gov/sites/tirc/Pages/TIRCDecision.aspx [https://perma.cc/T4LL-UJGC]; Nicholas Creary, *Md. Lynching Commission Offers Chance to Investigate, Atone*, BALT. SUN (Apr. 29, 2019, 10:55 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0430-lynching-commission-20190429-story.html [https://perma.cc/VB63-4CEP]; Tom Hays, *NYC Mayor Forms Race Commission, Sets Juneteenth Holiday*, ABC NEWS (June 19, 2020, 1:16 PM), https://abcnews.go.com/US/wireStory/nyc-mayor-forms-race-commission-sets-juneteenth-holiday-71346889 [https://perma.cc/NDC9-7TXZ]; Andy Fies, *Evanston, Illinois, Finds Innovative Solution to Funding Reparations: Marijuana Sales Taxes*, ABC NEWS (July 19, 2020, 10:03 AM), https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707 [https://perma.cc/Q6N2-BNFR]; Ovetta Wiggins, *Landmark Commission Begins Tackling 'Unconfronted Truth' of Racially Motivated Lynchings in Md.*, WASH. POST (Sept. 18, 2020, 5:49 PM), https://www.washingtonpost.com/local/md-politics/maryland-lynching-report/2020/09/18/ba8655e8-f8fa-11ea-a275-1a2c2d36e1f1_story.html [https://perma.cc/T63 6-LJZL]; Zachary Oren Smith, *Iowa City Council Nearly Unanimously Votes to Form Commission Charged to Help End Systemic Racism*, IOWA CITY PRESS-CITIZEN (Sept. 16, 2020, 2:26 PM), https://www.press-citizen.com/story/news/2020/09/16/iowa-city-council-vote-end-systemic-racism-truth-reconciliation-commission/5813294002/ [https://perma.cc/2CQL-4VW2]; Neil Vigdor, *North Carolina City Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/us/reparations-asheville-nc.html [https://perma.cc/4S2L-JHAF]; Scott Merzback, *Amherst Pursues Reparations to Black Residents*, DAILY HAMPSHIRE GAZETTE (Dec. 8, 2020, 7:56 PM), https://www.gazettenet.com/Amherst-adopts-resolution-in-support-of-reparations-for-Black-residents-37677477; David Crary, *More US Churches Commit to Racism-linked Reparations*, ABC NEWS (Dec. 13, 2020, 9:09 AM), https://abcnews.go.com/US/wireStory/us-churches-commit-racism-linked-reparations-74701219 [https://perma.cc/YNX3-LDT5].

68. Rachel L. Swarns, *Is Georgetown's $400,000-a-Year Plan to Aid Slave Descendants Enough?*, N.Y. TIMES (Oct. 30, 2019), https://www.nytimes.com/2019/10/30/us/georgetown-slavery-reparations.html [https://perma.cc/XP2A-3JNP]; Ed Shanahan, *$27 Million for Reparations Over Slave Ties Pledged by Seminary*, N.Y. TIMES (Oct. 21, 2019), https://www.nytimes.com/2019/10/21/nyregion/princeton-seminary-slavery-reparations.html [https://perma.cc/Y2W5-SGHF].

69. From 1989 until his retirement in 2017, Rep. John Conyers, Jr., introduced a bill (H.R. 40) in every Congress to study reparations for slavery. H.R. 40 is still pending. *See* Coates, *supra* note 23.

Article, recognizing this transitional context and how it has shaped the law helps us to better understand several decades of American jurisprudence.

B. Toward a Transitional Analysis of American Jurisprudence

1. Benefits of a Transitional Analysis

This Article demonstrates how transitional concerns permeate a series of racial equality debates that Americans are having. However, a number of factors have prevented widespread application of a transitional analysis to the United States. The United States' centuries of racist violence and multiple attempts at redemption do not lend themselves to simple transitional analysis. American exceptionalism presents the United States as a champion of liberty since its founding rather than a society rooted in white supremacy and settler colonialism.[70] Many Americans take democracy as a given instead of recognizing the development of democracy in this country as an ongoing and evolving process.[71] Furthermore, American legal debates have calcified around particular theories of equal protection that do not explicitly take transitional dynamics into account.[72]

However, as this Article shows, a transitional perspective is necessary to make sense of American race jurisprudence.[73] A polity committed to ridding itself of the vestiges of oppression *requires* an account of the past out of which it is emerging, the future it ought to pursue, the transition pathway between them, and the present stage of transition. Such a general theory is needed to make decisions about the legitimacy of various practices (what aspects of the past cannot be tolerated in the present?), to develop strategies (what is necessary to create a future distinct from the past?), and to determine progress (what of the past is safely behind and what is still present?).[74] U.S. Supreme Court decisions shape and are shaped by such transitional theories, yet the transitional bases of decisions are rarely acknowledged and sometimes even denied. The task of this Article is to

70. *See* text accompanying *supra* notes 29–32 (discussing American racial exceptionalism); *infra* note 321 (discussing America's creedal story).

71. DEMOCRATIZATION IN AMERICA: A COMPARATIVE-HISTORICAL ANALYSIS (Desmond King, Robert C. Lieberman, Gretchen Ritter & Laurence Whitehead eds., 2009).

72. *See supra* note 13.

73. *Affirmative Action as Transitional Justice*, *supra* note 22, at 37 (explaining why "[t]ransitional justice provides a better account of [American] affirmative action" jurisprudence than corrective justice and distributive justice).

74. *See generally* Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009) [hereinafter *How "Transitions" Reshaped Human Rights*].

tease out the existing theories of transition in racial equality opinions and to evaluate those theories in light of transitional justice insights.[75]

Rereading race jurisprudence in light of more global transitional justice theory places American approaches in dialogue with international norms and debates. For example, transitional justice values, such as accountability, redress, non-repetition, and reconciliation, have been considered crucial in other societies struggling to recover from conflict and oppression.[76] Understanding how these values are taken up in U.S. Supreme Court opinions is important because inadequate treatment of transitional concerns may be one reason why the United States has struggled to surmount racism. In addition to pursuing these values, transitional justice processes grapple with dilemmas that are endemic to periods of transition. One classic example is the "peace versus justice dilemma,"[77] which transitional justice approaches address by seeking to "reconcile legitimate claims for justice with equally legitimate claims for stability and social peace . . . ."[78] Recognizing transitional dilemmas is important because opinions resolving these dilemmas reveal judicial priorities such as alleviating white resentment over minority frustration,[79] or taking a "non-accusatory" stance over working toward accountability.[80]

75. The international field of transitional justice has paid little attention to the United States, despite the involvement of U.S.-based actors living in the aftermath of the Civil Rights Movement. Since its inception, the field has been more concerned with transitions to democracy—such as in Argentina and Chile as they emerged from dictatorships—than with transformations within "established" democracies. *Affirmative Action as Transitional Justice*, *supra* note 22, at 4. These features of transitional justice, coupled with a general reluctance to apply international human rights standards to the United States and to discuss U.S. civil rights as human rights, have further contributed to the underutilization of transitional frameworks in the United States. *See* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1947 (2002); CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003). This is unfortunate because insights from transitional justice can benefit the pursuit of racial transition in the United States. Transitional justice demonstrates that the centuries-long oppression of Black Americans is precisely the kind of massive human rights violation that necessitates systematic and ongoing redress. Moreover, it places the United States alongside other countries that have taken, or are in the process of taking, steps to address historical legacies of oppression. *See Does Transitional Justice Belong in the United States?*, *supra* note 22.

76. *See supra* notes 17–21; *see also* Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 98 (2008); Jon Elster, *Justice, Truth, Peace*, 51 NOMOS 78 (2012).

77. For an introduction to the peace versus justice dilemma, see Chandra Lekha Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 GLOBAL SOC'Y 579 (2007) and Cecilia Albin, *Peace Versus Justice—and Beyond*, *in* THE SAGE HANDBOOK OF CONFLICT RESOLUTION 580–594 (Jacob Bercovitch, Victor Kremenyuk & I. William Zartman eds., 2008).

78. *How "Transitions" Reshaped Human Rights*, *supra* note 74, at 323.

79. I develop a fuller account of America's peace versus justice dilemmas in other work. *See* Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. (forthcoming 2022) [hereinafter *Racial Justice and Peace*].

80. Memorandum from Chief Justice Earl Warren to the Members of the United States Supreme Court (May 7, 1954) (suggesting that the *Brown* opinion should be "above all, non-accusatory").

Engagement with transitional justice generates many new insights about American race jurisprudence. For example, transitional justice highlights the interplay between individual laws and policies as elements of an integrated transition process.[81] Not only has the U.S. Supreme Court failed to adopt such an approach, it has actively impeded an integrated transition process, for example, by striking down policies designed to address the relationship between residential and educational segregation. Likewise, given transitional justice's emphasis on historical and collective memory,[82] it is important to consider how the Supreme Court remembers (and misremembers) history—what it passively overlooks and what it actively chooses to forget. This analysis points to the Court's limited recognition of America's racist history and its role in perpetuating America's "unmastered past" as impediments to transition.[83]

The transitional justice-inflected approach developed in this Article thus gives visibility to a broader range of considerations that shape race jurisprudence, while also shedding light on the particular and limited ways in which the Supreme Court has understood transition. Using this approach, scholars of racial discrimination can undertake a more multifaceted and internationally contextualized analysis of race decisions. At the same time, scholars of transitional justice can apply their concerns, which are typically directed at government interventions, to a jurisprudential analysis.

2. Objections to a Transitional Analysis

Despite these benefits, some readers might object to this Article's transitional analysis of American society and jurisprudence.[84] In regard to American society, one potential objection may consider a transitional analysis inapposite because the United States is an "established" democracy.[85] For example, some scholars like Eric Posner and Adrian

81. Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFF. 17, 19 (2006) (proposing "a holistic approach to transitional justice"); *Theorizing Transitional Justice*, *supra* note 16, at 34 (transitional justice measures "are not elements of a random list" but "[r]ather, they are parts of a whole"); Matiangai V.S. Sirleaf, *Beyond Truth and Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223, 233 (2014) (discussing the "mutually reinforcing effects" of "truth and punishment mechanisms"); Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980, 982 (2010) (empirically analyzing transitional justice mechanisms and "how they work in tandem" to promote democracy and human rights).

82. *How "Transitions" Reshaped Human Rights*, *supra* note 74, at 357–59.

83. *See* text accompanying *infra* notes 422–424.

84. Some of this discussion was excerpted and published elsewhere prior to the publication of this Article. *See Does Transitional Justice Belong in the United States?*, *supra* note 22.

85. Lundy & McGovern, *supra* note 23, at 273 ("transition" tends to be understood as transition to democracy); *How "Transitions" Reshaped Human Rights*, *supra* note 74, at 322, 325 (tracing the influence of "transition to democracy" in transitional justice).

Vermeule classify the United States as a "nontransitional societ[y]," even as they recognize that "consolidated liberal democracies" (such as the United States) "must deal with the problems of their own, albeit smaller-scale, transitions."[86] Yet, if even "consolidated" democracies undergo transitions, it is a misnomer to continue to classify them as "nontransitional."

This posture rests on both an overestimation of American democracy and an underestimation of the transition process: Democracy in the United States is not as "established" as commonly assumed, democratization is an ongoing rather than a one-time process, and transition is more than the maintenance of a democratic regime.

Claims that emphasize the United States' status as an "established" democracy ignore the denial of basic political rights and representation during slavery, up through Jim Crow, and into the present day.[87] Writers from W. E. B. Du Bois to Nikole Hannah-Jones have argued that the United States was not a real democracy before Black people moved it toward becoming one.[88] These arguments highlight how American democracy has been—and remains—incomplete, given the nation's lack of racial justice.

The incomplete nature of American democracy is evident when considering two tiers of liberal democracy: "restricted" democracy and "full" democracy. In a 2004 article, political scientists Francisco González and Desmond King drew this distinction and characterized the United States as a "restricted" democracy prior to the implementation of the 1964 Civil Rights Act and the 1965 Voting Rights Act.[89] Weakened civil and voting

86. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 769, 823 (2004).

87. For instance, in May 2020, a federal judge entered a permanent injunction against a Florida law that required people with serious criminal convictions to pay court fines as a condition for registering to vote, calling it "[a] tax by any other name." Jones v. DeSantis, 462 F. Supp. 3d 1196, 1234 (N.D. Fla. 2020). In July 2020, the Eleventh Circuit stayed the permanent injunction pending appeal, and the Supreme Court refused to vacate the stay, allowing Florida to enforce the law. Raysor v. DeSantis, 140 S. Ct. 2600 (2020).

88. DU BOIS, *supra* note 4; Nikole Hannah-Jones, *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html [https://perma.cc/F6A3-ARDR].

89. Francisco E. González & Desmond King, *The State and Democratization: The United States in Comparative Perspective*, 34 BRIT. J. POL. SCI. 193, 194 (2004). Pointing to the barriers that Black voters faced in Alabama in 1963, Dr. King similarly asked in his letter from Birmingham Jail: "Can any law enacted under such circumstances be considered democratically structured?" Martin Luther King, Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS. L. REV. 835, 841 (1993) [hereinafter *Birmingham Jail*].

Consistent with this transition from "restricted" to "full" democracy, scholars have referred to periods of major racial change in American history using terms indicative of regime change. For instance, historian Eric Foner and others have framed the Reconstruction era as America's "second founding." Foner, *supra* note 5. Political scientist Andrew Valls describes the Civil Rights era as a "regime transition" that "was woefully incomplete, and therefore unjust." Valls, *supra* note 27, at 71. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014) (tracing how the Civil Rights Movement transformed the U.S. Constitution).

rights and broader racial authoritarianism likely render the United States of today something less than a "full" democracy.[90]

An enduring feature of Black oppression in the United States has been a backsliding away from democracy. Transition is thus better conceptualized as the maintenance of democratic rule rather than only the attainment of a democratic regime.[91] This understanding is reflected in the "preclearance" requirement of the Voting Rights Act, which prevents public officials from using discriminatory voting practices on a continuous basis, thus supporting transition by sustaining democratic rule.[92]

Transition is not only a move toward democracy and the rule of law, but also charts a path toward peace and justice.[93] In his letter from Birmingham Jail, Dr. King expressly called for "*transition* from an obnoxious negative peace . . . to a substantive and positive peace, in which all men will respect the dignity and worth of human personality."[94] Recurring protests against police violence and structural racism indict the government's failures to secure such a substantive and positive peace. Civil rights leader Bayard Rustin's warning to New York City mayor Robert Wagner rings as true today as it did in 1965: "[E]ither you creatively meet the causes of discontent in spring, or negatively face another long, hot summer."[95] This warning reminds us of the need to target our transitional efforts not only at American democracy, but at racial justice.[96]

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90. *See generally* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY (2018); Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism in U.S. Democracy*, SCI. MAG. (Sep. 4, 2020), https://science.sciencemag.org/content/369/6508/1176.

91. Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172, 212 (2005) (describing transition under a pre-existing democratic framework as "a deepening, rather than an introduction, of democratic standards").

92. *See infra* Part II.C.

93. *See generally Racial Justice and Peace*, *supra* note 79.

94. *Birmingham Jail*, *supra* note 89, at 842 (emphasis added).

95. BAYARD RUSTIN, I MUST RESIST: BAYARD RUSTIN'S LIFE IN LETTERS 304 (Michael G. Long ed., 2012).

96. Others might object to a transitional analysis of the United States on the basis that either "too much" or "too little" has changed since America's racial apartheid. From a "too much has changed" perspective, it does not make sense to consider the period from the First or Second Reconstruction to the present day as a single transition—because too much time has passed or there have been too many intervening events. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978); Shelby Cty. v. Holder, 570 U.S. 529, 547 (2013). This perspective risks overstating the changes and understating the continuities between America's racial past and present. No one claims that the United States of today is exactly the same as the antebellum or Jim Crow United States; the question that needs to be addressed is what legacies of the wrongful past are still present in today's society.

The passage of significant time since slavery and Jim Crow has not rendered questions of racial transition obsolete. Countries spanning from Canada to the Philippines have taken centuries to grapple with the legacies of their past. For instance, Canada's 2008 Truth and Reconciliation Commission reached back to the Residential Schools of the 1860s, established to "aggressively assimilate" Indigenous children into Euro-Canadian culture; the mandate of Burundi's 2014 Truth and Reconciliation Commission extended to cover crimes since 1885; Mauritius' 2009 Truth and Justice

In regard to American jurisprudence, a second potential objection may be that judges' opinions are guided by law rather than theories of transition. However, even judges who present their reasoning as *non*-transitional (not concerned with transition)[97] or *anti*-transitional (against a transition project or judicial involvement in it)[98] ground arguments in the circumstances and needs of a society in transition. Often, these same judges articulate their own transitional visions to explain why certain measures should not be permitted.[99]

Conversely, other readers may object that if judges already have their own *local* theories of transition, there is no need for "transitional justice" as an *external* framework or field. However, there is value in undertaking a partly immanent and partly external critique of legal opinions, evaluating race jurisprudence based both on its own logic and the perspective of transitional justice.

The U.N. Special Rapporteur on racism, E. Tendayi Achiume, counsels looking beyond the United States for guidance because "international human rights norms require and offer the foundation for a better system than the one currently in place in this country."[100] Achiume calls for "push[ing] back against the sort of exceptionalism that implicitly treats existing domestic law as a high watermark for achieving justice and equality, when this law falls short even of global human rights anti-racism standards . . .

Commission went back to the start of colonialism in 1638; the Commission on the Truth of Black Slavery in Brazil reached back to the Atlantic slave trade era in the 1500s; and the Philippines' Framework Agreement on the Bangsamoro and Transitional Justice and Reconciliation Commission reached back to pre-1521 colonization. Until the United States takes adequate steps to address legacies of racism, its transition will be delayed as harms compound and past progress is erased. Truth & Reconciliation Comm'n of Can., *Our Mandate*, http://www.trc.ca/about-us/our-mandate.html [https://perma.cc/PW28-RFL8] (Canada); Beatrice Tesconi, *Burundi extends the mandate of the Truth and Reconciliation Commission to cover crimes since 1885*, ICL MEDIA REV. (Oct. 31, 2018, 8:19 PM), http://www.iclmediareview.com/31-october-2018-burundi-extends-the-mandate-of-the-truth-andreconciliation-commission-to-cover-crimes-since-1885 [https://perma.cc/34HE-RPWJ] (Burundi); Rep. of Truth & Reconciliation Comm'n (2011), http://pmo.govmu.org/English/Documents/TJC_Vol1.pdf [https://perma.cc/R6GY-PGQH] (Mauritius); Márcia Leitão Pinheiro, *A Truth Commission in Brazil: Slavery, Multiculturalism, History and Memory*, 18 CIVITAS-REVISTA DE CIÊNCIAS SOCIAIS 683 (2018) (Brazil); Kristian Herbolzheimer, *The Peace Process in Mindanao, the Philippines: Evolution and Lessons Learned*, INT'L REL. SEC. NET. 17 (2015) (Philippines).

From a "too little has changed" perspective, the language of transition (like that of change or progress) obscures continuities with the past and implies structural change where it does not truly exist. From this vantage point, calling the U.S. transitional is a misnomer because it suggests that American society is moving beyond its racist past, when it is really continuing or repeating the past. This "too little has changed" perspective reminds us that racial transition encompasses both discontinuity and continuity, both steps forward and back. In so doing, it cautions us against letting the former eclipse the latter in our collective understanding of transition. Indeed, one of the main reasons to undertake a transitional analysis is precisely to reconcile the various breaks from and continuities with the past.

97. *See, e.g.*, *Bakke*, 438 U.S. at 298.

98. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 378 (2003) (Thomas, J., dissenting).

99. *See* text accompanying *infra* notes 249–254.

100. Achiume, *supra* note 32.

."[101] Achiume's assessment suggests that the local theories that have been governing American race jurisprudence may be inadequate. In addition to offering the kind of independent perspective that is needed to assess local theories of transition, transitional justice provides a framework for aligning local approaches with international human rights norms. By situating what judges are doing within a transitional justice framework, we can better understand the limitations of their approaches and look for alternate modes of response.

Some Americans may resist an external field that embraces different approaches than those adopted by the United States or reveals this country to be still 'developing' in ways that place it alongside or behind others perceived as 'less developed.'[102] However, given the value of a transitional justice framework, engaging with it is worthwhile even in the presence of local theories of transition and even where this engagement involves the discomfort of viewing the United States in an international context.[103] Unsettling beliefs about American democracy and exceptionalism may be necessary for racial and other justice struggles. International comparisons have helped the pursuit of racial justice in the past[104] and may do so again as the United States seeks to restore its image on the world stage.[105]

This Part has begun to examine the United States in transitional terms. Building on this foundation, the next Part of this Article undertakes a transitional analysis of American race jurisprudence.

II. TRANSITION AND RACE JURISPRUDENCE

Race jurisprudence is said to be "a jurisprudence of fragmentation" partly because it compartmentalizes types of cases involving race and applies different doctrinal strategies to them.[106] However, certain transitional frames operate across decisions and bodies of law. In analyzing opinions concerning school desegregation, voting rights, affirmative action, and disparate impact, this Part foregrounds the opinions' understandings of the racial past out of which the nation has been emerging, the racial future

101. *Id.*

102. *See generally* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 77 (2013) (discussing how foreign comparisons express national identity).

103. Rebecca Hamilton, *If We Could See Ourselves from the Outside*, JUST SEC. (June 4, 2020), https://www.justsecurity.org/70576/if-we-could-see-ourselves-from-the-outside/ [https://perma.cc/6NN8-GVFQ].

104. DUDZIAK, *supra* note 52, at 13 ("The story of race in America, used to compare democracy and communism, became an important Cold War narrative.").

105. Dorothy Wickenden, *Can Joe Biden Repair America's Reputation Abroad?*, NEW YORKER (Dec. 3, 2020), https://www.newyorker.com/podcast/political-scene/can-joe-biden-repair-americas-reputation-abroad.

106. Rachel F. Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of* Parents Involved, 69 OHIO ST. L.J. 1321, 1322 (2008).

it ought to pursue, the transition pathway between them, and the present stage of transition.[107]

This analysis reveals that the Supreme Court has sought racial transition in two main ways—*reckoning with* and *distancing from* the past. In the Civil Rights era, the Court recognized that addressing centuries of racial discrimination would take active steps and a significant amount of time.[108] However, the civil rights retrenchment and conservative appointments starting in the late 1960s shifted the Court's approach away from reckoning with historic wrongs. Civil rights law once considered necessary for grappling with the past was curtailed in the name of getting over the past.

Exploring transitional arguments that have shaped racial equality opinions until now sheds light on future arguments. Conservative opinions in several recent cases have employed transitional reasoning to justify dramatic changes. The Roberts Court struck down school desegregation and voting rights measures on the basis that they are no longer necessary or appropriate; only Justice Kennedy's decisive votes kept affirmative action and disparate impact measures alive. With the retirement of Justice Kennedy and the passing of Justice Ginsburg, the Court could deploy transitional narratives that even more drastically limit civil rights protections in the name of achieving a better racial future.

A. Distancing and Reckoning Frameworks

Although the original distancing and reckoning frameworks developed in this Article are derived from the cases themselves, they echo a key debate within transitional justice. Should societies attempt to "close the book" on their traumatic pasts or should they "reckon with past wrongs"?[109] In closing the book, some societies strive to put the past behind them, on the belief that too much memory of the past may be destabilizing for the transition

107. While transitional reasoning structures a large number of these opinions, this discussion prioritizes *paradigmatic* opinions that most clearly reflect the transitional imperative, as well as *predictive* opinions that shed light on the future trajectory of transitional jurisprudence. The opinions discussed here are both *illustrative* and *constitutive* of transition; they offer a window into how transitional concerns shape the law and how the law shapes the transition process.

108. Even so, the Warren Court's race reckoning had limitations. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown, *and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1130–39 (2012); *see also infra* notes 347–350.

109. Mark Arenhövel, *Democratization and Transitional Justice*, 15 DEMOCRATIZATION 570, 572 (2008) (describing transitional justice responses ranging from "a resurrection of the past on the one hand, to unconditionally 'closing the book' and collective amnesia on the other"); HENNIE VAN VUUREN, APARTHEID GRAND CORRUPTION: ASSESSING THE SCALE OF CRIMES OF PROFIT IN SOUTH AFRICA FROM 1976 TO 1994, 86–87 (2006) (distinguishing between options to "close the book on the past" and "forthrightly engage with the past"). *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 4 (1998).

process.[110] In reckoning with wrongs, societies aim to address the long shadow of history, with the understanding that too much forgetting may yield an incomplete or inadequate transition process.[111]

Distancing corresponds with "closing the book" by relegating racism to a remote and irrelevant past. In this approach, racial transition involves a repudiation of past racial wrongdoing and a refusal to allow it to have authority over present life; transition is achieved once past racist policies have been eliminated from today's world. Because distancing aims to create a disjuncture between past and present society, it views too much association with past injustices as an impediment to transition.[112] Civil rights law carries the risk of entrenching past conflict by pursuing remedies long after the original perpetrators and victims are gone.

Reckoning seeks to confront racism's enduring and evolving legacies. According to this view, racial transition involves both recognition and remediation of centuries of racial violence and their longer-term consequences for society; transition is complete not when past racist policies are discontinued, but when white supremacist structures and ideologies no longer taint the present or threaten the future. Because reckoning aims to address the linkages between past and present society, it views too much disregard for past injustices or failure to recognize historical continuities as threats to transition. Civil rights law is needed to address pernicious legacies and features of the previous regime that have persisted in an altered form.

Distancing and reckoning are therefore about the relationship that a transitioning United States should have with its white supremacist history. Generally speaking, distancing analyses clearly demarcate a post-

110. CATHERINE O'ROURKE, GENDER POLITICS IN TRANSITIONAL JUSTICE 58 (2013) ("Demands to 'look to the future' and to 'move on' and 'close the book' on harms of the past are potent in contexts in which the past is deemed difficult, divisive and potentially destabilising to a transition."); Azanian Peoples Org. v. President of the Republic of S. Afr., 1996 (4) SA 672 (CC) at 674 (S. Afr.) ("It was realised that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past."); VAN VUUREN, *supra* note 109, at 3 ("[Closing] the book on the past . . . will, however, probably always haunt us as a society.").

111. David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43 (1999) (discussing "ethical issues that emerge in reckoning with past wrongs"); Alexandra Barahona De Brito, Carmen González Enríquez & Paloma Aguilar, *Introduction* to THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 2 (Alexandra Barahona De Brito, Carmen González Enríquez & Paloma Aguilar eds., 2001) (discussing "the significance of forms of reckoning with the past for a process of democratization or democratic deepening").

112. Various normative, political, and psychological concerns might underlie such a distancing approach to transition. Those eager to disassociate the present from the past may genuinely consider doing so the most promising path forward. They may believe that injustice has already been overcome or cannot be overcome with state action. They may be invested in removing "extraordinary" transitional practices (such as affirmative action and voter protections) and restoring an "ordinary" status quo that they consider more beneficial. They may also experience resistance or fatigue in the face of a transition process that (in their view) has gone too far or gone on too long.

transitional present from the past, and thus see only a limited set of transitional policies as appropriate. Meanwhile, reckoning analyses see enduring and evolving legacies of the past in the present, and so believe in the necessity of a more expansive transition project. Embedded in these approaches are different understandings of when transition is complete, what harms it should address, over what time horizon, and through what means.

Completed vs. pending transition.—Distancing analyses insist that because overt Jim Crow-style practices are no longer prevalent, a transition from one age to another has occurred and injustice overcome.[113] Any discrimination and disadvantage minorities face today are unrelated to historic practices and therefore outside the scope of transition; all requisite reckoning is already complete.[114] By contrast, reckoning analyses recognize that racist structures and practices have endured—even if they may appear different in some instances—such that transition is incomplete and necessitates continued attention.[115]

Episodic vs. continuous transition.—Distancing analyses emphasize discontinuity between past racist episodes and present racial disparities, such that remedies from the past ought to be divorced from present-day laws.[116] Reckoning analyses instead recognize that forms of racial oppression are not neatly bounded in time and earlier remedies may be needed to address the root causes of present-day problems. Reckoning opinions underscore continuities between past and present forms of racism that may appear different, because it is difficult to "completely escape[] the grip of a historical legacy spanning centuries,"[117] and because "history repeats itself."[118]

Temporary vs. enduring transition.—Distancing analyses define transition as a short, temporary process that has a clear end point and are

113. Shelby Cty. v. Holder, 570 U.S. 529, 547, 552 (2013) (stating that "[n]early 50 years later, things have changed dramatically" and "history did not end in 1965").

114. *Id.* at 536 (conceding that "voting discrimination still exists" while striking down key provisions of the Voting Rights Act).

115. *Id.* at 592 (Ginsburg, J., dissenting) (noting that "history repeats itself"); McCleskey v. Kemp, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting) (refusing to "pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries").

116. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 756 (2007) (Thomas, J., concurring) (arguing that "the further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation"); City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (once a demonstrable link between the past and the present attenuates, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."); Columbus Board of Education v. Penick, 443 U.S. 449, 491 (1979) (Rehnquist, J., dissenting) (worrying that desegregation remedies would "render all school systems captives of a remote and ambiguous past").

117. *McCleskey*, 481 U.S. at 344 (Brennan, J., dissenting).

118. *Shelby Cty.*, 570 U.S. at 592 (Ginsburg, J., dissenting).

critical of transitional measures that might operate "in perpetuity."[119] Reckoning analyses propose a more enduring transition process that may not have a clear end-date;[120] ongoing measures are necessary for extirpating entrenched legacies, "preventing retrogression,"[121] and tackling "[s]econd-generation barriers" to racial equality that "come in various forms."[122]

Isolated vs. coordinated strategies.—Distancing approaches isolate racism to particular practices and institutions while disregarding racism that operates across multiple sites to produce systemic disadvantage,[123] for example, by refusing to address linkages between residential and educational segregation patterns.[124] Taking a more expansive view,

119. Bd. of Educ. v. Dowell, 498 U.S. 237, 248 (1991); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 226 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (rejecting ongoing preventative measures because "[p]unishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure . . . .").

120. *Dowell*, 498 U.S. at 267 n.11 (Marshall, J., dissenting) (rejecting a preoccupation with the "temporariness and permanence" of transitional measures).

121. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 806 (2007) (Breyer, J., dissenting).

122. *Shelby Cty.*, 570 U.S. at 563 (Ginsburg, J., dissenting). Although this argument is not directly made in racial equality cases, enduring measures may also be necessary to manage what Derrick Bell termed "the permanence of racism." DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993); Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79 (1991). Robert Meister similarly describes "transitional time" as a time "of indefinite duration, potentially permanent . . . ." MEISTER, *supra* note 27, at 85. Monica Bell proposes "a perpetual governance process" to address racialized policing given "the phoenix-like resilience of institutional racism . . . ." Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 744, 763 (2020).

Even where reckoning and distancing opinions agree that transitional measures should ideally be temporary (as with affirmative action), there are disparate political and practical motivations for underscoring the temporariness of transition. For those invested in remedying racial oppression, temporariness expresses an aspiration that justice must be achieved sooner rather than later; it perhaps also reflects a belief that a community (or powerful forces within it) will allow remedies for historical injustice only if those remedies are limited in time. By contrast, for those invested in restoring an "ordinary" status quo, temporariness suggests that transitional laws ought to be terminated because the precise problems that caused them to be enacted have been solved (rendering remedies unnecessary) or because too much time has passed since historical injustice (rendering remedies inappropriate). No one has more at stake in making transition temporary than those who feel disfavored by transitional practices and seek to restore a status quo they consider more beneficial. Owen M. Fiss, Gaston County v. United States: *Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379, 433 (1969) ("Part of the pressure in society to forget the past no doubt generates from either those who discriminated or those who have little or nothing to gain from the correction of past discrimination.").

Temporariness may also be appealing because time appears more impartial than other criteria for ending transitional measures, and setting a duration for transition may enable compromise between actors who disagree about the purpose and path of transition. *See generally* ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE 97–119 (2018). However, temporary transitions may be unrealistically short and fail to achieve necessary changes, encouraging narrow interpretations of wrongs and remedies and the pursuit of reductive rather than transformative goals.

123. *Bakke*, 438 U.S. at 307 (rejecting affirmative action aimed at redressing "societal discrimination").

124. Milliken v. Bradley, 418 U.S. 717 (1974); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 711–712 (2009). *See generally* Cary Franklin, *Separate Spheres*, 123 YALE L.J. 2878, 2883 (2014) (describing "interspherical impacts" as "the cumulative effects of disadvantage and discrimination across multiple spheres of civil society.").

reckoning approaches trace the effects of racism across different social institutions and spheres such as education and housing.[125] In turn, reckoning opinions advocate for coordinated and cross-cutting solutions.[126]

Perfect vs. imperfect strategies.—Distancing approaches tend to demand perfection of transitional measures and weigh the costs of imperfections heavily based on assumptions of a just world.[127] Demands for perfection sometimes take doctrinal form, for example, through requirements that transitional measures be precisely aligned with their stated goals.[128] On the other hand, reckoning approaches contend that perfect solutions are unrealistic when transitioning from a deeply flawed world,[129] and imperfect strategies are necessary for the real-world pursuit of transition.[130]

Non-interventionist vs. interventionist strategies.—Distancing approaches argue that a government that once discriminated on the basis of race should not create race-sensitive policy, even if that policy is anti-racist.[131] Non-interventionism is frequently justified on the grounds that existing race-sensitive strategies have "already served [their] purpose"[132] and will now "do more harm than good."[133] Reckoning approaches urge positive countering of racial disparities on the belief that race-sensitive policies that achieve racial equity are necessary to address deep-seated legacies and avoid repeating the past.[134]

125. *Milliken*, 418 U.S. at 802 (Marshall, J., dissenting) (courts "cannot ignore the white-flight problem" in addressing school segregation).

126. *Id.* at 803–14 (detailing the problems with a "Detroit-only" desegregation decree).

127. *Bakke*, 438 U.S. at 291–92 (subjecting affirmative action for underrepresented minorities to "the most exacting judicial examination" on the assumption that it is "no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority").

128. Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 311 (2013) (detailing narrow tailoring requirements for affirmative action); Shelby Cty. v. Holder, 570 U.S. 529, 542–45 (2013) (criticizing the Voting Rights Act's coverage formula for not "accurately" reflecting the covered jurisdictions).

129. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 14 (1971) (the Court taking upon itself to "amplify guidelines, however incomplete and imperfect").

130. *Id.* at 28 (recognizing that "all awkwardness and inconvenience cannot be avoided").

131. Grutter v. Bollinger, 539 U.S. 306, 378 (Thomas, J., dissenting).

132. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 226 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

133. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 315 (2014) (Roberts, C.J., concurring).

134. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401–02 (Marshall, J., concurring in part and dissenting in part) ("If we are ever to become a fully integrated society . . . we must be willing to take steps to open those doors."); *id.* at 407 (Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond racism, we must first take account of race."); *Schuette*, 572 U.S. at 381 (Sotomayor, J., dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race . . . .").

Keeping these dichotomies in mind within an overarching framework comparing distancing and reckoning is useful for understanding Supreme Court cases in four areas.[135]

B. School Desegregation

More than any others, school desegregation cases reason in explicitly transitional terms that have shifted over time. Earlier cases identified segregation as a historical and ongoing wrong to be reckoned with through integration in public life. These decisions endorsed race-based measures as means to transition to integrated school systems, even if those measures were imperfect and disrupted existing white norms. However, more recent cases have cast segregation as a problem of the past and declared transition complete. These cases have questioned race-based strategies aimed at integration, insisting on proof of both explicit segregative policies and the direct necessity of integrative solutions.

The landmark 1954 decision in *Brown v. Board of Education of Topeka* declared racial segregation in public education unconstitutional.[136] When segregationists launched a "massive resistance" to *Brown* and school desegregation, *Brown II* a year later had to explain *how* the transition mandated in *Brown* would be achieved.[137] Courts would assess the adequacy of local plans "to effectuate a transition to a racially nondiscriminatory school system" and would have jurisdiction over desegregation cases "[d]uring this period of transition."[138] However, *Brown II* said that *Brown* shall be implemented only "with all deliberate speed,"[139] an ambiguous phrase that paved the way for further resistance to integration.[140]

After Arkansas state officials refused to abide by *Brown*, a unanimous opinion in *Cooper v. Aaron* in 1958 held that state officials must begin desegregating the state's public schools.[141] Rejecting a school board's proposal to reverse and postpone desegregation in order to maintain "public peace," the Supreme Court concluded that "law and order are not here to be

135. Although these two perspectives do not capture the entire universe of transitional concerns, and although some opinions reason from both distancing and reckoning perspectives to justify or critique existing civil rights measures, these common understandings of distancing and reckoning serve as useful frameworks to analyze racial equality opinions.

136. 347 U.S. 483, 483 (1954).

137. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299 (1955).

138. *Id.* at 301.

139. *Id.*

140. CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004).

141. 358 U.S. 1, 9 (1958).

preserved by depriving the Negro children of their constitutional rights."[142] Justice Frankfurter, concurring, recognized that although racial reckoning would stir "[d]eep emotions," those emotions ought not to stop transition processes.[143] He forecasted a transition process in which "local habits and feelings will yield, gradually though this be, to law and education."[144] Overall, *Cooper* made clear that steps toward justice via racial reckoning were not to be delayed in the name of racial peace.[145]

Desegregation decisions from the late 1960s through the early 1970s continued to expound the requirements of racial reckoning.[146] In 1968, a unanimous Court in *Green v. County School Board of New Kent County* said that a "freedom of choice plan," which allowed all students in a deeply segregated county to choose their school, was insufficient for "transition to a unitary, nonracial system of public education . . . ."[147] New Kent County had not satisfied its "affirmative duty" to eliminate racial discrimination "root and branch," [148] and needed to propose "a plan that promises realistically to work, and promises realistically to work now."[149] In so holding, *Green* highlighted the need for transitional measures to be both effective and timely in order to meet judicial standards.

Perhaps a high-water mark of reckoning jurisprudence was the 1971 decision in *Swann v. Charlotte-Mecklenburg Board of Education*.[150] The period of racial reckoning following *Brown* had disrupted settled expectations and provoked resistance to change. As the unanimous opinion recognized: "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then."[151] To help school systems and courts navigate these transitional dynamics, the Court took upon itself the responsibility to "amplify guidelines, however incomplete and imperfect . . . ."[152]

Swann openly acknowledged that transitional practices aimed at integration may be imperfect; however, such imperfections were the

142. *Id.* at 16.
143. *Id.* at 25 (Frankfurter, J., concurring).
144. *Id.*
145. For a detailed transitional account of *Cooper v. Aaron*, see *Racial Justice and Peace*, *supra* note 79.
146. J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 486 (1978) (criticizing how "from 1955 to 1968 the Court abandoned the field of public school desegregation," taking a "nonjurisprudential" role).
147. 391 U.S. 430, 436 (1968).
148. *Id.* at 437–38.
149. *Id.* at 439.
150. 402 U.S. 1, 1 (1971) (declaring that federal courts are constitutionally authorized to develop and oversee remedies for state-imposed segregation).
151. *Id.* at 13.
152. *Id.* at 14.

unavoidable consequence of reckoning with the deeply flawed world of segregation: "[A]ll awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."[153] In this way, *Swann* unanimously recognized that transitional measures did not have to be ideal in order to be valuable and worthwhile.[154]

This unanimity broke with the arrival of William Rehnquist.[155] In 1973, *Keyes v. School District No. 1* held that a single segregated school in Denver was enough to suggest a "prima facie case of unlawful segregative design," and the school board had the burden of proving that it operated without system-wide "segregative intent."[156] "Remoteness in time" since the school board's actions was no excuse.[157] Then-Justice Rehnquist, nominated to the Supreme Court by Richard Nixon shortly after *Swann*, dissented in *Keyes*.[158] He interpreted *Brown* in ways that would significantly limit desegregation efforts and soon become a dominant doctrinal view, as evidenced by the 1974 case *Milliken v. Bradley*.[159]

In *Milliken*, a 5-4 majority rejected a solution to desegregate both Detroit, which was two-thirds Black, and its suburbs, which were predominantly White.[160] The Court held that *Brown* did not allow interdistrict desegregation without an interdistrict violation; if suburban schools did not actively produce school segregation in Detroit, they did not have to promote integration.[161] *Milliken* thus treated the White Flight-induced segregation that plagued Detroit in the 1970s as discontinuous from

153. *Id.* at 28.

154. However, Owen Fiss predicted future backsliding by noting that *Swann*'s rules "may be only transitional requirements." Owen M. Fiss, *The* Charlotte-Mecklenburg *Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 703 (1971). 1997 survey data of over 1800 Charlotte-Mecklenburg students revealed the negative effects of segregation on academic achievement, "even in an ostensibly desegregated school system . . . ." Roslyn Arlin Mickelson, *Subverting* Swann: *First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215, 215 (2001).

155. For critical perspectives on Rehnquist's race jurisprudence, see Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019 (2006); Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597 (1994).

156. Keyes v. Sch. Dist. No. 1, 413 U.S. 199, 208–09 (1973). Writing for a 7-1 majority, Justice Brennan defined segregated schools to include those with "a combined predominance of Negroes and Hispanos" in light of the shared "educational inequities" of those racial minorities relative to Whites. *Id.* at 197–98. This extended desegregation beyond an exclusively black-white binary paradigm to include other racialized groups. Rachel F. Moran, *Untoward Consequences: The Ironic Legacy of* Keyes v. School District No. 1, 90 DENV. U. L. REV. 1209, 1211 (2013) (describing the effects on Latinx people of "white and middle-class flight to the suburbs that took place in the wake of the *Keyes* desegregation order").

157. *Keyes*, 413 U.S. at 201–11.

158. *Id.* at 254 (Rehnquist, J., dissenting).

159. 418 U.S. 717, 717 (1974).

160. *Id.*; *see* Myron Orfield, Milliken, Meredith, *and Metropolitan Segregation*, 62 UCLA L. REV. 363, 390–416, 430–38, 456–57 (2015) (discussing the *Milliken* litigation and its legacy).

161. *Milliken*, 418 U.S. at 745.

the Jim Crow segregation that *Brown* addressed in the 1950s. *Milliken*'s refusal to extend the ambit of racial reckoning beyond *Brown* cleared the way for racially and economically segregated neighborhoods and schools.[162] Of the five Justices in the majority, four were Nixon appointees.

In his dissenting opinion, Justice Marshall called *Milliken* "a giant step backwards" that would hinder the transition mandated in *Brown*.[163] "Our Nation, I fear, will be ill served by the court's refusal to remedy separate and unequal education," he cautioned, "for unless our children begin to learn together, there is little hope that our people will ever learn to live together."[164] Marshall's warning came true: Detroit's schools were even more segregated in 2019 than they were in 1974, a pattern that reappears in several cities.[165]

Even with four Nixon appointees, the Supreme Court occasionally reasoned from reckoning. In 1979, for instance, *Columbus Board of Education v. Penick* recognized how one school board's "conduct at the time of trial and before not only was animated by an unconstitutional, segregative purpose, but also had current, segregative impact . . . ."[166] By contrast, Justice Rehnquist's dissent portrayed the school board's current conduct as historically discontinuous, warning that *Penick* would "render all school systems captives of a remote and ambiguous past."[167]

With additional Reagan and Bush appointees, an increasingly conservative Court acted more decisively to limit desegregation by separating present from past. In 1991, for instance, *Board of Education of Oklahoma v. Dowell* held that desegregation decrees were not to operate "in

162. *Id.* at 717–20; *see* Charles R. Lawrence, III, *Segregation "Misunderstood": The* Milliken *Decision Revisited*, 12 U.S.F. L. REV. 15, 16 (1977) (arguing that *Milliken* "assured middle-class whites that their mass exodus to the suburbs to seek refuge from blacks had not been made in vain" and "made clear that [the Court] would not use school desegregation to invade the suburban fortress of housing for whites only").

163. *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

164. *Id.* at 783.

165. *Dismissed: America's Most Divisive School Board Districts*, EDBUILD (July 2019), https://edbuild.org/content/dismissed/edbuild-dismissed-full-report-2019.pdf [https://perma.cc/T99U-8FAH]. In 2017, Reps. John Conyers, Jr., and Bobby Scott introduced the Equity and Inclusion Enforcement Act, which would create a private right of action for families to bring legal challenges with respect to racially disparate school funding decisions. In 2018, Sen. Chris Murphy and Rep. Marcia L. Fudge introduced the Strength in Diversity Act, which would create a grant program for the development and implementation of interdistrict integration efforts. *See* Equity and Inclusion Enforcement Act of 2019, H.R. 2574, 116th Cong. (2019); Strength in Diversity Act of 2020, H.R. 2639, 116th Cong. (2020). However, Donald Trump's Secretary of Education Betsy DeVos cancelled a desegregation program from the Obama Administration and rescinded guidance on promoting racial diversity in schools, measures that the Biden Administration intends to restore. Erica L. Green, *Biden's Education Department Will Move Fast to Reverse Betsy DeVos's Policies*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/us/politics/biden-education-devos.html [https://perma.cc/9WTT-BLL3].

166. 443 U.S. 449, 455 (1979); *see* Boddie, *supra* note 14, at 1835–44 (discussing temporal dimensions of *Penick*).

167. *Penick*, 443 U.S. 449, 491 (Rehnquist, J., dissenting).

perpetuity," regardless of whether they were needed.[168] Now-Chief Justice Rehnquist interpreted references to "transition" in *Brown II* and *Green* to suggest "a temporary measure to remedy past discrimination" rather than something more enduring.[169] Such insistence on time limits for transition were mirrored in affirmative action and voting rights cases.[170]

Justice Marshall's dissent rejected *Dowell*'s preoccupation with "temporariness and permanence" because "the continued need for a [desegregation] decree will turn on whether the underlying purpose of the decree has been achieved."[171] For Marshall, that purpose was not achieved "so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist."[172]

The 2007 decision in *Parents Involved v. Seattle* captures the current distancing approach to school desegregation.[173] A 5-4 majority invalidated student assignment plans in Louisville and Seattle that promoted integration by taking explicit account of a student's race.[174]

Writing for a plurality, Chief Justice Roberts declared that because Jefferson County in Kentucky had already implemented a mandatory desegregation plan until 2000, it had completed its transition to a unitary school system.[175] Furthermore, because Seattle had never maintained an officially segregated school system (a contention that was disputed by the dissenting Justices), it could not employ a racial tiebreaker solely to address contemporary linkages between educational and residential segregation patterns.[176] In other words, Louisville had already completed its reckoning with Jim Crow segregation, and Seattle never needed such reckoning in the first place.

168. 498 U.S. 237, 248 (1991); *see* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 21–25, 30–35 (1992) (discussing the *Dowell* litigation and its implications); Kimberly Jenkins Robinson, *Resurrecting the Promise of* Brown: *Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 820–25, 829–30 (2010) (arguing that *Dowell* "reconstitutionalized segregation").

169. *Dowell*, 498 U.S. at 247.

170. *See* Grutter v. Bollinger, 539 U.S. 306, 342 (2003); Shelby Cty. v. Holder, 570 U.S. 529, 546 (2013).

171. *Dowell*, 498 U.S. at 267 n.11 (Marshall, J., dissenting).

172. *Id.* at 252.

173. 551 U.S. 701, 701 (2007).

174. *Id.*

175. As he explained: "Once those vestiges [of prior official segregation] were eliminated, Jefferson County was on the same footing as any other school district, and its use of race must be justified on other grounds." *Id.* at 725 n.12.

176. *Id.* at 712; *see* Erica Frankenberg & Chinh Q. Le, *The Post*-Parents Involved *Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015 (2008) (recommending fusing housing and education integration policy and returning equity and citizenship to the center of mainstream public school discussions).

In both cases, Roberts felt that continuing race-based integration plans would impede racial transition, as "the 'ultimate goal' of 'eliminating entirely from governmental decision-making such irrelevant factors as a human being's race' will never be achieved."[177] Only absolute colorblindness would clearly demarcate the present from the past: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," he declared.[178]

In a concurring opinion, Justice Thomas made distancing *and* reckoning arguments to reject Seattle's and Louisville's plans. From *distancing*, he argued that these practices were inappropriate because present circumstances could not be directly linked to prior discrimination. "[T]he further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation," he asserted.[179] Transition had to be a "one-time process involving the redress of a discrete legal injury inflicted by an identified entity," as opposed to "a continuous process with no identifiable culpable party and no discern[i]ble end point."[180] Furthermore, in contrast to most *reckoning* opinions, which support continued integration measures, Thomas argued that reckoning with America's racist past should lead us to reject integration strategies. He likened contemporary integrationist arguments to the segregationist arguments put forth in *Brown*—a comparison he has repeated in other cases.[181]

In a thirty-seven-page-long dissent, Justice Breyer criticized the plurality opinion's rendering of the Seattle and Louisville plans.[182] The transitional purpose of those plans, he argued, was not only "eradicating earlier school segregation," but also "bringing about integration" and "preventing retrogression."[183] Moreover, Seattle, too, had "*school board policies and actions* that had helped to create, maintain, and aggravate racial segregation," which the plurality opinion had overlooked in the absence of

177. *Parents Involved*, 551 U.S. at 730 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (plurality opinion of O'Connor, J.)).

178. *Parents Involved*, 551 U.S. at 748; *see* Erwin Chemerinsky, *Making Schools More Separate and Unequal:* Parents Involved in Community Schools v. Seattle School District No. 1, 2014 MICH. ST. L. REV. 633 (criticizing *Parents Involved* for exacerbating the problem of highly separate and unequal schools in an environment where federal incentive to pursue desegregation is already lacking); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1112–13 (2014) (arguing that *Parents Involved* extinguishes hope for integration in public school settings and pushes toward school choice that retrenches segregation and exempts states from addressing racial inequality).

179. *Parents Involved*, 55 U.S. at 756 (Thomas, J., concurring).

180. *Id.* at 756–57.

181. *Id.* at 748, 773–778; *Fisher I*, 570 U.S. 297, 323–24 (2013) (Thomas, J., concurring).

182. *Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting).

183. *Id.* at 806.

a judicial decree of desegregation.[184] Breyer's opinion illustrated how casting historical racism in narrow, formalistic terms would yield a more contained and incomplete transition project. He worried that *Parents Involved* "announce[d] legal rules that [would] obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools," thereby halting or reversing racial transition.[185]

Staking a middle path, Justice Kennedy proposed an approach that may be termed reckoning *while* distancing. Kennedy agreed with the plurality opinion that school boards could not explicitly classify students by race unless necessary.[186] However, he also questioned Chief Justice Roberts' "all-too-unyielding insistence" against race-sensitive integration,[187] recognizing that "[t]he enduring hope is that race should not matter; the reality is that too often it does."[188] Kennedy favored measures that would promote reckoning by reducing enduring segregation *and* distancing by reducing the legible importance of race.[189]

While the Supreme Court has not taken a major school desegregation case since *Parents Involved*, that case has laid the groundwork for a future distancing jurisprudence. The Court may further limit legal pathways to integration by declaring that (1) present-day segregation is discontinuous from Jim Crow segregation such that it is beyond the scope of transition; (2) transition to non-discriminatory school systems is a one-time process that is already complete; and (3) integration efforts perpetuate racial classifications of the past and impede transition to a colorblind society.

C. Voting Rights

Passed after the historic marches from Selma to Montgomery, the 1965 Voting Rights Act was enacted to remove barriers to the right to vote.[190] When the Act was immediately challenged, the Supreme Court recognized

184. *Id.* at 807.
185. *Id.* at 803.
186. *See id.* at 797–98 (Kennedy, J., concurring in part).
187. *Id.* at 787.
188. *Id.*
189. *See id.* at 797; *accord* Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts To Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277 (2009) (arguing that post-*Parents Involved*, school districts and governments should adopt facially-neutral efforts that pursue diversity without the potential harms of racial classifications).
190. Guy-Uriel Charles and Luis Fuentes-Rohwer argue that the Voting Rights Act can be understood as primarily pursuing three different goals: (1) eliminating racial discrimination in the political process, (2) ensuring voters of color wield consequential political power, and (3) protecting a positive right to political participation for all voters. Given the current "transitional moment in American democracy," voting rights policy "oscillates among these three models . . . [while] the extent of racial progress is also difficult to ascertain." Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1432–33, 1434 (2015).

the law's significance for racial reckoning.[191] In *South Carolina v. Katzenbach*, for instance, an 8-1 majority observed that the Act "was designed by Congress to banish the blight of racial discrimination in voting"[192] and to "truly" realize the promise of the Fifteenth Amendment.[193]

In the spirit of reckoning with historical and ongoing disenfranchisement, the Supreme Court prohibited particular forms of voting discrimination as unconstitutional. In *Harper v. Virginia State Board of Elections*, for instance, a 6-3 majority struck down Virginia's poll tax of $1.50 for violating the Equal Protection Clause.[194] Overruling its 1937 decision in *Breedlove v. Suttles*, Justice Douglas said that standards of equality had to evolve as society transitioned. "[T]he Equal Protection Clause is not shackled to the political theory of a particular era," and so previous rulings did not protect poll taxes from being declared unconstitutional as understandings of equal protection matured.[195]

Despite these early decisions striving for a more just franchise, an increasingly conservative Court curtailed their transitional mandate based on comparisons between past and present society, limiting what the law required and what it permitted of states in the pursuit of transition.[196]

By 1980, a 6-3 majority in *Mobile v. Bolden* upheld the legitimacy of at-large elections of city commissioners in Mobile, Alabama, even if that system diluted the voting strength of Black citizens.[197] In a plurality opinion, Justice Stewart declared that because at-large elections would disadvantage any voting minority, their deleterious effect upon Black people was insufficient proof of discrimination, despite their deliberate implementation only fifteen years after the marches from Selma to Montgomery in Alabama constituencies with deep-seated racism.[198]

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191. Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989) (describing how "[s]tarting in 1966, . . . jurisdiction after jurisdiction adopted measures designed to minimize the impact of the increased black vote") [hereinafter *Maps and Misreadings*].

192. 383 U.S. 301, 308 (1966).

193. *Id.* at 337. A few months later, in *Katzenbach v. Morgan*, a 7-2 majority held that Section 4 of the Act was a proper exercise of Congress' powers to enact legislation and did not infringe on powers reserved to the states under the Tenth Amendment. 384 U.S. 641, 646–47 (1966); *see* Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 19 (2012) (noting that *South Carolina v. Katzenbach* and *Katzenbach v. Morgan* upheld provisions favoring categorical legislation and executive branch enforcement over constitutional adjudication).

194. 383 U.S. 663, 663 (1966).

195. *Id.* at 669.

196. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 1 (2008) (finding that "Democratic appointees are significantly more likely than Republican appointees to vote for liability under Section 2 of the Voting Rights Act").

197. 446 U.S. 53, 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in* Thornburg v. Gingles, 478 U.S. 30 (1986); *see Maps and Misreadings*, *supra* note 191, at 192–196.

198. *Bolden*, 446 U.S. at 74.

Dismissing any continuing racist legacies, the plurality declared, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."[199]

Justice Marshall's dissent argued that the Court's attempts to isolate racism to the past would make it "an accessory to the perpetuation of racial discrimination."[200] He cautioned that the "superficial tranquility" of ignoring discrimination "can be but short-lived," suggesting that the plurality opinion had merely delayed an eventual reckoning with the effects of voting discrimination.[201] The plurality opinion dismissed Marshall's dissent as political theory, not law.[202]

The Supreme Court consistently struck down majority-minority electoral districts on the grounds that their creation was too reminiscent of the past. In 1993 in *Shaw v. Reno*,[203] Justice O'Connor found it "unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past,"[204] suggesting a repetition of history rather than a departure from it. She worried that "[r]acial gerrymandering, even for remedial purposes" would impede transition to "a political system in which race no longer matters," which was "a goal . . . to which the Nation continues to aspire."[205] Applying *Shaw v. Reno* in *Miller v. Johnson* two years later, Justice Kennedy said that "[a]s a Nation we share both the obligation and the aspiration of working toward" a society in which "all members of the polity share an equal opportunity to gain public office regardless of race," and that "[that] end is neither assured nor well served . . . by carving electorates into racial blocs."[206]

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199. *Id.*

200. *Id.* at 141 (Marshall, J., dissenting).

201. *Id.*

202. *Id.* at 75–76 (plurality opinion of Stewart, J.).

203. 509 U.S. 630 (1993) (raising constitutional concerns about a North Carolina congressional reapportionment plan that sought to enhance African American and Native American voting power).

204. *Id.* at 641. *But see* A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, Shaw v. Reno: *A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1644 (1994) (characterizing *Shaw* as "fundamentally flawed" in suggesting that "minority-majority congressional districts are somehow akin to apartheid and segregation").

205. Shaw, 509 U.S. at 657; *see* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines after* Shaw v. Reno, 92 MICH. L. REV. 588, 592 (1993) (discussing *Shaw*'s "inconclusive resolution" of "whether race may ever be justifiably relied upon in redistricting").

206. Miller v. Johnson, 515 U.S. 900, 927 (1995). In *Miller v. Johnson*, a 5-4 majority subjected Georgia's creation of a majority-Black district to strict scrutiny; the next year, in *Bush v. Vera*, that same majority struck down Texas' redistricting plans creating three majority-minority districts. 517 U.S. 952 (1996). In case after case, conservative majorities continued to limit the scope of voting rights in the name of transition. For instance, in a 2003 decision that weakened protections under Section 5 of the Voting Rights Act, Justice O'Connor declared that the law "should encourage the *transition to a society where race no longer matters*: a society where integration and color-blindness are not just qualities to be proud of, but are simple facts of life." Georgia v. Ashcroft, 539 U.S. 461, 490–91 (2003) (emphasis

As Congress repeatedly reauthorized the Voting Rights Act, challenges continued. In 2009 in *Northwest Austin v. Holder*,[207] Chief Justice Roberts observed that the Supreme Court had upheld prior reauthorizations because "circumstances continued to justify the provisions," suggesting that the law's continuation was contingent on the incomplete nature of transition.[208] Justice Thomas, dissenting in part, argued that the Act's success in ending intentional discrimination in the covered jurisdictions had rendered the provision unnecessary and unconstitutional.[209] Thomas insisted that "[p]unishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose."[210] It turned out that Roberts would agree four years later in *Shelby County v. Holder*.[211]

In a 5-4 decision, *Shelby County* struck down the coverage formula under Section 4 of the Voting Rights Act on the basis that it was "a drastic departure from the basic principles of federalism" that was justified only in the "exceptional conditions" of the past and did not reflect "current needs."[212] While the Court did not strike down the preclearance requirement under Section 5, it effectively nullified the law pending new Congressional coverage legislation.[213]

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added), *superseded by statute*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, *as recognized in* Ala. Legislative Black Caucus v. Alabama, 575 U.S. 254 (2015); *see* Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947 (2011); Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004) [hereinafter *Retrogression of Retrogression*].

207. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 193 (2009) (declining to address the constitutionality of Section 5 of the Act, the preclearance requirement); *see* Michael J. Pitts, *Redistricting and Discriminatory Purpose*, 59 AM. U. L. REV. 1575 (2010) (arguing that *Northwest Austin* puts Section 5's fate into doubt); Joshua A. Douglas, *The Voting Rights Act Through the Justices' Eyes:* NAMUDNO *and Beyond*, 88 TEX. L. REV. (2009) (discussing *Northwest Austin* in the context of election law jurisprudence).

208. *Nw. Austin*, 557 U.S. at 200.

209. *Id.* at 216 (Thomas, J., dissenting in part).

210. *Id.* at 226.

211. 570 U.S. 529, 529 (2013).

212. *Id.* at 535–36. *But see* Richard L. Hasen, Shelby County *and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 732–35 (2014) (arguing that *Shelby County* avoids discussing the Fifteenth Amendment's express shift of power from states to the federal government, defends a principle of equal sovereignty not found in the Constitution, and ignores how bailout from preclearance addresses current conditions).

213. Congressman John Lewis called *Shelby County* "a dagger into the heart of the Voting Rights Act" stuck by "justices [who] were never beaten or jailed for trying to register to vote." *John Lewis and Others React to the Supreme Court's Voting Rights Act Ruling*, WASH. POST (June 25, 2013), https://www.washingtonpost.com/opinions/john-lewis-and-others-react-to-the-supreme-courts-voting-rights-act-ruling/2013/06/25/acb96650-ddda-11e2-b797-cbd4cb13f9c6_story.html. Following his death in July 2020, there were renewed calls to restore the Voting Rights Act in his honor. Luke Broadwater, *After Death of John Lewis, Democrats Renew Push for Voting Rights Law*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/us/john-lewis-voting-rights-act.html [https://perma.cc/B98U-QTLM].

The majority opinion of Chief Justice Roberts encapsulates the current distancing approach to voting rights. Roberts openly conceded that "voting discrimination still exists; no one doubts that."[214] Yet, he questioned whether the Voting Rights Act had a role to play in addressing *current* voting discrimination; instead, he argued that that law "employed extraordinary measures to address an extraordinary problem" that no longer existed.[215]

By isolating the evils of disenfranchisement to Jim Crow, Roberts portrayed measures such as the Voting Rights Act as inappropriate for the present. He expressed frustration that "[n]early 50 years later, [Sections 4 and 5 of the Act] are still in effect . . . and are now scheduled to last until 2031."[216] This was simply too long because "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[217] "[H]istory did not end in 1965," he insisted, detailing the ways in which Southern states had progressed while avoiding discussion of the dynamic evolution of racist practices.[218] Although he allowed that the Act had contributed to perceived Southern progress, he gave little weight to how Section 5 might deter potential regression. Instead, he focused on the imperfections in the Section 4 coverage formula, which he felt no longer reflected the changed reality in the South.[219] Overall, Roberts felt that the "strong medicine" that was once needed to cure racism could now do the body politic harm.[220]

Justice Thomas echoed the distancing logic that "[t]oday, our Nation has changed" because "circumstances in the covered jurisdictions can no longer be characterized as 'exceptional' or 'unique.'"[221] He believed that these changes rendered unconstitutional not only the coverage formula in Section 4, but also the preclearance requirement in Section 5.[222]

In an extensive dissent, Justice Ginsburg argued that the Voting Rights Act was needed to deal with the more complicated and enduring legacies of the past. Congress, she said, had recognized two reasons for continuing the preclearance requirement: "First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard

214. *Shelby Cty.*, 570 U.S. at 536.
215. *Id.* at 534.
216. *Id.* at 535.
217. *Id.*
218. *Id.* at 552. Roberts acknowledged that racist practices had evolved in the aftermath of the Fifteenth Amendment, pointing to "literacy tests for voter registration and . . . other methods designed to prevent African–Americans from voting." *Id.* at 536. Yet, he was unwilling to recognize similar dynamics in the aftermath of the Voting Rights Act up to the present day. *Id.* at 547.
219. *Id.* at 547.
220. *Id.* at 535.
221. *Id.* at 558, 559 (Thomas J., concurring).
222. *Id*. at 559.

against backsliding."[223] In other words, the law was necessary to secure transition from historical practices, and considered by Congress as "an appropriate response" to newly emerged "[s]econd-generation [voting] barriers" such as racial gerrymandering and at-large voting.[224]

Justice Ginsburg's rejoinder made clear how sharply distancing and reckoning analyses had diverged in their understanding of transition. Whereas Chief Justice Roberts tried to prove *discontinuity* from the past by proclaiming that "history did not end in 1965,"[225] Justice Ginsburg set out to establish *continuity* by observing that "history repeats itself."[226] Both Justices agreed that the Voting Rights Act was "extraordinary," but disagreed about the implications of that label. For Roberts, the law's "extraordinary and unprecedented features" meant that it belonged to a distant era.[227] For Ginsburg, the law had an "extraordinary" mission "to realize the purpose and promise of the Fifteenth Amendment."[228] Although the Act had enabled progress, that mission of reckoning was incomplete. Striking down voter protections for their success at combating discrimination was, she concluded, "like throwing away your umbrella in a rainstorm because you are not getting wet."[229]

After *Shelby County*, that rainstorm became a deluge. Alabama announced that it would start requiring photo identification to vote before closing thirty-one driver's license offices, including those in several counties with the highest percentages of Black voters.[230] North Carolina introduced one of the most restrictive voting laws at the time, and Texas restored a voter identification law that had been blocked under the Voting Rights Act.[231] Eight years later, similar laws have been enacted in several jurisdictions previously covered by the preclearance provision, as well as in other places.[232]

223. *Id.* at 559–60 (Ginsburg, J., dissenting).

224. *Id.* at 563–64; *see* Reva B. Siegel, *Equality Divided*, 127 HARV. L. REV. 1, 67–74 (2013) (arguing that the *Shelby County* Court "substitute[d] its judgment for Congress's, without law or apology") [hereinafter *Equality Divided*].

225. *Shelby Cty.*, 570 U.S. at 552 (Roberts, C.J.).

226. *Id.* at 592 (Ginsburg, J., dissenting).

227. *Id.* at 549 (Roberts, C.J.).

228. *Id.* at 593 (Ginsburg, J., dissenting).

229. *Id.* at 590.

230. Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html [https://perma.cc/CXX3-V5WS].

231. Richard L. Hasen, *Supreme Error*, SLATE (Aug. 19, 2013, 12:08 PM), https://slate.com/news-and-politics/2013/08/north-carolinas-speedy-vote-suppression-tactics-show-exactly-why-the-voting-rights-act-was-working.html [https://perma.cc/92H6-SXSA].

232. Sherrilyn Ifill, *Before 2020: Upgrade Voting Systems, Restore Voting Rights Act, End Voter Suppression*, USA TODAY (Nov. 12, 2018, 3:15 AM), https://www.usatoday.com/story/opinion/2018/11/12/end-voter-suppression-restore-voting-rights-act-update-machines-column/1965522002/ [https://perma.cc/MSL2-JY4E].

The Supreme Court this Term will consider two consolidated cases under Section 2 of the Voting Rights Act, which prohibits any law that has the purpose or effect of abridging racial minorities' right to vote.[233] The 2020 elections have shown minority disenfranchisement to be a continuing feature of American democracy.[234] Even with the United States becoming a majority-minority nation by 2044, vote dilution and suppression could prevent minority numbers from translating into political power.[235] Yet, despite constant threats to the right to vote, the Supreme Court may further weaken voter protections by declaring that the time for reckoning has ended.[236]

D. Affirmative Action

Affirmative action emerged in the 1960s as a way of reckoning with the exclusionary legacies of racism.[237] However, since affirmative action first reached the Supreme Court in the 1970s, decisions have used multiple transitional logics. In primarily distancing terms, the Court has restricted overt reliance on race in the hopes of transcending racial divisions and reaching a colorblind society. In diluted reckoning terms, it has allowed

233. Democratic National Committee v. Hobbs, 948 F.3d 989 (9th Cir.) (en banc), *cert. granted sub nom.* Brnovich v. Democratic National Committee, No. 19-1257, 2020 WL 5847130 (U.S. 2020). The Ninth Circuit ruled that Section 2 prohibits Arizona from eliminating two practices which are disproportionately used by minorities to exercise their right to vote. Amy Howe, *Justices Add Seven New Cases to Docket, Including Major Voting-Rights Dispute*, SCOTUSBLOG (Oct. 2, 2020, 12:18 PM), https://www.scotusblog.com/2020/10/justices-add-seven-new-cases-to-docket-including-major-voting-rights-dispute/ [https://perma.cc/T22R-U7AK].

234. For a summary of recent voting rights litigation, see *Voting Rights Litigation 2020*, BRENNAN CENT. FOR JUST., https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-2020 [https://perma.cc/SK2E-5PH2]. For a history of disenfranchisement from Reconstruction to the present day, see ANDERSON, *supra* note 90, 2–44.

235. *Projecting Majority-Minority: Non-Hispanic Whites May No Longer Comprise Over 50 Percent of the U.S. Population by 2044*, U.S. CENSUS BUREAU, https://www.census.gov/content/dam/Census/newsroom/releases/2015/cb15-tps16_graphic.pdf [https://perma.cc/8AFY-DUAZ].

236. An important strand of voting rights literature discusses (without using explicitly transitional language) whether the Voting Rights Act has served its purpose and is now impeding rather than facilitating racial transition. *Compare* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) (suggesting that "section 5 has served its purposes and may now be impeding the type of political developments that could have been only a distant aspiration when the VRA was passed in 1965"), *with Retrogression of Retrogression*, *supra* note 206, at 36 ("Our long, bitter, and all-too-recent history of covered jurisdictions' pervasive indifference and hostility to minority citizens' political aspirations demands something more than the triumph of hope over experience.").

237. President Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights," *in* 2 PUB. PAPERS 635, 636 (June 4, 1965); Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 278–84 (2015).

"indirect"[238] reliance on race with the understanding that race remains salient in American society, and thus an element of race-consciousness is needed to move toward a country free of race-based discrimination.[239]

The Supreme Court first ruled on the constitutionality of affirmative action in its 1978 decision in *Regents of the University of California v. Bakke*.[240] Four Justices in that case—Justices Blackmun, Brennan, Marshall, and White—embraced racial reckoning. Writing for all four in dissent, Justice Brennan recounted "how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color."[241]

Looking backward, Justice Marshall argued that Black people's subordinate social position today was "the tragic but inevitable consequence of centuries of unequal treatment."[242] He urged a reckoning with America's racist history and the inclusion of Black people in American life, because "[t]o fail to do so is to ensure that America will forever remain a divided society."[243]

Looking forward, Justice Blackmun argued that affirmative action would help the United States become a society in which affirmative action is no longer needed.[244] As he put it: "[B]eyond any period of what some would claim is only *transitional* inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary."[245] But that end point of racial transition would not arrive without racial reckoning: "In order to get beyond racism, we must first take account of race. There is no other way."[246]

Each of these opinions conceived of reckoning as a necessary path to distancing; without race-based steps to undo historical legacies, American society would remain segregated and stratified. Justices Blackmun,

238. Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2536–39 (2019) [hereinafter *Racial Indirection*] (discussing racial transition as a justification for indirect reliance on race); *Affirmative Action as Transitional Justice*, *supra* note 22, at 20–22 (same).

239. Other affirmative action cases (beyond those discussed here) have also used multiple transitional logics. For example, in *Wygant v. Jackson Bd. of Ed.*, 476 US 267 (1986), Justice Powell wrote that "[p]ublic schools, like other public employers, operate under two interrelated constitutional duties": (1) "to eliminate every vestige of racial segregation and discrimination in the schools," which suggests reckoning, and (2) "to 'do away with all governmentally imposed discriminations based on race,'" which suggests distancing. *Id.* at 277. Powell said that "[t]hese related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care." *Id.*

240. 438 U.S. 265 (1978).

241. *Id.* at 326 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

242. *Id.* at 395 (Marshall, J., concurring in part and dissenting in part).

243. *Id.* at 396.

244. *Id.* at 403 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

245. *Id.*

246. *Id.* at 407.

Brennan, Marshall, and White would have upheld race-based affirmative action, even if it would "upset the settled expectations of nonminorities."[247]

In an opinion that would prove hugely influential in constitutional law, Justice Powell took a different view of transition. He declared that changes in American society since 1868 meant that "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority."[248] From this distancing perspective, too much time had passed and there had been too many intervening events since Reconstruction to justify a strong reckoning jurisprudence under the Fourteenth Amendment.

Powell cautioned that legal doctrine could not resolve transitional problems and that "transitory considerations" ought not to influence legal doctrine.[249] Yet, despite this caution, Powell applied his own theory of transition to limit affirmative action. America, he declared, had become "a Nation of minorities" in which "[e]ach had to struggle"[250] and none had a singular claim to reckoning.[251] He worried that race-based affirmative action "may serve to exacerbate racial and ethnic antagonisms rather than alleviate them,"[252] expressing particular concern for "innocent" Whites who "bear the burdens of redressing grievances not of their making."[253] From this transitional theory, Powell's opinion steered affirmative action away from programs explicitly based on race toward those in which reliance on race is less conspicuous, and away from racial reckoning toward the more universal rationale of "diversity."[254]

In 2003, *Grutter v. Bollinger* endorsed Justice Powell's opinion in *Bakke*.[255] Yet, even as *Grutter* accepted *Bakke's* constraints on the use of race in admissions, it embraced a more expansive understanding of the transitional functions that race-sensitive affirmative action could perform. Writing for a 5-4 majority, Justice O'Connor acknowledged that such affirmative action could "promote[] 'cross-racial understanding,' help[] to break down racial stereotypes, and 'enable[] [students] to better understand persons of different races.'"[256] It could also "cultivate a set of leaders with

247. *Id.* at 363 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

248. *Id.* at 292 (Powell, J.).

249. *Id.* at 298–99.

250. *Id.* at 292.

251. Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1063 (2007) [hereinafter *A Nation of Minorities*].

252. *Bakke*, 438 U.S. at 298–99.

253. *Id.* at 298, 307.

254. *Id.* at 311–13.

255. Grutter v. Bollinger, 539 U.S. 306, 320 (2003) (upholding the race-sensitive admissions program of the University of Michigan Law School).

256. *Id.* at 330.

legitimacy in the eyes of the citizenry" by ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity."[257]

Grutter proclaimed that distancing from the nation's past was incomplete and still required a modicum of reckoning. Justice O'Connor pointed to the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[258] As she explained: "By virtue of our Nation's struggle with racial inequality, [minority] students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."[259] Limited use of race in admissions would allow for reckoning *while* distancing, reducing racial disparities and ultimately the need for overt racial considerations. However, because it relied on "dangerous" classifications rooted in a racist past, O'Connor insisted that race-sensitive affirmative action "must have a logical end point."[260] Based on the progress made during the previous twenty-five years, she predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[261]

Justice Ginsburg suggested that much more racial reckoning was necessary. Her concurrence in *Grutter* described the timeline of twenty-five years as a "hope, but not [a] firm[] forecast," pointing out the nonlinear progress of the previous twenty-five years.[262] Her dissent in *Gratz v. Bollinger* (a sibling case decided on the same day as *Grutter*) pushed even more for reckoning. Rejecting distancing in express terms, Ginsburg wrote: "[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools."[263] Proximity to historical injustice made

257. *Id.* at 332.
258. *Id.* at 333.
259. *Id.* at 338.
260. *Id.* at 342.
261. *Id.* at 343. After retiring, O'Connor reportedly said that her twenty-five-year timeline in *Grutter* "may have been a misjudgment," adding that: "There's no timetable. You just don't know." Evan Thomas, *Why Sandra Day O'Connor Saved Affirmative Action*, THE ATLANTIC (Mar. 19, 2019), https://www.theatlantic.com/ideas/archive/2019/03/how-sandra-day-oconnor-saved-affirmative-action/584215/ [https://perma.cc/3URC-WJFR]; *see* Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172–73 (2004).
262. *Grutter*, 539 U.S. at 345–346 (Ginsburg, J., concurring). Deadlines to complete transition sometimes lead to relitigating the past and renegotiating the social and legal compacts made to deal with it; other times, the lapsing of a deadline is taken to imply that the transition is complete. For instance, with the Freedmen's Bureau's impending expiration in 1866, Andrew Johnson declared that remedial measures were no longer needed "in a time of peace, and after the abolition of slavery." Andrew Johnson, *An Important Veto Message from President Johnson*, N.Y. TIMES (Feb. 20, 1866), https://www.nytimes.com/1866/02/20/archives/washington-news-an-important-veto-message-from-president-johnson-he.html [https://perma.cc/88PQ-TW3F].
263. Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting).

affirmative action a transitional necessity: "The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital."[264]

Meanwhile, *Grutter* dissents also used transitional arguments to oppose affirmative action. From his distinctive reckoning perspective, Justice Thomas argued that *any* government intervention involving race either harms Black people or cannot be trusted not to harm them. Quoting an 1865 address by Frederick Douglass, in which he asked the nation to "[d]o nothing with us," Thomas urged that genuine reckoning with racial wrongdoing required *inaction*.[265]

Offering his hybrid transitional viewpoint, Justice Kennedy argued that *direct* reliance on racial categories would "perpetuate the hostilities that proper consideration of race is designed to avoid."[266] Although Kennedy believed both reckoning and distancing had their place, even rectifying racial exclusion could not justify the risks of racial categorization. Kennedy instead wanted racially *indirect* admissions programs that would "bring[] about the harmony and mutual respect among all citizens that our constitutional tradition has always sought."[267]

In 2014, Justice Kennedy again worried that reckoning which risked disharmony would threaten transition. Writing for a majority that upheld Michigan's ballot initiative banning affirmative action, Kennedy cautioned: "Government action that classifies individuals on the basis of race . . . carries the danger of perpetuating the very racial divisions the polity seeks to transcend."[268]

By contrast, Justice Sotomayor's fifty-five-page-long dissent emphasized the need for honest racial reckoning: "The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination," she wrote.[269] Setting out the various ways in which "race matters" in American society,

264. *Id.* at 304 (citation omitted). Similarly, in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 274 (1995), Justice Ginsburg argued that "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice."

265. *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part).

266. *Id.* at 394 (Kennedy, J., dissenting).

267. *Id.* at 394–95. *See generally Racial Indirection*, *supra* note 238.

268. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 308 (2014).

269. *Id.* at 381 (Sotomayor, J., dissenting). This was an apparent repudiation of Chief Justice Roberts's principle of absolute colorblindness: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

Sotomayor urged her colleagues to recognize how their decision upholding an affirmative action ban would hurt transition.[270]

Most recently, the Supreme Court confirmed the constitutionality of affirmative action in *Fisher v. University of Texas* in 2016.[271] Justice Kennedy's majority opinion revealed that although he remained concerned about racial harmony, his perspective had evolved since *Grutter*.[272] *Fisher* reflected the understanding that in an American society where race still matters, racial harmony and transition may be impossible without race-sensitive measures.

Where Justice Kennedy went from affirmative action dissenter to defender, Justice Thomas doubled down. In reckoning terms, Thomas compared affirmative action to slavery and Jim Crow on the basis that "[t]he worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities."[273] He further equated arguments made in favor of racial diversity to those that were "advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court."[274] For him, true racial reckoning meant ending "perpetual racial tinkering by the State."[275]

A Supreme Court bolstered by three Trump appointees may be willing to reconsider this line of cases. In September 2019, a federal judge upheld Harvard College's affirmative action program for reasons steeped in transition.[276] "The rich diversity at Harvard and other colleges and universities and the benefits that flow from that diversity will foster the tolerance, acceptance and understanding," Judge Allison D. Burroughs wrote, "that will ultimately make race conscious admissions obsolete."[277] The First Circuit upheld this opinion in November 2020.[278] Given the opportunity to hear *Students for Fair Admissions v. Harvard* or a similar case, the Supreme Court is likely to ground its arguments about affirmative

270. *Schuette*, 572 U.S. at 380–81 (Sotomayor, J., dissenting). Justice Sotomayor framed the past out of which the United States is transitioning as follows: "For much of its history, our Nation has denied to many of its citizens the right to participate meaningfully and equally in its politics. This is a history we strive to put behind us. But it is a history that still informs the society we live in, and so it is one we must address with candor." *Id.* at 342.

271. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

272. Yuvraj Joshi, Bakke *to the Future: Affirmative Action After* Fisher, 69 STAN. L. REV. ONLINE 17 (2016).

273. *Fisher I*, 570 U.S. 297, 328 (2013) (Thomas, J., concurring).

274. *Id.* at 320.

275. *Id.* at 325.

276. Yuvraj Joshi, *What the Harvard Decision Gets Right about Affirmative Action,* INT'L J. CONST. L. BLOG (Oct. 11, 2019), http://www.iconnectblog.com/2019/10/what-the-harvard-decision-gets-right-about-affirmative-action/ [https://perma.cc/939Z-BJT9].

277. Students for Fair Admissions v. President & Fellows of Harvard College, 397 F. Supp. 3d 126, 205 (D. Mass. 2019).

278. Students for Fair Admissions v. President & Fellows of Harvard College, No. 19-2005 (1st Cir. Nov. 12, 2020).

action in the circumstances and needs of a society in transition.[279] Therefore, when affirmative action returns to the Court, supporters and critics will not only be litigating specific admissions policies. They will also be litigating whether America's racial past is truly behind it—and whether affirmative action can help complete the transition.

E. Disparate Impact

Disparate impact laws allow discrimination to be measured by the disproportionate harm a practice inflicts on racial minorities, even without proof of intentional discrimination.[280] As these laws redress enduring racial disparities, they are supported by those who perceive a connection between current disparities and past or present state action and challenged by those who deny any such connection. Accordingly, while a reckoning strand of jurisprudence has recognized the transitional necessity of disparate impact liability, another distancing strand has placed limitations on disparate impact claims and restricted them to particular statutory contexts.

The Supreme Court first recognized disparate impact liability in its 1971 decision in *Griggs v. Duke Power Co.*[281] *Griggs* allowed plaintiffs to challenge an employer's job requirements of a standardized test and a high school degree based on a disparate impact on minority applicants.[282] In so doing, it identified a distinctly reckoning-related objective of Title VII, which is to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[283] As society sought to surmount racial wrongdoing, it said, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[284] Such "freezing" of an unequal and discriminatory status quo would impede transition to a world where "race, religion, nationality, and sex become irrelevant."[285]

Griggs stood for the principle that eliminating overt discrimination was not enough to complete racial transition; disparate impact liability was needed to deal with covert forms of discrimination and disparities that

279. *Racial Indirection*, *supra* note 238, at 2560–62.

280. In so doing, disparate impact laws tackle implicit bias and structural discrimination that are common in a society transitioning from an oppressive past. *See* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 657–59 (2015).

281. 401 U.S. 424 (1971). *See generally* Alfred W. Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

282. *Griggs*, 401 U.S. at 425–28.

283. *Id.* at 429–30.

284. *Id.* at 430.

285. *Id.* at 436.

required focused action. However, changes in the composition of the Supreme Court assured that *Griggs*, rather than declaring an overarching reckoning principle, would have its impact confined to particular discrimination cases.

Only five years after *Griggs* in 1976, a differently constituted 7-2 majority in *Washington v. Davis* upheld a qualifying test for police officers that had a disparate impact on Black applicants.[286] Ignoring *Griggs*' reckoning with race-based educational disparities, the *Davis* Court had "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory" because of racially disproportionate consequences.[287] It further expressed concern that accepting disparate impact liability under the Constitution would threaten laws (like the tax code) "that may be more burdensome to the poor and to the average black than to the more affluent white."[288]

Citing *Davis* ten years later in 1986, a 5-4 majority in *McCleskey v. Kemp* upheld a Black man's death penalty conviction despite statistical evidence showing racial disparities in Georgia's capital sentencing process.[289] The *McCleskey* Court worried that accepting that "racial bias has impermissibly tainted the capital sentencing decision" would lead to "similar claims as to other types of penalty."[290] To that Court, preserving a potentially discriminatory status quo was a more constitutionally acceptable risk than initiating a systemic reckoning.[291]

Justice Brennan labeled the *McCleskey* Court's reasoning "a fear of too much justice."[292] His dissent recognized racial disparities in Georgia's capital sentencing process as a testament to "[t]he ongoing influence of history."[293] Rejecting a superficial distancing from historical racism, Brennan refused to "pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries."[294] Instead,

286. Washington v. Davis, 426 U.S. 229 (1976); *see* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (critiquing the discriminatory purpose standard in *Davis*); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. Chi. L. Rev. 935 (1989) (same).

287. *Davis*, 426 U.S. at 245.

288. *Id.* at 248; *see* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS–AND HOW WE CAN FIX IT (forthcoming 2021).

289. 481 U.S. 279 (1987); *see* Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988) (comparing *McCleskey* to *Plessy* and *Korematsu*); Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018) (describing the historical context surrounding *McCleskey*).

290. *McCleskey*, 481 U.S. at 315.

291. *Id.* at 305.

292. *Id.* at 339 (Brennan, J., dissenting).

293. *Id.* at 333.

294. *Id.* at 344.

transition required time to grapple with "the subtle and persistent influence of the past" because "the reverberations of injustice are not so easily confined."[295]

Ricci v. DeStefano in 2009 returned disparate impact to the spotlight.[296] *Ricci* held that New Haven violated Title VII by discarding the results of a promotional exam—one that would have promoted a disproportionate number of White candidates over minority candidates—*after* the test had been administered.[297] Writing for a 5-4 majority, Justice Kennedy noted the perceived tension between reckoning and distancing, that is, "the tension between eliminating segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other."[298] In his view, reconciling these competing transitional goals required flexible rather than mechanical approaches.

Where Justice Kennedy saw transitional goals in tension, Justice Ginsburg saw harmony. Her dissent emphasized that ending "needlessly exclusionary selection processes" actually encouraged "race-neutral means to increase minority . . . participation."[299] In this way, Title VII's disparate impact provision promoted reckoning by desegregating employment *and* distancing by moving away from racial considerations.[300]

Disparate impact survived its most recent challenge in *Texas v. Inclusive Communities*.[301] Writing for a 5-4 majority, Justice Kennedy explained how disparate impact liability promoted reckoning by targeting "housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification."[302] Despite these benefits for reckoning, Kennedy limited disparate impact liability to facilitate distancing. He worried that such liability "might cause race to be

295. *Id.*

296. Ricci v. DeStefano, 557 U.S. 557 (2009); *see* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci: *Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 82–86 (2010) (critiquing *Ricci* for validating a racial framing where "present-day discrimination is largely a problem confronting whites" and the pursuit of test fairness is by definition a racial agenda); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 223 (2010) (arguing that *Ricci*'s highly differing narratives reflect "the Court's deeply divided views over the meaning of equality . . . informed by a divided empirical assessment of the United States' post-racial status").

297. *Ricci*, 557 U.S. at 580; *see* Mark S. Brodin, Ricci v. DeStefano: *The New Haven Firefighters Case and the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 204–05, 224 (2011) (critiquing *Ricci*'s "equation of test success with merit" despite White firefighters having "generational advantages" on the same test); Norton, *supra* note 296, at 220 (noting that the *Ricci* dissent discussed national and local histories of racism in government and questioned the test's ability to pick true leaders).

298. *Ricci*, 557 U.S. at 582.

299. *Id.* at 627 (Ginsburg, J., dissenting).

300. Ginsburg noted that "[f]irefighting is a profession in which the legacy of racial discrimination casts an especially long shadow," suggesting the need for additional reckoning. *Id.* at 609.

301. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015).

302. *Id.* at 539.

used and considered in a pervasive way and 'would almost inexorably lead' governmental or private entities to use 'numerical quotas.'"[303] Safeguards, such as establishing causality between a policy and a statistical disparity, were needed in order to avoid undue perpetuation of racial considerations.[304]

Ultimately, *Inclusive Communities* understood the law's significance for racial transition. "Much progress remains to be made in our Nation's continuing struggle against racial isolation," Justice Kennedy concluded.[305] "The Court acknowledges the Fair Housing Act's continuing role in moving the Nation toward a more integrated society."[306]

Unsurprisingly, Justice Thomas disagreed with this transition project. Because he doubted that racially disparate practices were discriminatory at all, Thomas would have ended disparate impact liability under both the Fair Housing Act and Title VII.[307] Meanwhile, Justice Alito accepted the Fair Housing Act's transitional aim[308] but rejected disparate impact liability on both textual[309] and transitional[310] grounds, echoing Kennedy's concern that disparate impact liability may "perpetuate race-based considerations rather than move beyond them."[311]

In August 2019, the Trump Department of Housing and Urban Development issued a proposed rule that would make it more difficult to bring successful disparate impact claims under the Fair Housing Act.[312]

303. *Id.* at 542 (quoting Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 653 (1989)).

304. Furthermore, disparate impact liability had to be limited to "sustain a vibrant and dynamic free-enterprise system," suggesting that the nation's racial transition, although important, is not necessarily the paramount objective. *Id.* at 533.

305. *Id.* at 546.

306. *Id.* at 546–47; *see* Robert G. Schwemm, *Fair Housing Litigation after* Inclusive Communities: *What's New and What's Not*, 115 COLUM. L. REV. SIDEBAR 106 (2015) (noting that *Inclusive Communities* solidified disparate impact theory in fair housing cases and anticipating future cases stemming from landlords' use of prior criminal records and refusal to rent to voucher holders, restrictions on housing opportunity connected with geography, and mortgage providers screening using credit scores or tactics that exclude minorities disproportionately).

307. *Inclusive Cmtys. Project*, 576 U.S. at 547–57 (Thomas, J., dissenting).

308. *Id.* at 560 (Alito, J., dissenting).

309. *Id.* at 559–63.

310. *Id.* at 589.

311. *Id.* (quoting *id.* at 543 (majority op.)).

312. Linda Greenhouse, *Civil Rights Turned Topsy-Turvy*, N.Y. TIMES (Aug. 29, 2019), https://www.nytimes.com/2019/08/29/opinion/trump-civil-rights.html [https://perma.cc/2SNP-4WZK]. Henry Rose argues that the Department's proposal would not be harmonious with *Inclusive Communities*, which "explicitly identified 'perpetuating segregation' as a discriminatory effect that the [Fair Housing Act] is designed to prevent." Henry Rose, How the Trump Administration's Plan to Limit Disparate Impact Liability Would Undermine the Fair Housing Act's Goal of Promoting Residential Integration 12 (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm=3464555).

Additionally, in the final weeks of the Trump Administration, the Department of Justice sought to limit disparate impact liability under Title VI of the Civil Rights Act. Katie Benner & Erica L. Green, *Justice Dept. Seeks to Pare Back Civil Rights Protections for Minorities*, N.Y. TIMES (Jan. 5, 2021), https://www.nytimes.com/2021/01/05/us/politics/justice-department-disparate-impact.html [https://perma.cc/F6V6-HL6R].

However, a federal judge issued a nationwide preliminary injunction in October 2020,[313] and the Biden Administration has committed to vigorously enforcing the Fair Housing Act.[314] Nevertheless, Justice Kennedy's vote was crucial to sustaining disparate impact liability; changes in the composition of the Court have thrown its doctrinal future into doubt.[315]

F. The Roberts Court and Ramos v. Louisiana

This Part has shown the significance of transitional reasoning to racial equality decisions and how that reasoning has evolved. Recent decisions reflect a shift from a reckoning viewpoint—that present discrimination and disparities are the legacies of the past—toward a distancing viewpoint—that present discrimination and disparities are far removed from the past. While the Court has not been completely consistent in its embrace of distancing,[316] the jurisprudence of several conservative Justices argues that because America's racial transition has mostly concluded, measures once deemed beneficial are now burdensome. Some find the continuation of racial reckoning itself a barrier to completing racial transition.

This trend is problematic, however, because despite some indications of racial progress, American society remains deeply racially stratified for both enduring and evolving reasons, suggesting that more reckoning is needed.[317]

313. Katy O'Donnell, *Court Stops Launch of HUD Rule that Makes It Harder to Prove Discrimination*, POLITICO (Oct. 26, 2020), https://www.politico.com/news/2020/10/26/court-stops-hud-rule-discrimination-432592 [https://perma.cc/4QBQ-572P].

314. *The Biden Plan for Investing in Our Communities Through Housing*, https://joebiden.com/housing/ [https://perma.cc/B23F-54Z6]. On using the Fair Housing Act to address racial disparaties, see Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

315. Legal scholars have discussed whether statutory disparate impact standards contravene constitutional equal protection standards, making disparate impact laws unconstitutional under current doctrine. Writing before *Ricci* was decided, Richard Primus outlines three possible readings of disparate impact decisions, including a *general* reading that views any disparate impact standard as an equal protection problem. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003). Samuel Bagenstos predicts that although *Inclusive Communities* provides a path for reconciling disparate impact and equal protection, a more conservative Court "will quite likely hold, notwithstanding *Inclusive Communities*, that disparate impact laws are unconstitutional." Samuel Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115, 1167 (2016). Writing in the Trump era, Reva Siegel suggests that disparate impact can survive "if disparate impact is not defended solely as a measure of *racial* justice, but also serves as a standard of inclusion that other Americans might claim." Reva B. Siegel, *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss's Brennan Lecture*, 106 CALIF. L. REV. 2001, 2022 (2018).

316. For example, *Parents Involved* and *Shelby County*, which were authored by Chief Justice Roberts, reason from distancing much more strongly than *Fisher* and *Inclusive Communities*, which were authored by Justice Kennedy.

317. For research linking present day United States to its racist history, see generally IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA

Although transitional societies "must deal with the past and not dwell in it,"[318] the jurisprudence of the U.S. Supreme Court has veered too far from dealing with the past. The Court has legitimated the belief that brief implementation of discrete measures has resolved centuries of racial subordination,[319] when transitional justice is an intergenerational project requiring holistic approaches.[320] Such a distancing approach would be tenuous even in a society that had implemented a transitional justice strategy; it seems altogether untenable in an American society weighted by the failed promises of the First and Second Reconstructions.[321]

Despite these limitations, the Roberts Court is likely to continue developing its own distancing jurisprudence to reorient racial equality law. For instance, the Court may discontinue or weaken current civil rights laws

(2017); KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019); MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2017); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2010); HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT (2006).

318. Boraine, *supra* note 81, at 27.

319. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70, 175 (1995) (Ginsburg, J., dissenting) ("[C]ompared to more than two centuries of firmly entrenched official discrimination, the experience with the desegregation remedies ordered by the District Court has been evanescent.").

320. For example, Canada's Indian Residential Schools Settlement Agreement of 2007 included $125 million to address "the legacy of harms suffered at Indian Residential Schools including the intergenerational effects." Chantelle Bellrichard, *Residential School Healing Fund Set to End as First Nations Leaders Say Demand for Services Growing*, CBC NEWS (Nov. 25, 2020, 4:00 AM), https://www.cbc.ca/news/indigenous/residential-schools-end-healing-fund-1.5814505 [https://perma.cc/L3NR-HWWW].

321. A distancing jurisprudence further bolsters America's "creedal story" that depicts American history as a "steady fulfillment" of the idea that "all men are created equal." Aziz Rana, *Race and the American Creed: Recovering Black Radicalism*, N+1 (Winter 2016), https://nplusonemag.com/issue-24/politics/race-and-the-american-creed/ [https://perma.cc/9VXZ-4XV7]. Because enduring racial oppression challenges the notion of America's founding commitment to equality, a distancing approach that isolates racism to discrete historical periods is one way to "recover" American national identity. *See* Meister, *supra* note 27, at 86 (describing a post-Civil War project of national "recovery"); Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265 (2019) (chronicling a "restorative" post-Civil War jurisprudence). By painting slavery and segregation as exceptional periods that were successfully overcome, distancing obscures how white supremacy and settler colonialism have been the nation's governing doctrines from the beginning and are still with us. *See* AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2011); KENDI, *supra* note 317; Waldstreicher, *supra* note 36; Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549 (1993). In so doing, distancing turns racial transition into a national redemption story instead of a cautionary tale about how racism endures and evolves. This redemption story in turn serves both as a sword for ending civil rights measures and as a shield against criticizing inequitable laws and policies. Meanwhile, America's creedal story take the place of other, more egalitarian ideals that may be recovered from the past or imagined in the future. *See* WILLIAM J. BARBER, II WITH JONATHAN WILSON-HARTGROVE, THE THIRD RECONSTRUCTION: MORAL MONDAYS, FUSION POLITICS, AND THE RISE OF A NEW JUSTICE MOVEMENT 56 (2016) (recovering the practice of "fusion politics" from nineteenth-century U.S. thought).

by counting on Congress to "update" laws for the twenty-first century,[322] while constricting legally recognized racial justice claims and the practical structuring of civil rights measures.

On the current Court, for instance, Chief Justice Roberts is deeply invested in restoring a social and legal status quo devoid of "extraordinary" transitional practices. In *Shelby County*, Roberts struck down key provisions of the Voting Rights Act on the belief that voting discrimination today—which he said "still exists"—was less evil and more ordinary than the "extraordinary problem" of the past.[323] As such, Roberts' distancing approach requires terminating "extraordinary" civil rights protections even if the problems they addressed have not ended, but simply shifted form. Especially when civil rights measures offend his vision of a colorblind society, he feels that their continuation could "do more harm than good."[324]

Meanwhile, as the second African American on the Court, Justice Thomas appeals to *both* distancing and reckoning to reject civil rights measures.[325] In distancing terms, he contends that segments of American society are no longer demonstrably affected by historical injustice, rendering protections against that injustice inappropriate.[326] In reckoning terms, he suggests that contemporary civil rights laws harm Black people by virtue of being government interventions involving race.[327] According to Thomas, race-sensitive measures do not only prevent the United States from leaving its racist past behind, they represent a continuation or repetition of that past. Because he maintains that government interventions can only

322. Charles & Fuentes-Rohwer, *supra* note 190 (noting that replacing the Voting Rights Act requires rebuilding a consensus around what discrimination and voting rights mean; only then can a new public policy become a superstatute, upheld by all branches).

323. Shelby Cty. v. Holder, 570 U.S. 529, 534, 536 (2013).

324. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 315 (2014) (Roberts, C.J., concurring).

325. Whereas his White conservative colleagues tailor their transitional arguments to American society as a whole, White Americans, cross-racial relations, and only occasionally Black people and non-Black minorities, Justice Thomas frequently appeals to the interests of Black Americans. In a recent book, Corey Robin argues that "Thomas is a black man whose conservatism is overwhelmingly defined by and oriented toward the interests of black people, as he understands them." COREY ROBIN, THE ENIGMA OF CLARENCE THOMAS 4 (2019). Rejecting this depiction, Randall Kennedy argues that "a far better guide to Clarence Thomas's thinking than the Constitution or *The Autobiography of Malcolm X* are the platforms of the Republican Party and the talking points of Rush Limbaugh." Randall Kennedy, *The Apparatchik: The rise of Clarence Thomas*, THE NATION (Oct. 29, 2019), https://www.thenation.com/article/archive/enigma-clarence-thomas-book-review/ [https://perma.cc/T5Y6-NCSE]. This disagreement raises questions whether judges' claims about transition are grounded in some normative conception of a racially just society or whether they are merely politically expedient justifications for reorienting racial equality law. *See infra* Part III.B.1.

326. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 756 (Thomas, J., concurring).

327. *Id.*

really harm Black people,[328] his reckoning approach requires ending "perpetual racial tinkering by the State."[329]

Last Term's decision in *Ramos v. Louisiana* sheds some light on the transitional approaches of two of the Court's newer members.[330] Writing for a 6-3 majority, Justice Gorsuch recognized that Louisiana's law allowing non-unanimous jury verdicts arose out a convention whose "avowed purpose . . . was to 'establish the supremacy of the white race.'"[331] Likewise, Oregon's law could be "traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'" [332] The majority opinion considered these "racist origins of Louisiana's and Oregon's laws" relevant to its legal analysis.[333] Justice Kavanaugh's concurrence similarly recognized "non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans. . . ."[334] For him, these racist origins colored contemporary practice and were "significant" to legal analysis.[335] Refusing to completely disassociate past and present, he noted how "[t]hen and now, non-unanimous juries can silence the voices and negate the votes of black jurors. . . ."[336] By contrast, Justice Alito's dissent deemed the racist origins of a practice to mean "nothing" for contemporary constitutional questions.[337]

To many court watchers, *Ramos* reads like a reckoning opinion. As Leah Litman wrote immediately following the decision: "Perhaps *Ramos* signals that a new majority of the court is occasionally willing to acknowledge portions of America's racist history. Perhaps someday a majority of the court will be willing to do so in voting rights cases and across the board."[338] However, *Ramos* is also a distancing opinion in condemning only Jim Crow-style racism. Some Justices in the *Ramos* majority may be less willing to address racist practices that cannot be easily traced to a form practiced in an earlier era, as doing so would expand the scope of the transition

328. *See generally* Robin, *supra* note 325.
329. *Fisher I*, 570 U.S. 297, 325 (2013) (Thomas, J., concurring).
330. Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (Gorsuch, J.).
331. *Id.* at 1394.
332. *Id.*
333. *Id.* at 1405.
334. *Id.* at 1417 (Kavanaugh, J., concurring).
335. *Id.*
336. *Id.* at 1418.
337. *Id.* at 1426 (Alito, J., dissenting). Invoking *Ramos* two months later, Justice Alito deemed the origins of a practice to be extremely relevant where it involved prejudice against Catholics. Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2267–74 (2020) (Alito, J., concurring).
338. Leah Litman, *The Supreme Court Is Split on How to Talk About Race*, SLATE (Apr. 22, 2020, 6:53 PM), https://slate.com/news-and-politics/2020/04/supreme-court-racism-ramos-v-louisiana.html [https://perma.cc/UM46-LQN4].

project.[339] While *Ramos* suggests the possibility of occasional, limited reckoning, it gives no indication of a reversal of the trend toward distancing. Indeed, occasional reckoning may sustain the illusion that Supreme Court Justices are committed to surmounting racism in all of its forms rather than implicated in sustaining racism in the name of a colorblind society.[340]

Given recent appointments on the Supreme Court,[341] we urgently need analytical tools to evaluate different transitional arguments and to decide which claims should have purchase. To continue developing such tools, the next Part of this Article places the Court's local theories of transition in dialogue with the international field of transitional justice.

III. TRANSITION AND THE SUPREME COURT

Courts of law play a central role in transition processes. While special judicial mechanisms are sometimes established for these processes, standard courts are often responsible for promoting truth and reconciliation, prosecuting human rights violations, redressing victims for historical abuses, and articulating rule-of-law standards. In the United States, no special courts were established to steer the nation away from slavery and segregation. Instead, the U.S. Supreme Court has significantly and deliberately shaped the racial transition process.

This Part uses transitional justice theory to assess the Supreme Court's decision-making, placing its concerns within a broader and deeper context. This approach reveals the particular and limited ways in which the Court has understood transition—what issues it has prioritized and what it has missed—and sheds new light on interpretive disagreements within race jurisprudence.

339. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("[I]t is wholly inapt to liken that morally repugnant order [in *Korematsu*] to a facially neutral policy denying certain foreign nationals the privilege of admission.").

340. Likewise, a predominantly distancing jurisprudence may be seen to absolve institutions such as the Supreme Court of their responsibility in the perpetuation of systemic racism.

341. During her confirmation hearings, now-Justice Amy Coney Barrett said that while "it is an entirely uncontroversial and obvious statement" that "racism persists in our country," "making broader diagnoses about the problem of racism is kind of beyond what I'm capable of doing as a judge." *See Amy Coney Barrett Faces Questioning: Highlights of Day 2 of the Confirmation Hearings*, N.Y. TIMES (Oct. 14, 2020, 7:34 AM), https://www.nytimes.com/live/2020/10/13/us/amy-coney-barrett-live [https://perma.cc/HXT7-AWTD]. While it is difficult to determine Justice Barrett's transitional approach on the basis of this response, it intimates that her jurisprudence might not be one of racial reckoning. Instead, Justice Barrett might formulate her legal reasoning in non- or anti-transitional terms (i.e., "racism persists" but addressing it is beyond judicial purview) or in distancing terms (i.e., "racism persists" but is not as pressing today as it once was).

A. Transitional Justice Values

Transitional justice values of accountability, redress, non-repetition, and reconciliation provide a vocabulary and a normative framework for discussing Supreme Court decisions around race. This Part begins by examining how the Court interprets these values in shaping racial equality law, highlighting the limitations of both distancing and reckoning analyses.

1. Accountability

Promoting accountability is considered an important part of how successor regimes deal with the human rights abuses preceding them.[342] Accountability for past wrongs matters for reasons of justice, legitimacy, and "social learning."[343] Past abuses "if left unaddressed, can serve to maintain hostile relations and antagonistic identifications even in the absence of overt violence."[344] Accounting for the past can signal a shift in societal values and delegitimize violence against oppressed groups; failing to do so can have the opposite effect.[345]

Despite the importance of accountability for transition processes, the U.S. Supreme Court has avoided accountability for past and present racism.[346] This avoidance is reflected in *Brown* itself. In a May 1954 memorandum, Chief Justice Earl Warren instructed his colleagues that the *Brown* opinion should be "above all, non-accusatory."[347] Accordingly, *Brown* did not mention White people's humiliating and harmful treatment of Black children or segregation's white supremacist aims.[348] Where Randall Kennedy observes that "[m]issing from the most honored race

342. *See supra* text accompanying note 17. On how transitional justice mechanisms can themselves impede accountability, see Laurel E. Fletcher, *A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT'L L.J. 447 (2016).

343. Aiken, *supra* note 21, at 49.

344. *Id.*

345. *Id.* at 50.

346. Supreme Court decisions beyond its racial equality jurisprudence have been similarly detrimental to accountability. For instance, although there have been calls to hold the police responsible for killing Black people, the Court's "qualified immunity" doctrine has impeded accountability for police misconduct. Joanna Schwartz has found that "[a]lthough few cases are dismissed on qualified immunity grounds, multiple aspects of the doctrine . . . may send the message that officers can disregard the law without consequence." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018). The Court recently declined to hear several qualified immunity related challenges. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862 (2020).

347. Memorandum from Chief Justice Earl Warren to the Members of the United States Supreme Court (May 7, 1954).

348. In 1960, Charles Black, Jr., criticized the opinion for ignoring that segregation "is perceptibly a means of ghettoizing the imputedly inferior race" out of the Court's "reluctance to go into the distasteful details of the southern caste system." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960).

relations decision in American constitutional law is any express reckoning with racism," [349] Angela Onwuachi-Willig elaborates that "*Brown* completely failed to even name, much less recognize, the material benefits that had come to Whites, even poor Whites, as a result of Jim Crow racism."[350] This failure to hold White people accountable left intact "the unchallenged notions about black inferiority and white superiority that . . . had become deeply embedded within every aspect of our society."[351]

Post-*Brown* decisions have likewise avoided accountability for racism in various ways. Some of these decisions suggest that because the original perpetrators of slavery and Jim Crow are no longer around, it is wrong to hold "innocent" succeeding generations to account for historical wrongs.[352] Following this distancing logic, Justice Powell's plurality opinion in *Bakke* not only refused to recognize Whites as the perpetrators and beneficiaries of centuries-long racial subordination, it also depicted Whites as the victims of forms of discrimination on par with slavery and segregation.[353] Such reasoning is inadequate from an accountability perspective because it disregards the communal, intergenerational effects of historical injustice and the possibility of collective and political (as opposed to individual and personal) forms of responsibility.[354] Even decisions that have acknowledged the need for reckoning have avoided holding entities accountable for racist wrongs. The *Griggs* decision, for instance, went out of its way to absolve an employer of any discriminatory intent, despite that employer's history of racial discrimination.[355] Such refusals to hold racism and racial privilege to account may arise from deference to White Americans' need for positive

349. Randall L. Kennedy, *Ackerman's* Brown, 123 YALE L.J. 3064, 3068 (2014).

350. Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355 (2019).

351. *Id.*

352. Scholars have observed how the price of "Whites' experience of innocence is paid for by minorities." L. Taylor Phillips & Brian S. Lowery, *Herd Invisibility: The Psychology of Racial Privilege*, 27 CURRENT DIRECTIONS PSYCHOL. SCI. 156, 160 (2018); *see also* Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 512 (2006); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790 (1991); Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015).

353. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292; *see also* Haney López, *A Nation of Minorities*, *supra* note 251, at 1063.

354. Bashir, *Accommodating Historically Oppressed Social Groups: Deliberative Democracy and the Politics of Reconciliation*, *in* THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES 48, 58–59 (Will Kymlicka & Bashir Bashir eds., 2008).

355. Griggs v. Duke Power Co., 401 U.S. 424, 427 (1971); Blumrosen, *supra* note 281, at 59–60 ("[M]any companies had introduced tests . . . when they could no longer legally restrict opportunities of blacks and other minority workers . . . .").

self-regard[356] and America's exceptionalist self-image,[357] constricting legal and political accountability.

In circumstances where rigorous accountability would deepen social divisions, decisionmakers may be justified in pursuing a more tempered accountability in the service of other transitional justice values.[358] Transitional justice approaches seek to "reconcile legal norms that demand accountability with political goals such as conflict resolution, truth recovery, healing for victims and reconciliation."[359] Some Justices writing racial equality decisions may have downplayed accountability in the interest of furthering societal reconciliation,[360] although evidence of that logic is sparse. Indeed, the more salient question is not whether the Supreme Court has adequately balanced accountability and other transitional justice values, but whether it has considered accountability at all. As Colleen Murphy argues with respect to transitional compromises, it matters not only "that essential moral values be taken into account and to some extent achieved by transitional justice processes," but also that "their being taken into account be made recognizable."[361] Furthermore, even if the Court seeks balance between accountability and other values, it remains an open question whether that balance is defensible, as sacrificing accountability can itself impede reconciliation.[362]

356. Brian S. Lowery, Eric D. Knowles & Miguel M. Unzueta, *Framing Inequity Safely: Whites' Motivated Perceptions of Racial Privilege*, 33 PERSONALITY & SOC. PYSCHOL. BULL. 1237 (2007); Glenn Adams, Teceta Thomas Tormala & Laurie T. O'Brien, *The Effect of Self-Affirmation on Perceptions of Racism*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 616 (2006).

357. *See supra* text accompanying notes 29–32 and 100–101 (discussing American racial exceptionalism).

358. Olsen, Payne & Reiter, *supra* note 81 (comparing the merits of different levels of accountability).

359. Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'*, 3 INT'L J. TRANS. JUST. 5, 11 (2009).

360. *From Colorblindness to Antibalkanization*, *supra* note 27, at 1336–37 n.165.

361. Colleen Murphy, *III—On Principled Compromise: When Does a Process of Transitional Justice Qualify as Just?*, 120 PROC. ARIST. SOC'Y 47, 63 (2020).

362. Versions of this transitional justice argument were in circulation following Joseph Biden's presidential win and surfaced significantly following the violent insurrection at the United States Capitol on January 6, 2021, which resulted in Donald Trump's second impeachment. *See, e.g.*, The Editorial Board, *Accountability After Trump*, N.Y. TIMES (Dec. 19, 2020), https://www.nytimes.com/2020/12/19/opinion/sunday/trump-presidency-accountability.html [https://perma.cc/3BU3-MA58] ("Does restoring the soul of America require an exorcism of the past four years? Or would that only deepen the nation's divisions, making it impossible to move forward?"); Chris Coons, *The World Is Watching. We Need to Hold Trump Accountable*, N.Y. TIMES (Jan. 11, 2021), https://www.nytimes.com/2021/01/11/opinion/chris-coons-trump.html [https://perma.cc/Y8BB-2NQ4] ("To those Republican lawmakers who have been calling for healing and unity: There can be reconciliation only with repentance.").

2. Redress

Transitional justice aims to redress human rights violations and give effect to human rights norms.[363] Pablo de Greiff, former U.N. Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, calls for modes of redress that "not only assuage suffering but also restore the rights that were so brutally violated and affirm victims' standing as full citizens."[364]

The United States has never pursued comprehensive redress for slavery, Jim Crow practices, and ongoing discrimination. Still, some earlier Supreme Court decisions enforced and encouraged discrete racial remedies to reckon with historical legacies. Although many of these decisions reflected a limited understanding of racial harms and redress and were therefore inadequate, they at least recognized an ongoing need for remediation.[365] More recently, the Court has limited even modest forms of racial redress by requiring clear links between past wrongs and present remedies and by rejecting remedies that directly invoke race. These limitations are ostensibly justified in the interest of racial transition: to avoid forms of racial redress that the Court considers inapposite and inimical to the transition process.

For example, the Supreme Court has resisted generalized racial remedies to avoid unduly linking past and present society and placing the burden of redress on successive generations. In this vein, Justice Powell rejected affirmative action aimed at redressing "societal discrimination" because it may be "ageless in its reach into the past,"[366] "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."[367] However, questions of how far back to look and which victims, perpetrators, and descendants to involve in transitional justice processes are faced by most transitional societies. Their experiences provide insights about structuring redress in ways that recognize citizens as individuals, build civic trust, and foster social solidarity.[368] Insofar as the Court is involved in

363. *Theorizing Transitional Justice*, *supra* note 16, at 40.

364. *Id.* at 42–43. Redress can take a variety of forms, including criminal prosecutions, reparations programs (including material reparations such as compensation and symbolic reparations such as apologies), restitution programs (such as land transfers), truth and reconciliation processes, and institutional reforms.

365. For a critical perspective on earlier cases, see Goluboff, *supra* note 6; Lewis M. Steel, *A Critic's View of the Warren Court—Nine Men in Black Who Think White*, N.Y. TIMES (Oct. 13, 1968), https://www.nytimes.com/1968/10/13/archives/a-critics-view-of-the-warren-court-nine-men-in-black-who-think.html [https://perma.cc/9QLU-WZRX].

366. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

367. *Id.* at 298.

368. Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451–77 (Pablo de Greiff ed., 2006) [hereinafter *Justice and Reparations*].

delimiting acceptable redress for past wrongs, it should grapple with the complexity of these questions rather than avoid them.

Furthermore, the Supreme Court has worried that race-based remedies would impede transition by perpetuating racial considerations. As Justice Kennedy put it in *Parents Involved*: "To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome."[369] Yet, as discussed above, the evils of racism extend far beyond formal uses of race.[370] Even reckoning decisions like *Brown* and *Griggs* failed to address a larger white supremacist system in which Black people and other racial minorities suffer brutal abuse by both state and private actors.[371] More recently, efforts to address this larger system have been stymied by a distancing jurisprudence focused on avoiding racial classifications. From a transitional justice perspective, determining what kinds of redress are needed requires grappling with and making amends for the full magnitude of previous and ongoing human rights violations.[372]

3. Non-Repetition

Non-repetition refers to preventing a recurrence of human rights violations by addressing their underlying causes.[373] Naomi Roht-Arriaza explains that "[guarantees of non-recurrence] are broader than avoiding recurrence to the specific victim of a violation—even in their narrowest acceptation, they look to other potential victims of the same types of violations."[374] Pablo de Greiff calls for multidimensional responses "to diminish the likelihood of repeated violations," adding that "neither cost nor complexity of interventions is a legitimate excuse for inaction."[375]

Several reckoning opinions understand civil rights measures as a means of non-repetition without using that exact term. According to these opinions, voluntary school integration plans are aimed not only at "eradicating earlier school segregation," but also "preventing retrogression."[376] The preclearance requirement for voting changes is meant both to "facilitate completion of the impressive gains thus far made" and to "guard against

369. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part).

370. *See supra* Part I.A.

371. *See supra* text accompanying notes 346–349.

372. Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 DIACRITICS 33, 39–40 (2002) (critiquing South Africa's Truth and Reconciliation Commission for its narrow framing of the harms of apartheid).

373. *Measures of Non-repetition in Transitional Justice*, *supra* note 19.

374. *Id.*

375. Pablo de Greiff, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, ¶ 37, U.N. Doc. A/HRC/30/42 (Sept. 7, 2015).

376. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 806 (Breyer, J., dissenting).

backsliding."[377] Disparate impact liability in housing seeks to disrupt racially disparate "patterns that might otherwise result from covert and illicit stereotyping," even after formal racial discrimination has been outlawed.[378] From a reckoning viewpoint, because mechanisms that perpetuate racist human rights violations are various and evolving, measures of non-repetition must also be diverse and enduring.

While distancing opinions have also sought non-repetition, their predominant concern has been only "the prevention of official conduct discriminating on the basis of race."[379] Partly to avoid repeating its own errors like *Korematsu v. United States*, the Court has applied strict scrutiny to even benign racial classifications designed to benefit racial minorities: "Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."[380]

However, distancing opinions have rejected more expansive non-recurrence measures by refusing to recognize contemporary practices and structures as repetitions of historical racism. Thus, Chief Justice Roberts in *Parents Involved* disregarded the contributions that voluntary school integration plans could make to non-repetition of segregation; additionally, his opinion in *Shelby County* downplayed the significance of preclearance in preventing current and future voter suppression.[381] Going further, Justice Thomas in *Northwest Austin* categorically rejected "a forward-looking preventative measure" like preclearance as "[p]unishment for long past sins."[382] Failing to recognize current discrimination and disparities as part of a historical pattern hinders efforts at non-repetition, which requires "getting at root causes" and "a bottom-up analysis of what those root causes are."[383]

4. Reconciliation

Reconciliation refers to building social trust between members of a polity and increasing their willingness to live together peacefully in the

377. Shelby Cty. v. Holder, 570 U.S. 529, 559–60 (2013) (Ginsburg, J., dissenting).

378. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 576 U.S. 519, 540 (2015).

379. Washington v. Davis, 426 U.S. 229, 239 (1976); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978); Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

380. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995).

381. *Parents Involved*, 551 U.S. 701 at 725; *Shelby Cty.*, 570 U.S. at 549; *see* Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. F. 248 (2014).

382. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 226 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

383. Roht-Arriaza, *supra* note 19, at 33.

wake of a conflictual past.[384] Pablo de Greiff characterizes an "unreconciled society" as one in which "resentment characterizes the relations among citizens and between citizens and their institutions."[385] He emphasizes the resentment of *victims* who have suffered "massive abuse" and who need to be the focus of reconciliation efforts.[386] Political theorist Mihaela Mihai points out that although *perpetrators* may also experience resentment, some negative emotions may be less "democratically legitimate," and courts may play a role in addressing both legitimate and illegitimate negative emotions.[387]

The Supreme Court's concern for mitigating racial resentment arguably comports with transitional justice's concern for ensuring peace and reconciliation.[388] For instance, Justice Powell's opinion in *Bakke* struck down racial quotas to avoid the "deep resentment" likely to be felt by non-beneficiaries of affirmative action.[389] More recently, Justice Kennedy's decision in *Schuette* underscored affirmative action's "latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it."[390] However, unlike transitional justice approaches, which prioritize the pain of those historically oppressed, the Court's explicit reasoning has prioritized white resentment.[391]

The Supreme Court has failed to acknowledge minority resentment even in cases where it was presented with briefs highlighting the issue. For instance, a *Grutter* brief filed by student intervenors pointed to the "understandable anger and resentment" that stems from limiting affirmative action for a few underrepresented minority applicants while allowing the unfair advantages of White and wealthy applicants.[392] It cautioned that striking down affirmative action would "resegregate, divide, and polarize our country," leading to increased social strife.[393] However, these minority-centered narratives are absent from the Court's recent decisions. Instead, Justices have sought to assuage white resentment while doing little to actively alleviate minority frustration, treated white negative emotions as

384. While reconciliation is most commonly associated with truth commissions, other transitional justice measures, such as criminal prosecutions and reparation programs, can be key to mending relationships. Monika Nalepa, *Reconciliation, Refugee Returns, and the Impact of International Criminal Justice: The Case of Bosnia and Herzegovina*, 51 NOMOS 316, 316–19 (2012).

385. *Theorizing Transitional Justice*, *supra* note 16, at 49.

386. *Id.* at 50.

387. MIHAI, *supra* note 20, at 3.

388. *From Colorblindness to Antibalkanization*, *supra* note 27, at 1336–37 n.165.

389. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978).

390. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 314 (2014).

391. This was not always the case, as I show in other work. *See Racial Justice and Peace*, *supra* note 79.

392. Brief for Respondents at 37, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 716302, at *37.

393. *Id.* at *7–8.

more democratically legitimate[394] by prioritizing white resentment over minority frustration when limiting race-conscious policies. In so doing, the Supreme Court has promoted a one-sided reconciliation in which Black people must reconcile themselves to a white status quo; meanwhile, White people's sense of entitlement and victimhood remains unchallenged and even sacrosanct.[395]

In addition to resolving negative emotions, reconciliation involves transforming individual and communal identities. In relation to ethnic conflicts, Paige Arthur observes that decision-makers may "attempt to forge a new national identity to take the place of previous, divisive ones" or may "wish to stress individuality over collective identities . . . ."[396] However, she cautions, "attempting to abolish the 'old' identities may simply turn out to be a way of confirming their continuing importance."[397] Thus, identity-based conflict is seldom resolved by whitewashing the past and eliminating sociopolitical identities; instead, reconciliation involves facing the past and implementing structural changes in order to give old identities and relations new meanings.

Despite recognizing the need for Americans to reconcile with one another, some distancing opinions have sought to forge new identities without facing enduring divisions and disparities. For instance, Justice

394. In turn, this dynamic has played out on university campuses. Linking her law school's "tone-deaf" response to George Floyd's killing to the *Grutter* decision, law graduate Hannah Taylor underscored "the price Black America pays for White America's comfort in higher education." Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, SLATE (June 12, 2020, 1:50 PM), https://slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html [https://perma.cc/J32C-ZVVG].

395. Harris & West-Faulcon, *supra note* 296, at 85 (*Ricci* advances an "ideological realignment of antidiscrimination law to center on . . . whites"); Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 237, at 288 (discussing how "[t]he end result of the [*Fisher I*] majority opinion was the reinforcement and fortification of white privilege"); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 453 (2014) (discussing how the diversity rationale for affirmative action supports white privilege and inhibits the development of white anti-racist identity formation); L. Taylor Phillips & Brian S. Lowery, *The Hard-Knock Life? Whites Claim Hardships in Response to Racial Inequity*, 61 J. EXPERIMENTAL SOC. PSYCHOL. 12, 16 (2015) (finding that "Whites claim increased life hardships when exposed to evidence of racial privilege, that these claims are motivated by threat to self, and that these claims help Whites deny that racial privilege extends to themselves."); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. ON PSYCHOL. SCI. 215, 217 (2011) (finding that "not only do Whites think more progress has been made toward equality than do Blacks, but Whites also now believe that this progress is linked to a new inequality—at their expense"); Clara L. Wilkins & Cheryl R. Kaiser, *Racial Progress as Threat to the Status Hierarchy: Implications for Perceptions of Anti-White Bias*, 25 PSYCHOL. SCI. 439, 444 (2014) (finding that "racial progress causes Whites who view the status hierarchy as fair to react by perceiving more anti-White bias.").

396. Paige Arthur, *"Fear of the Future, Lived Through the Past": Pursuing Transitional Justice in the Wake of Ethnic Conflict*, *in* IDENTITIES IN TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 271, 271 (Paige Arthur ed., 2011) [hereinafter *Fear of the Future, Lived Through the Past*].

397. *Id.*

Scalia believed affirmative action along racial lines would "reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."[398] Promoting a singular national identity, he argued: "In the eyes of government, we are just one race here. It is American."[399] Stressing individualism over collective identities, he said: "The relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against."[400] Yet, such appeals to national identity and individual rights only obscure racial stratification and strife. Ignoring the role of race makes it difficult to target transitional policies and address and prevent specific dynamics with a basis in race. By contrast, the reckoning jurisprudence of those like Justice Marshall and Justice Sotomayor recognizes that reconciliation necessitates dealing with structural racism and the social significance of race.[401]

In sum, Supreme Court opinions have grappled with many of the same concerns that animate transitional justice processes elsewhere, but in limited ways that fail to realize the key values at stake. For example, whereas transitional justice approaches grapple with the relationships between accountability, redress, non-repetition, and reconciliation, Supreme Court jurisprudence falls short of realizing each of these values and recognizing the relationships between them. The failure to realize these transitional justice values may be an important part of the United States' failure to combat racism. How much richer could America's racial transition process be if it systematically and comprehensively sought these transitional justice values, giving weight to the concerns of historically oppressed groups? Engagement with transitional justice reveals that the Supreme Court's treatment of these values is not normatively comprehensive, and invites us to steer the United States toward better approaches to transition.[402]

398. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

399. *Id.*

400. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring in judgment).

401. Milliken v. Bradley, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting); Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 342 (2014) (Sotomayor, J., dissenting).

402. Engagement with transitional justice can enable a richer discussion of these values in racial equality jurisprudence, even if understandings of these values are not completely settled in transitional justice theory, and even if these values are not fully realized in transitional justice practice. *See* Melissa S. Williams & Rosemary Nagy, *Introduction*, 51 NOMOS 1, 28 (2012) ("The normative aspirations of transitional justice, whether conceived in terms of peace, truth, or varying interpretations of justice, will always be 'essentially contested concepts.'").

B. Competing Transitional Visions

Continuing to draw on insights from transitional justice, this Part now examines how disagreements within race jurisprudence reflect struggles over the ownership of transition and over America's "unmastered past." Transitional justice can serve as an independent perspective that helps us to decide between competing claims about transition.

1. Interpretive Disagreements

Transitional justice theory allows us to see disagreements in racial equality cases as struggles over the ownership of transitional discourse and mechanisms. Christine Bell explains that transitional justice mechanisms are hotly contested because of "their capacity to adjudicate on the rights and wrongs of a conflict, not only as regards individual culpability but also in relation to institutional and social responsibility for the genesis and sustenance of the conflict . . . ."[403] In other words, because transitional justice mechanisms may write dominant narratives for large groups of people, there is fierce contestation over the control of those mechanisms.

These contests are both normative and political in nature. In describing normative contests over transitional justice, Bell points to "the battle between those who seek to 'do good' in protracted social conflict but who have competing ideas of what doing good requires."[404] In describing political contests, Bell notes that taking control of transitional justice mechanisms "can enable victory in the metaconflict—the conflict about what the conflict is about—and thereby enable the victor to tilt all transitional mechanisms towards an end point for transition that approximates to the victor's battlefield goals."[405]

From this vantage point, judges' claims can be read as expressing deep normative convictions about the purpose and path of the transition process. They can also be interpreted as reflecting a political practice that uses transitional discourse and mechanisms to further political goals.[406] Given

403. Bell, *supra* note 359, at 16.

404. *Id.*

405. *Id.*

406. For instance, with respect to *Shelby County*, Richard Hasen argues that the majority's brief decision "tried to hide the major jurisprudential hurdles it jumped to reach a political decision." Hasen, *supra* note 212, at 714. Reva Siegel observes how Justice Scalia, and likely other conservative justices, view affirmative action, disparate impact law, and voting rights as "political spoils" and racial entitlements that the Court must urgently cleanse from politics. *Equality Divided*, *supra* note 224, at 73. Desmond King and Rogers Smith argue that Justice Scalia's comment about racial entitlements gives voice to beliefs advanced by conservatives that have sought to nullify political participation rather than compete for votes by people of color. Desmond S. King & Rogers M. Smith, *The Last Stand?:* Shelby County v. Holder*, White Political Power, and America's Racial Policy Alliances*, 13 DU BOIS REV. 25 (2016).

that (1) judges' normative claims about transition can align with their preferred political interests, (2) each side can defend its own claims as the best understanding of transition, and (3) each side can accuse the other of engaging in a political practice, an independent perspective is needed to reveal the actual strengths and inadequacies of competing judicial accounts.

Transitional justice scholars and practitioners have offered frameworks for deciding which approaches should be adopted and which avoided in seeking to surmount the past. Examining how American approaches to transition accord with or diverge from these international standards can help us to both improve strategies and take sides in disagreements.

Some transitional justice frameworks identify principles that transitional decision-making should consider. For instance, Paige Arthur identifies key questions to guide transitional justice in the context of identity-based conflicts:

> 1. Will the initiative provide for accountability, both to the law and to all the communities it aims to represent?
> 2. Will the initiative be perceived as legitimate by all affected groups?
> 3. Will the initiative promote social learning between communities?
> 4. Will the initiative promote trust between groups?
> 5. Will the initiative make state and/or social institutions more representative of the society they serve?
> 6. Will the initiative promote and protect the dignity of all?[407]

Although these questions are designed to assess political decision-making, we may apply them to Supreme Court decisions about racial integration, voter protection, affirmative action, and other decisions about the government's role in handling racial injustices. For instance, affirmative action opinions engage these questions when they seek to "promote[] 'cross-racial understanding,' help[] to break down racial stereotypes, and 'enable[] [students] to better understand persons of different races,'" [408] or alternatively deem it "entirely irrelevant whether [affirmative action] increases or decreases tolerance."[409] These questions therefore provide a framework for assessing judicial interpretations of transitional issues.

Arthur stipulates that answering these questions should involve "judgment based on informed analysis. . . ."[410] Instead of relying on the Court's own (potentially incorrect) memory and intuitions about past and present society, Justices should critically engage with evidence to understand how current practices disrupt or perpetuate historical

407. *Fear of the Future, Lived Through the Past*, *supra* note 396, at 300.
408. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).
409. *Fisher I*, 570 U.S. 297, 325 (2013) (Thomas, J., concurring).
410. *Fear of the Future, Lived Through the Past*, *supra* note 396, at 300.

injustices.[411] Using these questions as an evaluative framework, judicial reasoning that pays careful attention to the country's actual historical and social circumstances, in addition to the multiple dimensions of transition, would have the most purchase.

Other frameworks are more directly aimed at distinguishing between desirable and undesirable forms of transitional justice. For instance, Rodrigo Uprimny and Maria Paula Saffon provide guidance for distinguishing between "manipulative" transitional justice, which "serves to preserve the unequal power relationships prevalent in the extant regime," and "democratic" transitional justice, which "takes the rights of victims seriously and seeks to constrain the political process by the imperative to protect and satisfy these rights. . . ."[412]

Applied to the Supreme Court, this distinction cautions against presuming transitional reasoning to be anti-racist, as its use may serve to legitimize and entrench racist structures.[413] For example, distancing may be used as a politically convenient argument for ending measures that enhance the inclusion and influence of Black Americans and challenge white supremacy. Therefore, "it is important to carefully analyze if the language of transitional justice . . . may be used not only for promoting transformative effects, but also for perpetuating the status quo."[414]

From a philosophical perspective, Colleen Murphy articulates criteria for distinguishing principled from unprincipled compromises in transitional justice processes.[415] Such criteria are needed because although transitional justice frequently requires compromises, there is a risk of "selling victims short" and "entrenching the status quo" by prioritizing political feasibility over necessary transformation.[416] Drawing on Lon Fuller's principles for the rule of law, Murphy argues that a principled compromise must satisfy "the morality of duty," which suggests a minimum threshold required to do

411. *ASA President Eduardo Bonilla-Silva Responds to Chief Justice John Roberts*, AM. SOCIOL. ASSOC. (Oct. 10, 2017), https://www.asanet.org/news-events/asa-news/asa-president-eduardo-bonilla-silva-responds-chief-justice-john-roberts [https://perma.cc/23EK-EV6Y] (explaining the importance of social science evidence); Monica Bell, *Black Security and the Conundrum of Policing*, JUST SEC. (July 15, 2020), https://www.justsecurity.org/71418/black-security-and-the-conundrum-of-policing/ [https://perma.cc/Z93N-C5EP] (highlighting the limitations of social science evidence in police reform debates and the need "to embrace new ways of evidence production, consumption, and visioning").

412. Rodrigo Uprimny & Maria Paula Saffon, *Uses and Abuses of Transitional Justice Discourse in Colombia*, DEJUSTICIA (2007), https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_59.pdf.

413. Relatedly, some scholars distinguish between "progressive" transitional justice events, where a supreme court upholds an enabling transitional justice proposal or law, and "regressive" events, where it strikes them down. Genevieve Bates, Ipek Cinar & Monika Nalepa, *Accountability by Numbers: A New Global Transitional Justice Dataset (1946–2016)*, 18 PERSPS. ON POL. 161, 166 (2020).

414. Uprimny & Saffon, *supra* note 412.

415. Murphy, *supra* note 361.

416. *Id.* at 56–57.

justice to victims, and "the morality of aspiration," which suggests a more robust protection of values.[417] However, progress does not amount to justice: "While a transitional justice process may be a moral improvement on the ways wrongs were addressed during conflict and repression, that process may still constitute a failure if it does not meet this threshold."[418] Furthermore, principled compromises must take account of the experiences and insights of historically marginalized groups.[419]

Such an approach to distinguishing between justified and unjustified compromises aligns with the American civil rights tradition; as Dr. King said in 1959: "While compromise is an absolute necessity in any moment of social transition, it must be the creative, honest compromise of a policy, not the negative and cowardly compromise of a principle."[420] From a transitional justice perspective, it is not surprising that the Supreme Court's race jurisprudence has been forged through compromises.[421] Instead, transitional justice theory enables us to recognize compromises that are implicit in the Court's racial equality opinions and deliberate whether those compromises are principled and defensible or unjustified and undesirable, given ethical principles and political constraints.

These are only a few examples of how transitional justice frameworks can be used to assess whether judicial opinions are conducive or detrimental to the transition process. Seriously considering these external perspectives can reorient the law toward a better internal approach, one that learns from other countries' experiences of transition.

2. Unmastered Pasts

Transitional justice thinking illuminates another way to understand disagreements within race jurisprudence—as a reflection of America's "unmastered past." Historian Gavriel Rosenfeld describes an unmastered past as "a historical legacy that has acquired an exceptional, abnormal, or otherwise unsettled status in the collective memory of a given society."[422] An unmastered past arises when "the commission of a historic injustice . . . has been remembered differently by, and has caused discord between, the original perpetrators, victims, and their respective descendants."[423] Until these various parties "can reconcile with one another and arrive at some

417. *Id.* at 64–65.
418. *Id.* at 65.
419. *Id.* at 67.
420. Martin Luther King, Jr., Address at the Fourth Annual Institute on Nonviolence and Social Change at Bethel Baptist Church, 333, 336 (Dec. 3, 1959) [hereinafter *Bethel Baptist Church*].
421. *Affirmative Action as Transitional Justice*, *supra* note 22, at 17.
422. Gavriel D. Rosenfeld, *A Looming Crash or a Soft Landing? Forecasting the Future of the Memory "Industry"*, 88 J. MOD. HIST. 122, 126–27 (2009).
423. *Id.* at 127.

form of consensus about the meaning of a given historical legacy . . . the past can safely be described as 'unmastered.'"[424]

This idea of an unmastered past has mostly been applied to countries other than the United States.[425] Yet, the United States has an unmastered past of racial violence that has been a site of contestation since the Civil War.[426] In *Black Reconstruction in America*, W. E. B. Du Bois detailed the contributions of Black people to the Civil War and Reconstruction to counter the accounts of "White historians" who "ascribed the faults and failures of Reconstruction to Negro ignorance and corruption."[427] The Civil Rights Movement further challenged a whitewashed memory of white supremacy and called for historical and ongoing injustices to be acknowledged and addressed. W. Fitzhugh Brundage explains that because "whites have had to contend with an enfranchised and mobilized black population that cannot easily be excluded from civic life . . . [t]he contest over interpretation of the southern past . . . has entered the public arena more directly than at any time since Reconstruction."[428]

This contest continues today. Political disputes over the history and trajectory of the United States have become highly visible in debates over Confederate monuments,[429] "The 1619 Project,"[430] critical race theory,[431] diversity trainings,[432] and "patriotic education."[433] Far from being new,

424. *Id.* at 128.

425. CHARLES S. MAIER, THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY (1998); Tulio Halperin Donghi, *Argentina's Unmastered Past*, 23 LATIN AM. RSCH. REV. 3 (1988).

426. MICHAEL KAMMEN, THE MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE (1991); DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY (2003); WILLIAM A. BLAIR, CITIES OF THE DEAD: CONTESTING THE MEMORY OF THE CIVIL WAR IN THE SOUTH, 1865–1914 (2004); W. FITZHUGH BRUNDAGE, THE SOUTHERN PAST: A CLASH OF RACE AND MEMORY (2005).

427. DU BOIS, *supra* note 4, at ix.

428. BRUNDAGE, *supra* note 426, at 313.

429. Alan Blinder & Audra D. S. Burch, *Fate of Confederate Monuments Is Stalled by Competing Legal Battles*, N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/us/confederate-monuments-legal-battles.html [https://perma.cc/2X4T-HXSR].

430. Hannah-Jones, *supra* note 88; Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, ATLANTIC (Dec. 23, 2019), https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093/ [https://perma.cc/679Y-E8NU]; Nellie Bailey & Glen Ford, *NYT "1619 Project" More Pro-American Exceptionalism Than Anti-Slavery*, BLACK AGENDA REPORT (Oct. 14, 2019), https://www.blackagendareport.com/nyt-1619-project-more-pro-american-exceptionalism-anti-slavery (interview with Josh Myers).

431. Deanna Pan, *What Is Critical Race Theory, President Trump's Latest Political Target?*, BOS. GLOBE (Sept. 21, 2020, 1:20 PM), https://www.bostonglobe.com/2020/09/21/metro/what-is-critical-race-theory-president-trumps-latest-political-target/ [https://perma.cc/R6YG-BP47].

432. Hailey Fuchs, *Trump Attack on Diversity Training Has a Quick and Chilling Effect*, N.Y. Times (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/us/politics/trump-diversity-training-race.html.

433. Alana Wise, *Trump Announces 'Patriotic Education' Commission, A Largely Political Move*, NPR (Sept. 17, 2020, 5:59 PM), https://www.npr.org/2020/09/17/914127266/trump-announces-patriotic-education-commission-a-largely-political-move [https://perma.cc/9MC6-9QR4].

these debates reflect old and deeply entrenched divisions; competing factions of Americans have built entire worldviews around their perspectives on racial injustices and the government's role in handling them.[434]

Different sides in this contest are not similarly situated with regards to the transitional justice interests at stake. In particular, the histories and perspectives of oppressed groups have special importance in the construction of memory.[435] Former U.N. Special Rapporteur on torture, Juan E. Méndez, calls for active participation of victims and survivors in memorialization so that "'impermissible lies' will not be allowed to remain a part of the historical record."[436] America's unmastered past preserves a dominant, white view of Black oppression that underestimates past and present systemic racism and what must be done about it.[437]

U.S. Supreme Court opinions are both illustrative and constitutive of this unmastered past. Some disagreements in deeply divided cases are factual disputes, such as when opinions split over whether a place was historically segregated.[438] However, most disagreements are less about historical fact and more about interpretations of past events and their implications for present times, such as when Justices have fundamentally different interpretations of the trajectory of American society.[439] Intense judicial disagreement over the past reflects and maintains its unmastered status, especially given the frequency of racial equality cases before the Court.[440]

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434. Not all perspectives in these disputes reflect historical and social realities. For instance, recent studies found that, relative to Black Americans, White Americans perceived less racism in both isolated and systemic forms, demonstrated less historical knowledge of racism and less ability to differentiate historical fact from fiction, and overestimated past and present racial economic equality. *See* Jessica C. Nelson, Glenn Adams & Phia S. Salter, *The Marley Hypothesis: Denial of Racism Reflects Ignorance of History*, 24 PSYCH. SCI. 213 (2013); Michael W. Kraus, Julian M. Rucker & Jennifer A. Richeson, *Americans Misperceive Racial Economic Equality*, 114 PROC. NAT'L ACAD. SCI. 10324 (2017).

435. Juan E. Méndez, *Victims as Protagonists in Transitional Justice*, 10 INT'L J. TRANSITIONAL JUST. 1, 4 (2016).

436. *Id.*

437. Psychological research has investigated this ignorance in terms of the "Marley hypothesis," which suggests that "[a]ccurate knowledge about documented incidents of past racism will be greater in subordinate-group communities than in dominant-group communities," and "this difference in reality attunement will partly account for (i.e., mediate) group differences in perception of racism in current events." *See* Nelson, Adams & Salter, *supra* note 434, at 214.

438. *Compare* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 511 U.S. 701, 711–12 (2007) (Roberts, C.J.), *with id.* at 805–06 (Breyer, J., dissenting).

439. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978) (Powell, J.) *with id.* at 326–27 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part), *and id.* at 400–02 (Marshall, J., concurring in part and dissenting in part).

440. On the other hand, such judicial disagreement may be desirable insofar as it allows legal claims about historical and current racism to remain in circulation at a time when dominant legal discourse erroneously and prematurely declares racism to be over.

Transitional justice mechanisms aim to establish a historical record of systemic violence and its causes. Such a historical record is important for countering denial about the extent and impact of systemic violence, addressing patterns of violence in reform efforts, and achieving societal reconciliation. [441] Could a national truth commission with widely disseminated findings establish a more accurate and authoritative historical record?[442] If the Supreme Court is unable to implement solutions such as these, and continues to reinforce rather than resolve disputes over America's historical legacies, other segments of society will need to take the lead.

CONCLUSION: PATHS FORWARD

This Article has shown how transitional reasoning has shaped, and may continue to shape, the Supreme Court's race jurisprudence. In an ideal world, this Article's analysis would lead the Court to better reconcile distancing with reckoning, accounting for where racial discrimination and disparities continue to structure everyday life. Such a jurisprudence would acknowledge the persistence of structural racism in the United States and Americans' role in perpetuating and benefiting from it.[443] It would promote collective responsibility and structural approaches for the problem of racism and uphold laws and practices designed to tackle it. As this jurisprudence secures robust protections for racial minorities, it would also reduce their estrangement from the law by better reflecting and respecting their experiences.[444] This more rigorous reckoning could be undertaken in the name of a more genuine distancing.

In reality, however, the Roberts Court seems ready to abandon racial reckoning in favor of an illusory distancing. By casting civil rights measures aside as obsolete and even detrimental, such a jurisprudence would help to maintain America's legacies of racism as well as Americans'

441. James L. Gibson, *Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Process*, 48 AM. J. POL. SCI. 201 (2004) (finding in a 2001 survey of over 3,700 South Africans that acceptance of the "truth" about apartheid corresponds with reconciled racial attitudes).

442. Sirleaf, *supra* note 81, at 246–49 (discussing considerations for establishing an authoritative historical record); Noha Aboueldahab, *The United States Needs a Truth Commission. It Should Be Televised.*, FOREIGN POL'Y (July 24, 2020, 11:45 AM), https://foreignpolicy.com/2020/07/24/united-states-racism-truth-commission-televise-south-africa-tunisia/ [https://perma.cc/GQR4-JB2C].

443. Kraus, Rucker & Richeson, *supra* note 434, at 10324 (finding "a profound misperception of and misplaced optimism regarding contemporary societal racial economic equality," particularly among White Americans).

444. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2114 (2017).

misperceptions regarding racial equality,[445] impeding possibilities for transition.

The fact that "transitional justice" has never appeared in a Supreme Court opinion does not detract from the utility of a transitional analysis.[446] Even if the Court does not take up a stance more richly rooted in transitional justice principles, this Article invites academics to more carefully interrogate its transitional reasoning. By invoking the more expansive understandings of human rights and theories of societal change that characterize critical transitional justice approaches, academics can evaluate the factual and normative assumptions of legal arguments and supplant or supplement the transitional pathways advanced by the Court. For example, through comparison with the larger universe of concerns that animate transitional justice approaches and how these concerns have played out in other countries, academics may examine how court decisions have failed to address specific problems and consider alternate responses.

By examining how different judges interpret transition, academics might be better able to identify actions and arguments that might withstand the scrutiny of an evolving Supreme Court. Advocates, in turn, might be better able to justify these interventions by tailoring arguments to specific judges. For instance, Chief Justice Roberts may be better persuaded to uphold certain civil rights measures by legal arguments that recognize both continuity with and discontinuity from the nation's past. Adopting a transitional perspective, arguments tailored to the Chief Justice would demonstrate that civil rights measures are worth preserving *even though* (and ideally *because*) the nation has changed since the Civil Rights era.[447] By contrast, Justices Gorsuch and Kavanaugh may be better persuaded to reject contemporary forms of racism by tracing them to a form practiced in an earlier era, thus demonstrating continuity between "[t]hen and now."[448] By making strategic transitional arguments, advocates can seek to reorient a predominantly distancing jurisprudence toward greater racial reckoning.

Beyond tailoring arguments to specific judges, legal advocates may seek to imbue racial equality law with more expansive and emancipatory understandings of transition, including from the past. For instance, contrary

445. *See* Kraus, Rucker & Richeson, *supra* note 434; Nelson, Adams & Salter, *supra* note 434, at 214.

446. On December 10, 2020, a Westlaw search for "transitional justice" in the Supreme Court database yielded zero cases.

447. Insofar as Roberts is concerned about the Court's sociological legitimacy, arguments tailored to him might also explain how a regressive race jurisprudence would be perceived in a soon-to-be majority-minority nation. Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2243 (2019) (book review) (alluding to Chief Justice Roberts' concerns about legitimacy). According to this legitimacy argument, a predominantly White and elite institution cannot continue discounting the experiences of racial minorities and still expect to be treated with respect and obedience.

448. Ramos v. Louisiana, 140 S. Ct. 1390, 1399 (2020) (Gorsuch, J.).

to Chief Justice Roberts' insistence that transitional measures have fixed deadlines, Dr. King noted that "the [*Brown*] court did not set a definite deadline for the termination of this process" and only expected Americans to work toward "a smooth and peaceful transition."[449] Reasoning from transition opens new avenues for not only framing racial injustices as international human rights violations, but also making more critical perspectives on racial transition throughout history cognizable by law.[450]

For Court enthusiasts and skeptics alike,[451] it is important to recognize that racial transition is most successfully pursued through a wide array of strategies in diverse fora, including city councils, state legislatures and courts, Congress, and other democratic decision-making bodies. For example, passing laws such as the For the People Act, which restores key protections of the Voting Rights Act, and the Ending Qualified Immunity Act could overcome certain judicially created impediments to transition.[452] Passing the John Lewis Voting Rights Advancement Act based on "current conditions" could help to curtail regressive transitional reasoning by courts.[453] The George Floyd Justice in Policing Act and the Confederate Monument Removal Act could directly address transitional justice concerns, including accountability, memorialization, and repair.[454]

Transitional justice measures, when implemented properly, can get to the roots of historical injustices and work toward creating a more just society.[455]

449. *Bethel Baptist Church*, *supra* note 420, at 336.

450. In particular, there may be significant synergies between transitional justice and critical race theory, as each pursues systematic analyses of and responses to historical injustice. However, there may also be important differences: for example, the balancing of ethical principles with political constraints is central to transitional justice, which often favors compromise. José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1430 (1992). Such an approach may stand in tension with the pursuit of racial justice as a matter of principle alone. Nevertheless, engagement with transitional justice can enhance the ability of race progressives to demand and develop systematic reforms and dispute American exceptionalist resistance to such reforms. On critical race theory, see generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé W. Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1996); KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019).

451. There are, of course, those who never did or no longer have much hope for the Supreme Court. *See, e.g.*, Steel, *supra* note 365.

452. For the People Act of 2021, H.R. 1, 117th Cong. (2021); Ending Qualified Immunity Act of 2020, H.R. 7085, 116th Cong. (2020).

453. John Lewis Voting Rights Advancement Act of 2020, S. 4263, 116th Cong. (2020); *John Lewis Voting Rights Advancement Act*, https://www.leahy.senate.gov/imo/media/doc/John%20Lewis%20Voting%20Rights%20Advancement%20Act%20one%20pager.pdf [https://perma.cc/WLP9-V8G3] (situating the Act in "current conditions in voting today").

454. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020); Confederate Monument Removal Act of 2017, H.R. 1772, 116th Cong. (2020).

455. Of course, the United States should not uncritically adopt transitional justice approaches from elsewhere. Those approaches have limitations and need to be considered with careful attention to specific contexts and local demands. South Africa's transition from apartheid, which has become paradigmatic

Throughout the United States, truth and reconciliation processes could be initiated to grapple with the legacies of racial oppression.[456] In June 2020, Rep. Barbara Lee called for a U.S. Commission on Truth, Racial Healing, and Transformation, and a number of cities followed with plans for their own truth, justice, and reconciliation commissions.[457] Since the U.N.'s failure to create an international commission of inquiry on U.S. racism that same month, there have been discussions of forming a nationwide "people's commission" on racism.[458] Implementation of such American commissions should build on the lessons learned from foreign ones, which are extensively studied in the transitional justice literature.[459]

Communities could undertake symbolic reparations, including public acts of atonement, establishment of museums, and changing of names, as

within the field of transitional justice, is increasingly invoked as an exemplar for the United States' transition from slavery, segregation, and white supremacy. However, South Africa's transition process has been criticized for having serious limitations. For instance, Mahmood Mamdani contends that the Truth and Reconciliation Commission's narrow framing of the harms of apartheid impeded the wider pursuit of economic justice. Mamdani, *supra* note 372. Jon Elster observes that "[w]rongdoers were not brought to justice, reparations to victims have been minimal, and there has been almost no land reform," suggesting that "[today's] failure of civic peace can be traced back to the failures of justice." Elster, *supra* note 76, at 90. Richard Wilson argues that although "[c]onstitutionalists hoped that a culturally neutral Bill of Rights would transcend particularistic nationalist ideology, . . . rights are subordinated to nation-building." RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 5 (2001). Discussions about transitional justice in the United States should consider what approaches would facilitate the emergence of a more human rights-respecting regime, weighing the costs of non-ideal strategies for dealing with racism against the costs of inaction. *See generally* KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 31 (2017) (urging to "start any discussion about legitimacy and effectiveness" of human rights strategies by asking "compared to what?").

456. *See supra* note 67; Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 269–70 (2003).

457. Press Release, Congresswoman Barbara Lee, In the Wake of COVID-19 and Murder of George Floyd, Congresswoman Barbara Lee Calls for Formation of Truth, Racial Healing, and Transformation Commission (June 1, 2020), https://lee.house.gov/news/press-releases/in-the-wake-of-covid-19-and-murder-of-george-floyd-congresswoman-barbara-lee-calls-for-formation-of-truth-racial-healing-and-transformation-commission [https://perma.cc/K6DK-SW6Q]. In December 2020, Sen. Cory Booker introduced a companion to Rep. Lee's resolution. Press Release, Booker Introduces Companion to Rep. Lee Resolution Calling for First United States Commission on Truth, Racial Healing, and Transformation (Dec. 3, 2020), https://www.booker.senate.gov/news/press/booker-introduces-companion-to-rep-lee-resolution-calling-for-first-united-states-commission-on-truth-racial-healing-and-transformation [https://perma.cc/KZG6-UPUW]. While acknowledging "the promise of truth-telling commissions," some commentators have raised concerns about how some American commissions may be implemented. Rory Fleming, Opinion, *Krasner's Truth and Reconciliation Commission Is a Good Idea—If He Can Get It Right*, PENN. CAPITAL-STAR (July 10, 2020), https://www.penncapital-star.com/civil-rights-social-justice/krasners-truth-and-reconciliation-commission-is-a-good-idea-if-he-can-get-it-right-opinion/ [https://perma.cc/C5TQ-NPRM].

458. E. Tendayi Achiume, *The UN Should Establish a Commission of Inquiry on Systemic Racism and Law Enforcement in the United States*, JUST SEC. (June 16, 2020), https://www.justsecurity.org/70811/the-un-human-rights-council-should-establish-a-commission-of-inquiry-on-systemic-racism-and-law-enforcement-in-the-united-states/ [https://perma.cc/DV3R-WFEQ].

459. Mamdani, *supra* note 372; Gibson, *supra* note 441; Sirleaf, *supra* note 81; Audrey R. Chapman & Patrick Ball, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23 HUM. RTS. Q. 1 (2001).

well as material reparations.[460] Recently, cities including Evanston, Illinois, Asheville, North Carolina, and Providence, Rhode Island, announced plans to initiate "reparations" processes.[461] Collective forms of reparations—such as service packages (including medical, educational, and housing assistance), development and social investment, and "racism response funds"—could be effective and viable steps toward reconciliation.[462] Georgetown University plans to finance health clinics and schools in Louisiana to reach the descendants of the enslaved people from whom Georgetown profited.[463] These commitments, though limited, could pave the way for more comprehensive efforts.

While American transitional justice discourse has aptly focused on reparations, transitional justice can encompass structural changes to address the causes of conflict and avoid its repetition.[464] In the United States, transitional justice can help frame changes in public education, criminal legal systems, and electoral and judicial institutions; for instance, movements to end mass incarceration have been called transitional justice efforts.[465] Inasmuch as the Supreme Court impedes America's transition from white supremacy, Supreme Court reform may itself be understood as a transitional justice measure.[466] Beyond institutional changes, universal reforms aimed at redistribution and cancellation of debts may help to address embedded inequalities and similarly be justified on transitional justice grounds. Isolated transitional justice measures are likely to be inadequate, ineffective, and even counterproductive without accompanying structural changes.

460. However, symbolic acts must not become a means of deferring substantive action on racial equality or prematurely declaring racial transition to be complete. JEANNE THEOHARIS, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY 3–9 (2018).

461. Vigdor, *supra* note 67.

462. *Justice and Reparations*, *supra* note 368, at 468–70; Monica C. Bell, *The Case for Racism Response Funds—A Collective Response to Racist Acts*, APPEAL (July 17, 2020), https://theappeal.org/the-case-for-racism-response-funds-a-collective-response-to-racist-acts/ [https://perma.cc/ZM35-E6BJ].

463. Swarns, *supra* note 68.

464. Laurel E. Fletcher & Harvey M. Weinstein with Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 204 (2009).

465. Desmond S. King & Jennifer M. Page, *Towards Transitional Justice? Black Reparations and the End of Mass Incarceration*, 41 ETHNIC & RACIAL STUD. 739 (2018); Equal Justice Initiative, *supra* note 50.

466. I intend to develop this argument in future work. On the relationship between judicial reform and transitional justice, see generally Muna B. Ndulo & Roger Duthie, *The Role of Judicial Reform in Development and Transitional Justice*, INT'L CTR. FOR TRANSITIONAL JUST. (June 1, 2009), https://www.ictj.org/publication/role-judicial-reform-development-and-transitional-justice [https://perma.cc/FB6K-ER2F].

Localized measures may be necessary in many cases, as racist policies, racialized experiences, and race relations all vary by region.[467] As Sherrilyn Ifill puts it: "Historically, racism was felt, lived, and perpetrated locally. Reconciliation, therefore, must also be local."[468] By delivering the kinds of reckoning and reconciliation that the United States has failed to realize at the national level, local government and community actions can carve out promising paths to "domesticating" transitional justice norms.[469] Given the sheer size of the United States, localized measures may be unavoidable; yet, they may also be insufficient to address racial injustices and may be seen to absolve all levels of government of their obligations.[470] Ultimately, local actions must influence national ones. The Biden Administration should coordinate a program to address the history and legacies of American racism,[471] building on lessons learned at home and abroad.[472]

The persistence of racism is visible in the endemic violence against Black people and in the racialized impact of and response to COVID-19.[473]

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467. JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018) (demonstrating that segregation becomes entrenched through local politics); Candis Watts Smith, Rebecca J. Kreitzer & Feiya Suo, *The Dynamics of Racial Resentment Across the 50 US States*, 18 PERSPS. ON POL. 527 (2020) (finding subnational variation in racial resentments); BROWN-NAGIN, *supra* note 6 (centering the role of local activists); *see also* Lundy & McGovern, *supra* note 23 (emphasizing local ownership of transitional justice measures).

468. *On the Courthouse Lawn*, *supra* note 23, at 127.

469. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1647 (2006); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9–10 (1983) (urging recognition of different normative worlds, rather than only the "thin" norms of the state).

470. For instance, economist William A. Darity, Jr., argues that effective reparations to close the racial wealth gap would cost between $10 and $12 trillion, which is three to four times the total state and municipal spending. Vigdor, *supra* note 67.

471. For early Biden Administration plans and advice from racial justice advocates, see Charisse Jones, *Joe Biden Pledges to Address Pay, Systemic Racism: 'Black and Latino Unemployment Gap Remains Too Large'*, USA TODAY (Jan. 18, 2021; 9:38 AM), https://www.usatoday.com/story/money/2021/01/18/biden-black-america-plans-boost-lending-address-racial-inequities/3578539001/ [https://perma.cc/8CB3-ZBJM].

472. *On the Courthouse Lawn*, *supra* note 23; Bradley, *supra* note 23. Transitional justice measures must involve active participation of oppressed groups in order to be effective. Méndez, *supra* note 435.

473. Clyde W. Yancy, *COVID-19 and African Americans*, 323 J. AM. MED. ASS'N 1891 (2020); Monika Kakol, Dona Upson & Akshay Sood, *Susceptibility of Southwestern American Indian Tribes to Coronavirus Disease 2019 (COVID-19)*, 37 J. RURAL HEALTH 1 (2020); Whitney N. Laster Pirtle, *Racial Capitalism: A Fundamental Cause of Novel Coronavirus (COVID-19) Pandemic Inequities in the United States*, 47 HEALTH EDUC. & BEHAV. 504 (2020); Brandon Baker, *Why Asian-American Racism Is Rampant During the Coronavirus*, PENN TODAY (Mar. 31, 2020), https://penntoday.upenn.edu/news/why-asian-american-racism-rampant-during-coronavirus [https://perma.cc/2B8E-LDXW] (interviewing scholar Josephine Park); Keeanga-Yamahtta Taylor, Opinion, *Of Course There Are Protests. The State Is Failing Black People.*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/george-floyd-minneapolis.html [https://perma.cc/G8EJ-FG93]; Elizabeth Hinton, *The Minneapolis Uprising in Context*, BOS. REV. (May 29, 2020), https://bostonreview.net/race/elizabeth-hinton-minneapolis-uprising-context [https://perma.cc/M8T7-J2JD]; Keisha N. Blain, *Violence in*

Racial justice movements such as the Movement for Black Lives are leading structural changes in American society.[474] Their demands are linked as much to the past and future as to the present. Protesters today are not demanding discrete remedies for discrete harms. Instead, they are calling for a comprehensive and coordinated transition process that deals with the history, legacy, and future threat of white supremacy in the United States. As Americans seek to actualize this transition process through or beyond the Supreme Court, they have much to learn from and contribute to global conversations around transitional justice.

Minneapolis Is Rooted in the History of Racist Policing in America, WASH. POST (May 30, 2020, 5:00 AM), https://www.washingtonpost.com/outlook/2020/05/30/violence-minneapolis-is-rooted-history-racist-policing-america/ [https://perma.cc/4C5F-MCCH]; Robert Greene, II, *We Are Living in a Red Spring*, JACOBIN (May 31, 2020), https://www.jacobinmag.com/2020/05/red-summer-riots-african-americans-pandemic-police [https://perma.cc/QMT7-VHYD]; Ibram X. Kendi, *The American Nightmare*, ATLANTIC (June 1, 2020), https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457/ [https://perma.cc/J7ML-YFKJ].

474. Movement for Black Lives, *Vision for Black Lives*, https://m4bl.org/policy-platforms/ [https://perma.cc/ZMX7-BZ57]; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018).