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Affirmative Action as Transitional Justice

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AFFIRMATIVE ACTION AS TRANSITIONAL JUSTICE

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What role does affirmative action play in transitioning toward a more just society? The two literatures best equipped to answer this question—transitional justice and affirmative action—have neglected both the question and one another. Transitional justice scholars have focused on a limited set of measures (such as truth commissions and criminal prosecutions) and overlooked the role of affirmative action in facilitating transition. At the same time, affirmative action scholars have neglected the ways in which affirmative action may be part of a larger transitional justice project. Bringing these literatures into conversation for the first time, this Article shows how integrating affirmative action and transitional justice can advance our understanding of both practices. Affirmative action can bring attention to structural inequalities in transitional societies and help delineate the boundaries of transitional justice. In so doing, affirmative action can bridge a divide between the field of transitional justice and the phenomenon of societal transition that it seeks to understand and facilitate. Transitional justice, on the other hand, can elucidate how the period of transition informs affirmative action's features and functions; it can also illuminate affirmative action's strengths and shortcomings in bringing about a more just society. Affirmative action should, therefore, be added to the transitional justice "toolkit" and anchored in transitional justice concepts and debates.

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INTRODUCTION

Transitional justice concerns how societies move beyond histories of oppression and violence toward a more just and peaceful order.[1] Most often, transitional justice is associated with a specific set of measures implemented to address massive human rights abuses, including truth and reconciliation commissions, criminal prosecutions, reparations programs, and institutional reforms.[2] In fixing their gaze on this limited set of measures, transitional justice scholars have largely overlooked the role of affirmative action measures that promote the inclusion of excluded groups.[3] At the same time, affirmative action scholars have often neglected the ways in which affirmative action may be part of a larger transitional justice project.

This Article shows how integrating affirmative action and transitional justice can advance our understanding of both practices. Affirmative

1. Transitional justice scholarship thus contemplates questions of "transition" (what constitutes a transition and how the transition should be accomplished) as well as 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); 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).

2. *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).

3. Affirmative action refers to measures that promote the inclusion and participation of excluded groups in societal institutions. *Affirmative Action*, STAN. ENCYCLOPEDIA PHIL. (Apr. 9, 2018), https://plato.stanford.edu/entries/affirmative-action/ [https://perma.cc/2LPL-R9UJ]. Affirmative action measures are often (though not always) aimed at particular beneficiaries (e.g., women, racialized groups), take many social forms (e.g., quotas, goals), and are used in various social spheres (e.g., education, employment). *Id.* In discussing transitions from South African and American racial violence, this Article refers primarily to affirmative action along racial lines.

action can bring attention to structural inequalities in transitional societies and help delineate the boundaries of transitional justice. In so doing, affirmative action can bridge a divide between the field of transitional justice and the phenomenon of societal transition that it seeks to understand and facilitate. Transitional justice, on the other hand, can elucidate how the period of transition informs affirmative action's features and functions; it can also illuminate affirmative action's strengths and shortcomings in bringing about a more just society. Affirmative action should, therefore, be added to the transitional justice "toolkit" and anchored in transitional justice concepts and debates.

No previous scholarship has offered an integrated account of affirmative action and transitional justice. This Article fills this gap in two ways. First, it compares affirmative action in South Africa and the United States, which are two societies seeking transition along racial lines. Second, it bridges scholarship on affirmative action and transitional justice, two literatures that share several conceptual and normative concerns, yet until now have remained largely isolated from one another. By bringing these countries and topics into conversation, this Article shows how affirmative action debates shed light on transitional dynamics and dilemmas and how fundamental insights from transitional justice theory apply in the context of affirmative action.

Both South Africa and the United States have deep histories of the state enforcing and enabling racial subordination: the racist apartheid system in South Africa spanned from 1948 to 1994, and government-supported slavery and official segregation in the United States spanned four centuries.[4] But while South Africa's transition from apartheid has become paradigmatic within the field of transitional justice, the United States' transition from slavery and segregation has received far less attention. Many commentators presume the U.S. to be a non-transitional society, even as parts of the U.S. engage in localized truth and reconciliation processes and reparations programs to overcome their legacies of racial oppression.[5]

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4. This Article refers to these very different time horizons (about half a century for South Africa versus four centuries for the United States) because the South African transition is widely conceptualized as a transition from the apartheid system, whereas the parameters of the American transition are not as well-theorized. To be clear, racism in South Africa predates the apartheid system, even if (as some have argued) the racist logic of colonial rule differed from that of apartheid. *See, e.g.*, DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 185–96 (1993).

5. *See, e.g.*, GREENSBORO TRUTH & RECONCILIATION COMM'N, GREENSBORO TRUTH AND RECONCILIATION COMMISSION REPORT: EXECUTIVE SUMMARY (2006), http://www.greensborotrc.org/exec_summary.pdf [https://perma.cc/N9F9-RQR8]; *TIRC Decisions*, ILL. TORTURE INQUIRY & RELIEF COMMISSION, https://www2.illinois.gov/sites/tirc/Pages/TIRCDecision.aspx [https://perma.cc/ND6V-3BBH]; 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-

Key features of the field of transitional justice have contributed to an exclusion of the United States from transitional discourse. This field emerged decades after the last coordinated program of transition in the U.S. during the Civil Rights era of the 1950s and 1960s. Furthermore, since its inception, the field of transitional justice has been far more concerned with transitions to democracy (such as in Argentina and Chile) than with transformations within "established" democracies (such as the U.S.).[6] These temporal and structural features of transitional justice, coupled with a general reluctance to discuss American civil rights as human rights,[7] have obscured the U.S. as a context of transitional justice.[8]

Yet, when placed in comparison with South Africa, the United States exhibits many characteristics of a transitional society.[9] Both the United

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ed-op-0430-lynching-commission-20190429-story.html [https://perma.cc/7FLD-3V3V]; 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/E35L-F6XW]; 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/U9AT-CQG4]; Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went.*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/reparations-slavery.html [https://perma.cc/R27P-E5WG]. While many commentators have neglected the United States as a context of transitional justice, some have called for the adoption and expansion of transitional justice approaches to address its legacies of racial violence. *See, e.g.*, SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN, REVISED EDITION: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY xv (2018) (seeking inspiration for the U.S. from South Africa's transitional justice project); 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/Z6H9-7SPN] ("Formalizing transitional justice, not social justice, for African Americans could prove to be a more helpful approach."); *Is the United States Ready for a Truth-Telling Process?*, INT'L CTR. FOR TRANSITIONAL JUST. (Aug. 9, 2017), https://www.ictj.org/news/united-states-ready-truth-telling-process [https://perma.cc/4CEH-LH2V] (discussing an interview with Fania Davis and Jodie Geddes about establishing a truth commission in the United States).

6. *See generally* Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321 (2009) (tracing the influence of "transition to democracy" in transitional justice); Fionnuala Ní Aoláin & Colm Campbell, *The Paradox of Transition in Conflicted Democracies*, 27 HUM. RTS. Q. 172 (2005) (theorizing "transitions that occur in a preexisting democratic framework").

7. *See generally* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955 (2003).

8. Other factors have also contributed to the United States' exclusion from transitional discourse, including United States' centuries of racial violence and multiple attempts at redemption, which do not lend to simple transitional analysis, and Americans taking democracy as a given instead of recognizing the development of democracy in their country as an ongoing and evolving process. *See* Yuvraj Joshi, *Racial Transition* (unpublished manuscript) (on file with author) [hereinafter Joshi, *Racial Transition*].

9. From one perspective, the American racial transition may be conceptualized as a "permanent recovery," spanning from before the Civil War to an indeterminate future. *See* ROBERT MEISTER, AFTER EVIL: A POLITICS OF HUMAN RIGHTS 81–86 (2010) (contrasting American politics of "permanent recovery" with South African politics of

States and South Africa have sought to move beyond racial pasts marked by deep histories and structures of racial domination. Each has striven toward a racial future that is different from its racial past, and each has experienced an interim period of racial transition that is neither the evil past, nor yet the desired better future.[10]

"closure"). Alternatively, we may trace transition in key periods of major change, such as the constitutional amendments following the Civil War or the Civil Rights decisions and legislation of the 1950s and 1960s. *See* Andrew Valls, *Racial Justice as Transitional Justice*, 36 POLITY 53, 60, 71 (2003) (conceptualizing "the civil rights era in United States history as a regime transition" and arguing that "by the standard for a justice transition, it was woefully incomplete, and therefore unjust."). *See generally* BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014) (tracing how the Civil Rights Movement transformed the U.S. Constitution). In either case, we find a nation struggling to move away from the legacies of slavery and segregation. I develop a fuller account of the American racial transition in other work. *See* Joshi, *Racial Transition*, *supra* note 8.

10. David Featherman identifies six reasons for comparing affirmative action in South Africa and the United States: both countries (1) are constitutional democracies, (2) are racially and ethnically diverse, (3) have experienced histories of racial conflict and oppression, (4) have undergone "experiences of racial liberation and of emergent civil and human rights," (5) have acknowledged the salience of race, and (6) are divided by class and race. *See* David L. Featherman, *Introduction: Twins Born at Different Times?*, in THE NEXT TWENTY-FIVE YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA 1, 3–24 (David L. Featherman et al. eds., 2010).

South Africa and the United States have also been prominent in developing constitutional frameworks governing affirmative action and transitional justice. *See infra* note 17 and accompanying text. Furthermore, South Africa and the United States are "most different" from one another with respect to their formal commitment to transitional justice and affirmative action, yet both countries feature affirmative action measures intended to benefit historically marginalized groups. *See* Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 139 (2005) (describing the "most difference cases" logic of comparative case selection). The South African Constitution, adopted in 1996 to "heal the divisions of the past," contains express authorization for affirmative action provisions. *See* S. AFR. CONST., Preamble, § 9, 1996. In contrast, the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, adopted in 1868 after the Civil War, has been interpreted to allow limited forms of affirmative action in certain spheres. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (allowing limited use of race in admissions decisions in the pursuit of a diverse student body, so long as such use satisfies strict scrutiny).

An important difference between these two countries is that transition in South Africa is about liberating a *majority* and in the United States it is about liberating a *minority* that was denied political and socioeconomic rights. This difference has implications for the political viability of race-based affirmative action and for the practical structuring of affirmative action to achieve transitional goals. For instance, because blacks are an overwhelming majority in South Africa and a minority in the United States, exclusively class-based affirmative action could reach black South Africans in ways that it might not reach black Americans. *See* Kristina Bentley & Adam Habib, *An Alternative Framework for Redress and Citizenship*, *in* RACIAL REDRESS AND CITIZENSHIP IN SOUTH AFRICA 337, 345 (Kristina Bentley & Adam Habib eds., 2008).

For comparative analyses of the racial histories and affirmative action measures of South Africa and the United States, see, for example, GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY OF AMERICAN AND SOUTH AFRICAN HISTORY (1982); GOLDBERG, *supra* note 4; GEORGE M. FREDRICKSON, BLACK LIBERATION: A COMPARATIVE

Affirmative action has been a central means to pursue such transition. While South Africans generally recognize affirmative action as a post-apartheid transitional measure, to many Americans, today's affirmative action policies appear to have little or nothing to do with historical injustice.[11] Instead, affirmative action discourse over the past several decades has dwelled on the value of "diversity" and permissible ways to achieve it. The American terminological shift from "justice" to "diversity" has masked the ways we might think about affirmative action as transitional justice. But as this Article shows, affirmative action in the United States is a transitional practice *despite* the fact that conservative judges have declared the Constitution to be "colorblind" and affirmative action decisions have focused on "diversity" instead of "justice."[12] Transitional concerns underlie discussions of affirmative action in the United States as much as in South Africa. By bringing those transitional concerns to the fore, this Article brings national affirmative action laws and practices into dialogue with the international field of transitional justice.

This Article's analysis is timely at a moment when affirmative action in South Africa and the United States is under intense scrutiny. South Africa's implementation of affirmative action policies has been disputed in domestic courts and at the United Nations.[13] Freedom Front Plus, a

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HISTORY OF BLACK IDEOLOGIES IN THE UNITED STATES AND SOUTH AFRICA (1995); Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953 (1996); ANTHONY W. MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL (1998); Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378 (2004); Ockert Dupper, *Remedying the Past or Reshaping the Future? Justifying Race-based Affirmative Action in South Africa and the United States*, 21 INT'L J. COMP. LAB. L. & INDUS. REL. 89 (2005); DAVID THEO GOLDBERG, THE THREAT OF RACE: REFLECTIONS ON RACIAL NEOLIBERALISM (2009); Connie de la Vega, *The Special Measures Mandate of the International Convention on the Elimination of All Forms of Racial Discrimination: Lessons from the United States and South Africa*, 16 ILSA J. INT'L & COMP. L. 627 (2010); EQUALIZING ACCESS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN INDIA, UNITED STATES, AND SOUTH AFRICA (Zoya Hasan & Martha C. Nussbaum eds., 2012).

11. *See, e.g.*, Kimberly Reyes, *Affirmative Action Shouldn't Be About Diversity*, THE ATLANTIC (Dec. 27, 2018), https://www.theatlantic.com/ideas/archive/2018/12/affirmative-action-about-reparations-not-diversity/578005/ [https://perma.cc/G955-CK7W] (arguing that "the point [of affirmative action] should be justice, not 'diversity'").

12. *See infra* Part I.C.2.

13. *See* Amanda Khoza, *Constitutionality of Affirmative Action, BEE to be Challenged in ConCourt*, NEWS24 (Nov. 2, 2017), https://www.news24.com/SouthAfrica/News/constitutionality-of-affirmative-action-bee-to-be-challenged-in-concourt-20171102 [https://perma.cc/P8WJ-5SFZ] (reporting a challenge to the South African Department of Justice's appointment policy as an "inadmissible and unconstitutional quotas that are prohibited by the Employment Equity

small Afrikaans party seeking to repeal affirmative action for black South Africans, saw the largest increase in its share of the vote in the May 2019 general elections.[14] In the United States, Harvard College's consideration of race in admissions faces an investigation by the Department of Justice and a lawsuit from anti-affirmative action activist Edward Blum.[15] Although a federal judge upheld Harvard's admissions program in September 2019, that or a similar issue is expected to eventually reach the Supreme Court, with implications for affirmative action in public and private universities.[16] Should a conservative majority of justices end affirmative action as we know it, other measures fulfilling similar aims might soon be needed to take its place. At this critical juncture, it is important to gain a better understanding of the transitional role that affirmative action plays in these countries.

This Article is also timely because governments and institutions in many countries are searching for ways to move beyond legacies of injustice. Insights gained from South Africa and the United States may be relevant to other jurisdictions where questions of transitional justice and affirmative action are currently being debated. In Canada, for instance,

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Act"); U.N. Comm. On the Elimination of Racial Discrimination, Concluding Observations on the Combined Fourth to Eighth Periodic Reports of S. Afr. U.N. Doc. CERD/C/ZAF/CO/4-8 (Oct. 5, 2016) ("[T]he Committee is concerned at the lack of comprehensive disaggregated data on the impact of special measures on affected groups, especially the most disadvantaged and vulnerable among them, in the areas of employment, education and representation in public and political affairs at all levels.").

14. *See* Kimon de Greef & Norimitsu Onishi, *Boycott by Whites of South African Restaurant Reflects Growing Sense of Grievance*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/world/africa/south-africa-spur-boycott.html [https://perma.cc/QNF2-HF3Q].

15. *See generally*, Complaint, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176). Institutions currently facing allegations of unconstitutional admissions practices include Harvard University, University of California, University of North Carolina-Chapel Hill, and Yale University. *See* Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html [https://perma.cc/22Z5-YFM6]; Anemona Hartocollis, *With Echoes of Harvard Case, University of California Faces Admissions Scrutiny*, N.Y. TIMES (Nov. 15, 2018), https://www.nytimes.com/2018/11/15/us/university-of-california-admissions.html [https://perma.cc/L4RV-PZ2V]; Jane Stancill, *UNC Has Spent $16.8 Million on Affirmative Action Lawsuit*, THE NEWS & OBSERVER (Aug. 10, 2018, 7:04 PM), https://www.newsobserver.com/news/local/article216485240.html; Katie Benner & Erica L. Green, *U.S. Investigating Yale Over Complaint of Bias Against Asian-American Applicants*, N.Y. TIMES (Sept. 26, 2018), https://www.nytimes.com/2018/09/26/us/politics/yale-asian-americans-discrimination-investigation.html [https://perma.cc/VCH3-ZXYD].

16. 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/5AFZ-8L43].

courts and other decisionmakers have been in constant dialogue with these countries, both invoking and resisting understandings of affirmative action and transitional justice forged in their earlier debates.[17]

To demonstrate the benefits of integrating affirmative action and transitional justice, this Article proceeds in three parts. Part I shows how affirmative action in South Africa and the United States is a practice aimed at facilitating and negotiating each country's passage from its racial past to its racial future. This transitional interpretation responds to affirmative action's emergence and evolution and to the role that affirmative action plays in these two societies. Debates over how long affirmative action should continue and whether or not it should rely on race are best understood as debates about the role of affirmative action in facilitating or impeding transition.

Part II describes the benefits that transitional justice gains from paying attention to affirmative action. Because the field crystallized in the 1980s as several countries transitioned from authoritarian to more democratic regimes, transitional justice originally focused on political-institutional changes rather than broader concerns of social justice and

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17. Canadian equal protection and affirmative action law developed partly in reaction to early U.S. cases. *See* Colleen Sheppard, *Constitutional Recognition of Diversity in Canada*, 30 VT. L. REV. 463, 475 (2006) (observing that s. 15(2) of the Canadian Charter of Rights and Freedom "was added in an effort to secure the constitutionality of affirmative action initiatives and to avoid the divisive litigation that had occurred in the United States."). In an influential 1984 report that led to the Canadian Employment Equity Act of 1995, then-Commissioner and later-Justice Rosalie Abella avoided the term "affirmative action" and discouraged the use of "imposed" quotas in employment with the hope of avoiding the political and legal contestation over remedial measures found in the U.S. *See* ROSALIE SILBERMAN ABELLA, REPORT ON THE ROYAL COMMISSION ON EQUALITY IN EMPLOYMENT 212–13 (Oct. 1984); Abigail B. Bakan & Audrey Kobayashi, *Affirmative Action and Employment Equity: Policy, Ideology, and Backlash in Canadian Context*, 79 STUD. POL. ECON. 145, 149–50 (2007) (noting that "[t]he Abella Report deliberately distanced the concept of employment equity from that of affirmative action, which was seen as an American solution associated with quotas and government interference").

More recently, Canada's Truth and Reconciliation Commission of 2008 addressed the Residential Schools of the 1880s, which were established to "aggressively assimilate" Indigenous children into Euro-Canadian culture. The Canadian commission developed in the shadow of South Africa's 1995 commission by the same name, with some attempts to both learn and differentiate from the South African paradigm. *See* Geoffrey York, *South Africa's Postapartheid Journey Offers 'Important Insights' for Canada: Justice Minister*, THE GLOBE & MAIL (Apr. 2, 2017), https://www.theglobeandmail.com/news/politics/canada-can-look-to-south-africa-for-a-post-colonial-lesson/article34557588/ [https://perma.cc/A66B-PZ3Q] (quoting Canadian Justice Minister Jody Wilson-Raybould as saying that postapartheid South Africa offers "'many important insights' and 'parallels' for Canada to study"); Kim Stanton, *Canada's Truth and Reconciliation Commission: Settling the Past?*, INT'L INDIGENOUS POL'Y J., Aug. 2011, at 12 n.63 (2011) ("At a June 2007 conference on the then upcoming Canadian Truth and Reconciliation Commission, National Chief Phil Fontaine adamantly stated that the Canadian commission was not modeled on the South African Truth and Reconciliation Commission . . . .").

redistribution.[18] By highlighting overlooked dimensions of transition, affirmative action can help reorient the field of transitional justice toward better understanding and addressing structural inequalities. For instance, affirmative action debates bring attention to the socioeconomic consequences of the past that may linger long after a political regime has changed or violent conflict has ceased and that other transitional justice measures may overlook. This is one of several ways in which attending to affirmative action can help transitional justice advance beyond the political-institutional realm to the arena of economic and social justice.[19]

Part III describes the lessons we learn about affirmative action by viewing it through a transitional justice lens. Commentators in South Africa and the United States have raised concerns about the risk of overreliance on (and overburdening of) affirmative action as a means to achieve racial equality.[20] Transitional justice serves as a corrective to this risk. By promoting politically sensitive and multifaceted approaches to social change, transitional justice helps us recognize affirmative action as an imperfect and partial measure. Once we acknowledge these limitations of affirmative action, we can begin to overcome them by employing affirmative action in tandem with other transitional justice strategies and by seeking different paths toward transition.

This Article concludes that the whole is greater than its parts: affirmative action and transitional justice are best understood and employed together. In so concluding, this Article is a call-to-arms for affirmative action and transitional justice scholars and practitioners to pay closer attention to one another.

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18. Arthur, *supra* note 6, at 324, 357–58.

19. As Pablo de Greiff, the UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, observed in a 2017 report:

> [T]ransitional justice is but a part of a broader and deeper transformative agenda that States that have suffered systemic failure manifested in massive rights violations typically call for. Such States usually need reforms, including reforms of a socioeconomic, administrative and fiscal nature, that go beyond the remit of transitional justice, even though they should be coordinated with it . . . .

See Human Rights Council, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc. A/HRC/36/50 (Aug. 21, 2017).

20. This risk of overreliance on affirmative action is particularly marked in the U.S., where affirmative action is one of the few race-conscious measures that the Supreme Court has upheld as constitutional. *See, e.g.*, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (finding the University of Texas's reliance on race in admissions to be constitutional).

I. UNDERSTANDING AFFIRMATIVE ACTION AS A TRANSITIONAL PRACTICE

Affirmative action in South Africa and the United States is, this section argues, a transitional practice aimed at facilitating and negotiating each country's passage from its racial past to its racial future.[21] Affirmative action in these countries emerged in response to historical injustice,[22] and it still engages with transitional goals[23] and grapples with transitional dilemmas.[24] Features of this kind make sense only when viewed through a transitional lens and compel us to understand affirmative action in transitional terms.

A. Affirmative Action Emerged in Response to Historical Injustice

Affirmative action in South Africa and the United States emerged as an attempt to undo the legacies of racial subordination and move away from racial wrongdoing. South African affirmative action has been profoundly shaped by the legacy of apartheid,[25] and American affirmative action by that of slavery and segregation.[26]

The racist apartheid system in South Africa, spanning from 1948 to 1994, classified people into four groups: White, African, Colored, and Indian.[27] Only the former enjoyed full rights of citizenship, while the latter were all treated as different and inferior (with systemic hierarchy within oppressed groups).[28]

To undo the legacies of apartheid, post-apartheid South Africa adopted affirmative action from the outset.[29] Writing in 1990, Albie Sachs,

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21. For a definition of affirmative action, see *supra* note 3.

22. *See infra* Part I.A.

23. *See infra* Part I.B.

24. *See infra* Part I.C.

25. *See infra* notes 29–37.

26. *See infra* notes 45–49.

27. *See generally* DEBORAH POSEL, THE MAKING OF APARTHEID, 1948–1961: CONFLICT AND COMPROMISE (1991); NANCY L. CLARK & WILLIAM H. WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (3d ed. 2016).

28. This apartheid-era hierarchy within oppressed groups was at the center of an early affirmative action case. *See Motala & Another v. Univ. of Natal* 1995 (3) BCLR 374 (D) (S. Afr.) (observing that although Indians suffered discrimination under apartheid, the experience of Africans was significantly worse, and declaring it acceptable to apply affirmative action measures in proportion to the degree of disadvantage suffered in the past).

29. *See* S. AFR. (INTERIM) CONST., 1993, § 8(2)–(3)(a) (permitting "measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."); *Brink v. Kitshoff* 1996 (4) SA 197 (CC) 217 at para. 42 (observing that "[t]he drafters [of the interim Constitution] realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps

then an anti-apartheid advocate and later a judge on the Constitutional Court, heralded affirmative action as "the major instrument in the transitional period after a democratic government has been installed, for converting a racist oppressive society into a democratic and just one."[30] For Sachs, affirmative action was one of the primary means of realizing "agreed national and constitutionally established goals" for transition from apartheid.[31] After winning the 1994 democratic elections, the African National Congress (ANC) government introduced frameworks for affirmative action in education, employment, and other social spheres.[32]

The South African Constitution, which was drafted to "heal the divisions of the past," includes express authorization for affirmative action in Section 9(2).[33] Several legislative provisions give effect to constitutionally protected affirmative action. The Higher Education Act of 1997, for instance, requires public institutions of higher learning to have admissions policies including "appropriate measures for the redress of past inequalities,"[34] although it leaves the task of policy formation and

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to redress the effects of such discrimination"); *George v. Liberty Life Afr. Ltd.* (1996) 17 ILJ 571 (IC) (describing affirmative action as "primarily a means of ensuring that the previously disadvantaged are assisted in overcoming their disadvantages so that society can be normalized").

30. ALBIE SACHS, PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA 12–13 (1990) [hereinafter SACHS, PROTECTING HUMAN RIGHTS]; *see also* ALBIE SACHS, AFFIRMATIVE ACTION AND THE NEW CONSTITUTION 2 (1994) [hereinafter SACHS, AFFIRMATIVE ACTION] (observing that "[w]hatever form might emerge or whatever definition be given, everyone knew what the essence of affirmative action was: it meant taking special measures to ensure that black people and women and other groups who had been unfairly discriminated against in the past would have real chances in life").

31. SACHS, PROTECTING HUMAN RIGHTS, *supra* note 30, at 13.

32. *See infra* notes 33–37.

33. *See* S. AFR. CONST., Preamble, 1996 (describing a goal of the South African Constitution as "[h]eal[ing] the divisions of the past and establish[ing] a society based on democratic values, social justice and fundamental human rights"); *id.* § 9(2) (allowing "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken"); *id.* § 195(1)(i) (requiring that "[p]ublic administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation."); *see also S. Afr. Police Serv. v. Solidarity obo Barnard* 2014 (6) SA 123 (CC) at 16 para 29 (Moseneke ACJ) ("[Our Constitution] enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, whilst our society has done well to equalise opportunities for social progress, past disadvantage still abounds.").

34. *See* Higher Education Act 1997, § 37(3), GN 1655 of GG 18515 (19 Dec. 1997); *see also* Education White Paper 3: A Programme for the Transformation of Higher Education (July 1997) (S. Afr.) (calling on institutions of higher learning to contribute to South Africa achieving "political democratisation, economic reconstruction and development, and redistributive social policies aimed at equity"); Saleem Badat, *Redressing the Colonial/Apartheid Legacy: Social Equity, Redress, and Higher Education Admissions in Democratic South Africa*, *in* EQUALIZING ACCESS: AFFIRMATIVE ACTION IN

administration to individual institutions. The Employment Equity Act of 1998 enables affirmative action in public employment in relation to three designated groups (blacks, women, and people with disabilities).[35] Measures to ensure the equitable representation of designated groups may include preferential treatment and numerical goals, but not quotas.[36] Additionally, a Black Economic Empowerment program aims to support successful participation of black people in the economy, allowing quotas to be adopted in specific sectors.[37]

In the United States, after two and a half centuries of indenture and slavery (1619–1865), Reconstruction (1865–1877) made promises of equality and enfranchisement that were never realized.[38] A century of Jim Crow ensued (1877–1950s), with widespread racial violence and racist

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HIGHER EDUCATION IN INDIA, UNITED STATES, AND SOUTH AFRICA 121 (Zoya Hasan & Martha C. Nussbaum eds., 2012) (discussing racial redress in higher education).

35. *See* Employment Equity Act, Preamble, GN 1323 of GG 19370 (19 Oct. 1998) (recognizing "that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such grounded disadvantages for certain categories of people that they cannot redressed simply by repealing discriminatory laws"); Green Paper on Employment and Occupational Equity (July 1996) (S. Afr.) (calling on employers "to undertake organisational transformation to remove unjustified barriers to employment for all South Africans, and to accelerate training and promotion for individuals from historically disadvantaged groups").

36. *See* Employment Equity Act § 42, GN 1323 of GG 19370 (19 Oct. 1998). In September 2018, the Department of Labour proposed certain amendments to the Employment Equity Act, and in February 2020, Cabinet approved submission of the Employment Equity Amendment Bill of 2020 to Parliament. *See South Africa's Major New BEE Laws Get the Green Light*, BUSINESSTECH (Feb. 18, 2020), https://businesstech.co.za/news/business/374866/south-africas-major-new-bee-laws-get-the-green-light/ [https://perma.cc/3H9J-4JWY].

37. *See* Broad-Based Black Economic Empowerment Act, Preamble, GN 17 of GG 25699 (9 Jan. 2004) (intended in part "to promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution"); *see also* Stephan Klasen & Anna Minasyan, *Affirmative Action and Intersectionality at the Top: Evidence from South Africa*, Global Labor Organization Discussion Paper No. 467 (2020), https://www.econstor.eu/bitstream/10419/213568/1/GLO-DP-0467.pdf [https://perma.cc/JG3E-M38P] (finding that "the South African BEE policy increased the likelihood of Black women employment in top positions by three percentage points in the post-policy period"; however, "earnings for White men increased by 30 per cent, while earnings of Black women, Black men and White women remained largely unchanged.").

38. For an account tracing contemporary affirmative action policies to Reconstruction, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). On slavery and Reconstruction, 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 (1995); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997).

laws so oppressive that they became a model for Hitler's Germany.[39] During this time, blacks and other racial minorities were separated from whites in most aspects of life, including education, employment, and housing.[40] Segregation, like slavery before it, rested on and perpetuated the idea that nonwhites were different and inferior to whites.[41]

The Second Reconstruction emerged as a way to eradicate ongoing racial subordination.[42] The Supreme Court's landmark 1954 decision *Brown v. Board of Education*[43] and the Civil Rights Movement identified segregation as a wrong to be rectified through integration in public life.[44] In March 1961, President John F. Kennedy issued Executive Order 10925, which required government contractors to "take affirmative action" to ensure non-discrimination based on race.[45] In a historic address to Howard University in June 1965, President Lyndon B. Johnson declared that non-discrimination was not enough to remedy historical discrimination.[46] Further paving the way for affirmative action, Johnson famously said: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[47] This account of fairness, as correcting the legacies of racial wrongdoing, animated affirmative action measures during the 1960s. By the end of that decade, the federal government had

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39. JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW (2018). On the Jim Crow era, *see generally* GLENDA 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).

40. KLARMAN, *supra* note 39, at 17–28, 48–52 (discussing *Plessy v. Ferguson* era segregation cases and their consequences).

41. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Supreme Court ratified racial segregation under the "separate but equal" principle.

42. On the Civil Rights era, *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).

43. 347 U.S. 483 (1954).

44. *Id.* at 494–95.

45. Exec. Order No. 10925, 26 Fed. Reg. 1977 (May 8, 1961). Hobart T. Taylor Jr., an African American attorney, is credited with introducing "affirmative action" into Executive Order 10925. Judson MacLaury, *President Kennedy's E.O. 10925: Seedbed of Affirmative Action*, FED. HIST., Jan. 2010, at 42, 47.

46. Commencement Address at Howard University: "To Fulfill These Rights," 2 PUB. PAPERS 635, 636 (June 4, 1965).

47. *Id.*

introduced affirmative action plans in business and employment,[48] and institutions of higher learning had started adopting admissions programs designed to include minorities.[49]

The pace of integration slowed, however, as white non-beneficiaries challenged practices that sought to level the playing field for minorities.[50] In the wake of the Supreme Court's 1978 decision in *Regents of the University of California v. Bakke*,[51] affirmative action shifted from programs explicitly based on race toward those in which race is one of several factors or in which race does not explicitly factor. Affirmative action in higher education survived not as a policy promoting historical justice for racial minorities, but "as a policy promoting educational diversity that could indirectly benefit racial minorities."[52]

Today, racial remedies stand on a firmer legal footing in South Africa than in the United States. Because American discussions about affirmative action now downplay its rectificatory role, it is easy to forget that the original impetus for affirmative action in both countries was to correct the legacies of racial subordination.[53] Although the justificatory rhetoric for affirmative action may evolve over time,[54] we cannot understand affirmative action in these countries apart from its rectificatory origins.

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48. *See* Exec. Order No. 11,246, 3 C.F.R. § 202 (1964–65) (requiring federal contractors and subcontractors to identify underutilized minorities, assess availability of minorities, and if available, to set goals and timetables for reducing underutilization); Exec. Order No. 11,478, 3 C.F.R. § 803 (1969) (requiring equal employment opportunity for federal employees to be achieved through a "continuing affirmative program in each executive department and agency").

49. *See, e.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 314, 326–27 (1974) (noting that at least some of the eight black students admitted to the University of Washington Law School in 1969–70 were admitted on a preferential basis).

50. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1487–90, 1501 (2004) [hereinafter Siegel, *Equality Talk*].

51. 438 U.S. 265 (1978).

52. *See* Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2514 (2019) [hereinafter Joshi, *Racial Indirection*]. Under this diversity-based regime, a university can "no longer seek a simple ethnic diversity in the form of a racial quota; it ha[s] to consider racial or ethnic background as only one element in the selection process—and do so without assigning a specific weight to race." *See id.* at 2515–18.

53. *See, e.g.*, *Bakke*, 438 U.S. at 363 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) ("[T]he conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination."); *id.* at 374 ("[Affirmative action's] purpose is to overcome the effects of segregation by bringing the races together.").

54. *See, e.g.*, PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION 165–66 (2016) (discussing how understandings of affirmative action evolved since the Civil War).

B. Affirmative Action Engages with Transitional Goals

In transitional societies like South Africa and the United States, affirmative action specifically addresses inequalities in order to surmount the past. The transitional goals of affirmative action include remedying historical disadvantage, integrating historically segregated spaces, increasing political power for marginalized groups, breaking down racial stereotypes, and promoting cross-racial understanding and harmony. Affirmative action may pursue these goals to varying degrees and in more or less direct ways; it may serve certain goals without explicitly stating that it does so. For instance, the U.S. Supreme Court has rejected the use of racial quotas to integrate universities; the only interest that legally justifies even limited reliance on race in admissions decisions is "the attainment of a diverse student body."[55] Nevertheless, the pursuit of a diverse student body has served as an indirect path to desegregating America's universities, even if desegregation is not affirmative action's stated purpose.[56]

Affirmative action is not just a means for the realization of transitional goals, but also a focal point of contestation over what transition should lead to and how transition should be achieved. South Africa's ANC leaders tried to preempt political opposition and divisive litigation by incorporating the legality and purpose of affirmative action into the constitutional text.[57] Acknowledging some early resistance to affirmative action, the ANC's 1992 policy guidelines for a democratic South Africa sought to handle the issue "with both firmness and sensitivity."[58] As Sachs has explained, although affirmative action in South Africa has "clear and irreversible goals with an undeniable social and moral purpose . . . considerable flexibility is permitted in terms of how the goals are to be realized."[59] Affirmative action's flexibility has opened up political space for debating the means and ends of South Africa's transition from apartheid.[60] South Africans deliberate on the best means of addressing social inequalities against the backdrop of a transitional politics

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55. *See Grutter v. Bollinger*, 539 U.S. 306, 324, 334 (2003) (quoting *Bakke*, 438 U.S. at 311).

56. *See* Joshi, *Racial Indirection*, *supra* note 52, at 2513–23 (discussing how the goal of obtaining student body diversity became an indirect path to promote desegregation).

57. ANC, READY TO GOVERN: ANC POLICY GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA ADOPTED AT THE NATIONAL CONFERENCE 6 (1992).

58. *Id.*

59. SACHS, PROTECTING HUMAN RIGHTS, *supra* note 30, at 19.

60. For sources discussing the affirmative action debate at the University of Cape Town, see *infra* note 78.

that simultaneously seeks to redress the past and cultivate a new national identity.[61]

In the United States, contestation revolves around whether race-sensitive admissions policies facilitate or impede transition to a society free of race-based discrimination. For some conservatives, reliance on race in admissions suggests a continuation of the nation's racial past.[62] Reasoning from this belief, some Supreme Court justices have consistently voted to strike down race-sensitive affirmative action programs in public schools and universities.[63] For some progressives, a retreat from race in the present period suggests a disregard for or even a denial of historical racism.[64] Justices with this view have voted to uphold race-sensitive affirmative action and lamented limitations placed on direct considerations of race in admissions.[65] Affirmative action cases have forged particular

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61. *See* Kristina Bentley & Adam Habib, *Racial Redress, National Identity and Citizenship in Post-Apartheid South Africa*, *in* RACIAL REDRESS AND CITIZENSHIP IN SOUTH AFRICA 3, 3 (Kristina Bentley & Adam Habib eds., 2008) (noting "the tension that has tended to emerge between existing redress strategies and the country's constitutional goal to develop a single nation").

62. *See* F. Michael Higginbotham, *Affirmative Action in the United States and South Africa: Lessons from the Other Side*, 13 TEMP. INT'L & COMP. L.J. 187, 202 (1999) ("[Conservative] justices believed that the likelihood that affirmative action programs were motivated by racial prejudice and hostility was the same as the likelihood that segregation programs were motivated by such prejudice and hostility.").

63. *Id.* at 203–04 (detailing how conservative justices have consistently held that affirmative action programs are subject to strict scrutiny).

64. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting) ("[T]oday's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence . . . the majority launches a grapeshot attack on race-conscious remedies in general . . . [and] will inevitably discourage or prevent governmental entities . . . from acting to rectify the scourge of past discrimination.").

65. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) (recounting "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."); *id.* at 327 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) ("[W]e cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."); *id.* (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part) ("[A] glance at our docket and at dockets of lower courts will show that even today officially sanctioned discrimination is not a thing of the past. Against this background, claims that law must be 'color-blind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality." (footnote omitted)); *id.* at 402 (Marshall, J., concurring in part and dissenting in part) ("I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible."); *id.* at 403 (Blackmun, J., concurring in part and dissenting in part) (underscoring a serious lack of black physicians and attorneys and cautioning: "If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious."); *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting) ("[W]e are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned

understandings of transitional goals and trajectory, which in turn have been transported to other contexts, such as school desegregation.[66]

C. Affirmative Action Grapples with Transitional Dilemmas

Affirmative action grapples with various dilemmas that are endemic to times of transition.[67] In South Africa and the United States, these dilemmas entail a reconciliation between moving away from pervasive and pernicious use of race and continuing to use race to remedy historical wrongs,[68] between looking forward and looking backward,[69] between the individual and the collective,[70] and between peace and justice.[71] Affirmative action shapes and is shaped by the ways in which societies resolve these transitional dilemmas, which are often resolved by compromise rather than absolutism.

1. RACE-"NEUTRALITY" AND RACE-CONSCIOUSNESS

The most prominent of these dilemmas is the reconciliation between constitutional ideologies that encourage race "neutrality" ("non-racialism" in South Africa[72] and "colorblindness" in the United States[73]) and

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inequality remain painfully evident in our communities and schools."); *id.* at 301 (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.").

66. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (discussing understandings of racial history and transition developed in key affirmative action cases).

67. *See* MAMPHELA RAMPHELE, LAYING GHOSTS TO REST: DILEMMAS OF THE TRANSFORMATION IN SOUTH AFRICA 255–58 (2008) (discussing some dilemmas that arise in South African affirmative action).

68. *See* discussion *infra* Part I.C.1.

69. *See* discussion *infra* Part I.C.2.

70. *See* discussion *infra* Part I.C.3.

71. *See* discussion *infra* Part I.C.4.

72. S. AFR. CONST., § 1(b), 1996 (stating that South Africa is founded on "non-racialism"). In South Africa, the Black Consciousness vision of Steve Biko was largely eclipsed by the non-racial vision of Nelson Mandela. *See* Xolela Mangcu, *Shattering the Myth of a Post-Racial Consensus in South African Higher Education: "Rhodes Must Fall" and the Struggle for Transformation at the University of Cape Town*, 5 CRIT. PHIL. RACE 243, 249 (2017).

73. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

Constitutional scholars have debated whether the Equal Protection Clause is properly interpreted through a colorblind, anti-classification principle concerned with individual rights to equal treatment or a race-conscious, anti-subordination principle concerned with

affirmative action measures that entail race consciousness. Sachs recognized early on the challenge of harmonizing non-racial democracy with race-based affirmative action in South Africa: "Non-racism presupposes a colour-blind constitution; affirmative action requires a conscious look at the realities of the gaps between the life chances of blacks and whites."[74] In its 1992 policy guidelines, the ANC agreed to resolve this dilemma in the constitutional text itself: "The constitution will make it clear that seeking to achieve substantive equal rights and opportunities for those discriminated against in the past should not be regarded as a violation of the principles of equality, non-racialism and non-sexism, but rather as their fulfilment."[75] While explicit endorsement in the constitutional text rendered race-based affirmative action permissible, it did not end contestation over whether it is desirable. In a polemical 1998 report, the center-right Democratic Party blamed the ANC's affirmative action program for "a creeping reintroduction of race policies in South African society," comparing affirmative action policies to those at the beginning of apartheid South Africa, Jim Crow United States, and Nazi Germany.[76]

The South African debate about reliance on race continues to this day. Opponents such as Neville Alexander reject racial redress so that "the

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group inequalities. An important strand of this literature considers how these two principles overlap and interact in shaping the form of equal protection law. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 13 (2003) ("[A]ntisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice."); Siegel, *Equality Talk*, *supra* note 50, at 1477 ("[A]ntisubordination values live at the root of the anticlassification principle . . . .").

Progressive race scholars reject colorblind racial ideology on the grounds that colorblindness de-historicizes race and divorces it from social meaning, obscures and legitimizes practices that maintain racial inequalities, and actively undermines rather than vindicates constitutional commitments to equality. *See* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 1–2 (2003) (arguing that colorblind social policies have produced "durable racial inequality"); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337 (1988) (describing "a formalistic, color-blind view of civil rights that had developed in the neoconservative 'think tanks' during the 1970's" and "calls for the repeal of affirmative action and other race-specific remedial policies"); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991) (arguing that the "United States Supreme Court's use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination"); Ian F. Haney-López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) (describing "reactionary colorblindness" as "an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility").

74. SACHS, PROTECTING HUMAN RIGHTS, *supra* note 30, at 170.

75. ANC, *supra* note 57, at 6.

76. DEMOCRATIC PARTY, THE DEATH OF THE RAINBOW NATION: UNMASKING THE ANC'S PROGRAMME OF RE-RACIALISATION 2, 4 (1998).

humiliating experience of racial self-classification and the entire replication of the technical hocus pocus of the apartheid racial ideologues required for the identification of citizens in terms of their 'race' would be eliminated."[77] Meanwhile, proponents like Xolela Mangcu lament efforts to limit racial redress—such as the University of Cape Town's recent admissions policy that incorporates race as only one of several factors—as memory loss: "We forget too easily that in the racial memory of the university, black people have long been temporary sojourners. For example, the university admitted its first African medical student only in 1985."[78]

In the United States, a similar debate rages between conservatives who believe that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[79] and progressives who believe that "[i]n order to get beyond racism, we must first take account of race."[80] Since the 1970s, the Supreme Court's affirmative action decisions have moved away from overt uses of race because of the nation's history of invidious racial classifications,[81] and in the hopes that race would become

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77. Neville Alexander, *Affirmative Action and the Perpetuation of Racial Identities in Post-apartheid South Africa*, 63 TRANSFORMATION 92, 101–03 (2007) (suggesting "a non-racial approach to the promotion of national unity and social integration and cohesion"). *See also* Kanya Adam, *The Politics of Redress: South African Style Affirmative Action*, 35 J. MOD. AFR. STUD. 231, 231 (1997) (suggesting "a policy of non-racial, class-based affirmative action . . . as the most feasible way to facilitate reconciliation"); Jeremy Seekings, *The Continuing Salience of Race: Discrimination and Diversity in South Africa*, 26 J. CONTEMP. AFR. STUD. 1, 1 (2008) (arguing that "race remains very important in cultural and social terms, but no longer structures economic advantage and disadvantage").

78. Xolela Mangcu, *Lack of Good Faith Not Just Academic*, IOL (Oct. 2, 2016, 8:11 AM), http://www.iol.co.za/sundayindependent/lack-of-good-faith-not-just-academic-2075042 [https://perma.cc/85UV-URU9]; *see also* Mangcu, *supra* note 72, at 243 (disputing "the notion that class mattered more than race in South African politics"); Max Price, *In Defence of Race-Based Policy*, MAIL & GUARDIAN (Jan. 06, 2012), https://mg.co.za/article/2012-01-06-in-defence-of-racebased-policy [https://perma.cc/WD5M-7985] (comparing reasons for and against a race-based admissions policy at the University of Cape Town); Siyabonga Sesant, *Affirmative Action Isn't Going Anywhere, Says Minister*, IOL (May 10, 2017, 11:33 PM), https://www.iol.co.za/capeargus/affirmative-action-isnt-going-anywhere-says-minister-9053610 [https://perma.cc/2XFH-T7HE] (quoting Labor Minister Mildred Oliphant as saying, "Let us remind everybody that introducing employment equity was for all intents and purposes a recognition that South Africa comes from an ugly past where discrimination was the cornerstone of social and economic engineering.").

79. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

80. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

81. *Id.* at 291 ("This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history."); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

ever less relevant over time.[82] At the same time, the Court has allowed indirect uses of race to promote "diversity" with the understanding that race remains salient in American society, and thus an element of race-consciousness is needed to move toward a world in which race no longer matters.[83] This diversity rationale for affirmative action is a form of "racial indirection"[84] based on a political compromise—a halfway point between "colorblindness" and race-consciousness that fully vindicates neither.[85]

2. LOOKING FORWARD AND LOOKING BACKWARD

The second dilemma is the choice between backward-looking affirmative action, which is principally concerned with redressing past injustice, and forward-looking affirmative action, which is more concerned with promoting institutional diversity and legitimacy. Although South African constitutional and statutory law has entrenched backward-looking affirmative action, Sachs explains that the aim of affirmative action "is not to establish a form of anachronistic or disjunctive compensation for past injustices" but "is to rectify the way in which these injustices continue to permeate the world we live in."[86] Legal scholar Ockert Dupper proposes a more forward-looking approach to affirmative action in order to change attitudes about race while promoting racial integration.[87]

In the United States, the Supreme Court has rejected a number of backward-looking rationales for pursuing affirmative action in higher education, including remedying the historic underrepresentation of

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82. *Grutter*, 539 U.S. at 343 (predicting that "[twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

83. *See id.* at 338 ("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.").

84. *See* Joshi, *Racial Indirection*, *supra* note 52, at 2497 (defining racial indirection as "practices that produce racially disproportionate results without the overt use of race.").

85. *See* JOHN C. JEFFRIES, JR., LEWIS F. POWELL JR.: A BIOGRAPHY 500 (1994) (describing diversity-based affirmative action as "not the ultimate objective but merely a convenient way to broach a compromise"); Siegel, *Equality Talk*, *supra* note 50, at 1532 (describing the reliance on diversity in affirmative action as "a master compromise . . . that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles").

86. Albie Sachs, *Foreword* to ELAINE KENNEDY-DUBOURDIEU, RACE AND INEQUALITY: WORLD PERSPECTIVES ON AFFIRMATIVE ACTION IX (2006) (cited in Badat, *supra* note 34, at 132).

87. Ockert Dupper, *Remedying the Past or Reshaping the Future? Justifying Race-based Affirmative Action in South Africa and the United States*, 21 INT'L J. COMP. LAB. L. & INDUS. REL. 89, 90–91 (2005).

minorities and "societal discrimination" against them.[88] Yet, while the Court is reticent to explicitly discuss legacies of the past, many of its affirmative action decisions are steeped in distinctly transitional concerns. Justices authoring these decisions posit that some forms of affirmative action are likely to impede rather than facilitate transition.[89] For instance, Justice Powell's landmark opinion in *Bakke* prohibited racial quotas because an "[invidious] perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history,"[90] and on the belief that "[d]isparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."[91] Yet, even with these concerns, Justice Powell's opinion did not prohibit all consideration of race in admissions. As legal scholar Jack Balkin observes: "Powell allowed universities to admit members of previously disadvantaged groups without having to state directly that they were remedying past societal discrimination."[92]

Even as the Supreme Court limits a remedial rationale for affirmative action, it is clearly operating in a transitional context where moving beyond historic injustice is an underlying purpose of affirmative action. In a 2003 decision endorsing Justice Powell's opinion, the Court allowed the use of race in admissions to continue precisely because of the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[93] As Justice O'Connor 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."[94]

This diversity rationale is *both* backward- and forward-looking. It is backward-looking in the recognition that social meanings and relations of race today are shaped by those in the past, and that racial diversity has

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88. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306–11 (1978) (rejecting rationales for race-sensitive affirmative action including "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," and "countering the effects of societal discrimination").

89. It is, of course, possible to share the Court's concern for racial transition and yet to disagree with the way in which the Court imagines that transition unfolding. For a discussion of progressive objections to the Court's transitional account, see *supra* note 65 and accompanying text.

90. *Bakke*, 438 U.S. at 291.

91. *Id.* at 298–99.

92. Jack M. Balkin, Plessy, Brown, *and* Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 101, 135 (2005).

93. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

94. *Id.* at 338; *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

special significance today precisely because of that past. Moreover, it is forward-looking in the aspiration that social meanings and relations of race might be different in the future, and that racial diversity might help to bring about that difference.[95] This diversity rationale recognizes the salience of race in this moment of transition given this moment's proximity to historical injustice, while also leaving space for race to become less or differently salient over time.[96]

Stripped of its transitional context, this rationale of the U.S. could arguably apply even in a non-transitional society. *Any* society could pursue diversity without attaching the particular significance that the U.S. attaches to *racial* diversity for both historical and prospective reasons. Yet, precisely because of its transitional context, diversity-based affirmative action in the U.S. remains a distinctly transitional practice.

3. INDIVIDUAL AND COLLECTIVE

The third dilemma arises when affirmative action, framed as a group-based remedy for historical group-based discrimination, stands in tension with more individualistic notions of rights. In the United States, where both discrimination and rights tend to be viewed in individualistic terms, remedial measures face the challenge of specifying particular wrongs committed by particular perpetrators against particular victims—a challenge made more difficult as time passes.

The prioritization of individuals' rights has curtailed group-based affirmative action in the United States. Even as Justice Powell's opinion in *Bakke* allowed the possibility of remedial action in limited circumstances,[97] it restricted the direct pursuit of remedial and distributive justice because of an "inequity in forcing innocent persons in [Bakke's]

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95. The federal judge who upheld Harvard's admissions program in September 2019 reflected this understanding of affirmative action. "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." *See Students for Fair Admissions v. Harvard University*, 397 F. Supp. 3d 126, 205 (D. Mass. 2019).

96. This is not to suggest that the ways in and degrees to which the Supreme Court is looking backward and forward are appropriate. As critical scholars have convincingly shown, the Supreme Court's affirmative action opinions suffer from being insufficiently historically grounded. *See, e.g.*, Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 123, 128 (2006) (showing how "the racial past" in the Supreme Court's affirmative action opinions "has been pictured as a distant reality disconnected from the present"); Haney-López, *supra* note 73, at 1063 (observing that the Court has proceeded as if "blacks and other minorities faced the same social conditions as white ethnics, none more or less the victims of group discrimination").

97. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–08 (1978) ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.").

position to bear the burdens of redressing grievances not of their making."[98] Justice Marshall's powerful dissent rejected this individualistic approach, reminding the Court that "for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins."[99] Ultimately, it was Justice Powell's opinion that prevailed and became the basis for the current legal regime of affirmative action. Today, affirmative action in college admissions requires "truly individualized consideration" of applicants, which means that universities cannot employ racial quotas but can "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[100]

In contrast, the South African Constitution protects group-based affirmative action as an aspect of substantive equality.[101] Even before the interim Constitution of 1993 and the final Constitution of 1996, Sachs recognized the importance of group-based justice claims when he wrote: "It is not just individuals who will be looking to the Bill of Rights as a means of enlarging their freedom and improving the quality of their lives, but whole communities, especially those whose rights have been systematically and relentlessly denied by the apartheid system."[102] Still, South African affirmative action decisions devote considerable attention to the interests of individual non-beneficiaries on the belief that everyone's commitment is essential to the transition process.[103]

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98. *Id.* at 299; *see also id.* at 288 ("[When government decisions] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").

99. *Id.* at 400 (Marshall, J., concurring in part and dissenting in part); *see also id.* at 401–02 (Marshall, J., concurring in part and dissenting in part) ("It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to these positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.").

100. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

101. *See supra* note 33 and accompanying text.

102. SACHS, PROTECTING HUMAN RIGHTS, *supra* note 30, at 19.

103. *See, e.g.*, *S. Afr. Police Serv. v. Solidarity obo Barnard* 2014 (CCT 01/14) ZACC 23, para. 32 (opinion of Moseneke, A.C.J.) (discussing how affirmative action "must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non-sexist and socially inclusive society"); *id.* at para. 106 (opinion of Cameron, Froneman and Majiedt, JJ.) (encouraging reason-giving in affirmative action decision-making because "[k]nowing why the decision was adverse enables the aggrieved person to understand—an understanding that encourages participation in rebuilding our divided country.").

4. PEACE AND JUSTICE

Finally, affirmative action must be sensitive to the relationship between the pursuit of justice and the achievement of peace.[104] The failure of government to redress structural inequalities and secure sufficient improvements for its historically marginalized populations may fuel discontent and conflict. On the other hand, transitional measures that are employed as a means to alleviate such inequalities often breed resentment among individuals and groups that feel disfavored by these practices.

This need to balance considerations of justice with peace has figured prominently in South African and American affirmative action cases. For instance, South African Constitutional Court Judge Johann van der Westhuizen acknowledged in a 2014 opinion that a white woman denied promotion "has been understandably frustrated and disappointed because of the impact on her of an attempt to achieve equality."[105] He went on to pose searching questions about "[h]ow do her positive attributes sit with the constitutional responsibility to heal the divisions of the past and promote the achievement of equality?"[106] While allowing a university's limited use of race to achieve racial diversity, Justice Kennedy's 2016 opinion in *Fisher v. University of Texas at Austin* cautioned against using

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104. I intend to study the relationship between racial justice and peace in other work.

105. *S. Afr. Police Serv. v. Solidarity obo Barnard* 2014 (CCT 01/14) ZACC 23, para. 131 (opinion of van der Westhuizen, J.).

106. *Id.* South African commentators have observed patterns of racial resentment resulting from affirmative action programs. *See* Kanya Adam, *Affirmative Action and Popular Perceptions: The Case of South Africa*, 37 SOC. 48, 52 (2000) (observing that "affirmative action is most resented by the beneficiaries of previously legislated advantage" who "now consider it 'reverse racial discrimination,' contradicting the ANC promise of colorblind non-racialism"); Simon Bekker & Anne Leildé, *Is Multiculturalism a Workable Policy in South Africa?*, 5 INT'L J. MULTICULTURAL SOCIETIES 121, 126 (2003) (observing that affirmative action "has led to a sense of deprivation and discrimination among communities that fall outside the boundaries of beneficiary groups"); Ockert Dupper, *Affirmative Action: Who, How and How Long?*, 24 S. AFR. J. HUM. RTS. 425, 426 (2008) (noting that "affirmative action has emerged as one of the most controversial and divisive issues in post-apartheid South Africa" and seeking "to avoid a situation in which affirmative action becomes a policy that only generates resentment and strengthens, rather than weakens, existing social divisions"); ANTHONY BUTLER, CONTEMPORARY SOUTH AFRICA 186–87 (2nd ed. 2009) (observing that "White South Africans almost always reflect negatively on employment equity policy . . . despite Whites' low unemployment rates"); Benjamin Roberts, Gina Weir-Smith & Vasu Reddy, *Minding the Gap: Attitudes Toward Affirmative Action in South Africa*, 77 TRANSFORMATION 1, 23–24 (2011) (finding that "the specified beneficiary of [affirmative action] clearly seems to matter, with more positive evaluations evident when the policies target women and disabled persons relative to racial disadvantage").

"[f]ormalistic racial classifications . . . in a divisive manner . . . [that] could undermine the educational benefits the University values."[107]

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To summarize, affirmative action in South Africa and the United States has distinctly transitional features and functions. Affirmative action ultimately seeks to move beyond historical injustice, even if a different justificatory rhetoric obscures its remedial function. Furthermore, affirmative action facilitates the pursuit of and contestation over transitional goals and it grapples with dilemmas that are endemic to periods of transition. These characteristics give even diversity-based affirmative action, which could be employed in a non-transitional society, a distinctly transitional disposition. We therefore cannot make full sense of affirmative action in South Africa and the United States without first recognizing it as a transitional practice.

II. WHAT TRANSITIONAL JUSTICE GAINS FROM AFFIRMATIVE ACTION

In focusing on a limited set of measures, transitional justice actors have sometimes given the impression that these measures constitute the complete range of responses available to transitional societies. Where attention has been paid to affirmative action, it has often been in passing and limited to discussions of reparative justice. For instance, in her influential book on transitional justice, legal scholar Ruti Teitel does not focus on affirmative action, but dedicates a few pages to "racial preferences" in the United States as a form of transitional reparatory justice for government-supported slavery and official segregation.[108] Teitel identifies the dilemma that arises when "innocent" future generations are called upon to provide reparations for historical injustice.[109] However, this is but one of various transitional dilemmas that

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107. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016). *See* Yuvraj Joshi, Bakke *to the Future: Affirmative Action After* Fisher, 69 STAN. L. REV. ONLINE 17, 23–26 (2016) (discussing the role of social cohesion concerns in *Fisher*).

108. TEITEL, *supra* note 1, at 141–43.

109. *Id.* Affirmative action may appear to be already addressed or easily subsumed under the label of reparations. Indeed, affirmative action is sometimes used as a form of reparations, as evidenced by Georgetown University's 2016 decision to give admissions preference to descendants of 272 slaves. *See* Rachel L. Swarns, *Georgetown University Plans Steps to Atone for Slave Past*, N.Y. TIMES (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/us/slaves-georgetown-university.html [https://perma.cc/5RGH-QJ6Z]. Nevertheless, affirmative action is not reducible to reparations. Not only can affirmative action exist alongside reparative measures such as compensation and land transfers, it can be (and has been) justified in non-remedial terms. Even affirmative action measures that are originally justified in remedial terms can lose their compensatory character in ways that reparations (by definition) cannot. On reparations, see generally Pablo De Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451 (Pablo De Greiff ed., 2008); Lisa J. Laplante, *The Plural Justice Aims*

permeate affirmative action debates and that need to be captured in transitional justice scholarship.[110]

The field of transitional justice would benefit significantly from paying attention to affirmative action. Affirmative action is a central site where transitional dynamics and dilemmas play out.[111] Affirmative action and its critiques highlight the socioeconomic dimensions of transition that may be overlooked by other transitional justice measures.[112] Affirmative action also sheds new light on the conceptual and practical boundaries of transitional justice.[113] For these reasons, affirmative action should occupy a central place among the transitional justice measures implemented to address massive human rights abuses.

A. Affirmative Action is a Central Site of Transition

From the outset, transitional justice has been criticized for failing to capture the real-world complexities of transition.[114] The experiences of South Africa and the United States illustrate that affirmative action is a central site where the meanings and modalities of transition take shape.[115] Studying affirmative action can therefore help transitional justice to better capture and address the real-world dynamics of transition.

For instance, affirmative action reveals ways in which transition processes may be facilitated by and in favor of elites. Affirmative action may be of particular interest to "established elites" who have a stake in maintaining the legitimacy of leading social and economic institutions through the inclusion of historically marginalized groups.[116] Affirmative action may also be of interest to "ascendant elites" who are upwardly mobile members of historically marginalized groups and the current or future beneficiaries of affirmative action.[117] This strong association with

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of Reparations, *in* TRANSITIONAL JUSTICE THEORIES 66 (Suzanne Buckley-Zistel et al. eds., 2013).

110. *See supra* Part I.C.

111. *See infra* Part II.A.

112. *See infra* Part II.B.

113. *See infra* Part II.C.

114. For an early critique in this vein, see Timothy Garton Ash, *The Truth About Dictatorship*, N.Y. REV. BOOKS, Feb. 19, 1998, at 35 (preferring the German "*Geschichtsaufarbeitung*" and "*Vergangenheitsbewältigung*" to the English "transitional justice" to describe the phenomenon of transition and arguing that "the absence of a word in a language does not necessarily indicate the absence of the thing it describes").

115. *See supra* Part I.

116. *See* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1446 (2005) (differentiating between "established" and "ascendant" elites).

117. *Id. See also* Bentley & Habib, *supra* note 10, at 339–42 (discussing how relatively privileged members of historically marginalized groups may be best positioned to take advantage of affirmative action).

elite institutions and individuals may distort and diminish affirmative action's significance for transition.[118] It may draw our attention away from affirmative action measures that can benefit a wider range of individuals across a broader array of institutions, as well as those that can help to make institutions more just.[119]

Some scholarship reflects concerns about this elitist bent of affirmative action. South Africa's Black Economic Empowerment has been criticized as serving the economic interests of an elite few by detaching race from class;[120] in the words of economist Sampie Terreblanche, such measures "have benefited only the aspirant African petit bourgeois."[121] In the United States, Justice O'Connor had in mind the creation of a diversified elite when she supported race-sensitive affirmative action "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry . . . ."[122] Legal scholar Aziz Rana contends that the result of inclusion-based policies (such as affirmative action) "has been mostly to alter the composition of socially privileged groups rather than to undermine privilege as such."[123] Legal historian Tomiko Brown-Nagin identifies affirmative action in selective universities as exemplifying how "the priorities of elites often have been privileged over theories and strategies of social justice that focused on the plight of working-class and poor."[124] Attending to affirmative action can therefore provide insights into who controls and who benefits from the process of transition.

Affirmative action also illuminates some of the key dilemmas that animate existing transitional justice scholarship. One classic example is the 'peace versus justice' dilemma,[125] which transitional justice

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118. *See* Bakke *at 40: Transcript of Lunchtime Discussion*, 52 U.C. DAVIS L. REV. 2243, 2246 (2019) (detailing Colorado Supreme Court Justice Melissa Hart's suggestion that a focus on highly-selective institutions (such as Harvard University) distracts from the role affirmative action plays in moderately-selective institutions (such as the University of Colorado)).

119. *See generally* Yuvraj Joshi, *The Trouble with Inclusion*, 21 VA. J. SOC. POL'Y & L. 207 (2014) (differentiating between forms of institutional inclusion that are more or less likely to produce social justice).

120. MICHAEL MACDONALD, WHY RACE MATTERS IN SOUTH AFRICA 154–58 (2006) (arguing that the "fig leaf of racial empowerment" serves elite economic interests).

121. SAMPIE TERREBLANCHE, A HISTORY OF INEQUALITY IN SOUTH AFRICA, 1652–2002, 47 (Riaan de Villiers & Louis van Schaik eds., 2002).

122. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

123. AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 328 (2011); *see also* Joshi, *supra* note 119 (arguing that inclusion in societal institutions does not always achieve justice and might sometimes perpetuate injustice).

124. Brown-Nagin, *supra* note 116, at 1475.

125. For an introduction to the peace versus justice debate, see, for example, Chandra Lekha Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 GLOBAL SOC'Y 579 (2007); Cecilia Albin, *Peace Versus Justice—and Beyond, in* THE SAGE HANDBOOK OF CONFLICT RESOLUTION 580 (Jacob Bercovitch et al. eds., 2009).

approaches address by seeking to "reconcile legitimate claims for justice with equally legitimate claims for stability and social peace."[126] Although both peace and justice are necessary for transition, sometimes the pursuit of one comes at the expense of the other. The nature of the relationship between justice and peace is therefore a central question in transitional justice scholarship. The peace versus justice question has several elements, including: What is "peace" and what is "justice"?[127] Is there a conflict between peace and justice or are they compatible and even complementary goals?[128] Are peace and justice of similar normative and

126. Arthur, *supra* note 6, at 323.

127. Despite (or perhaps because of) these terms being used in a wide range of transitional debates, their meanings are not clearly articulated in transitional justice literature. *Peace* may refer to the ending of violent conflict, moving from violent conflict to legal and political contestation, settling the particular issues that inspired conflict, or resolving the deeper causes underlying conflict. A useful distinction is between "negative" and "positive" peace. Dustin Sharp describes negative peace as "the absence of direct violence" and contrasts it with the more substantive notion of positive peace, which is "the absence of both direct and indirect violence, including various forms of 'structural violence' such as poverty, hunger, and other forms of social injustice." *See* Dustin Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT'L L.J. 780, 784 n.10 (2012). This distinction illustrates that the achievement of negative peace may be insufficient to secure positive peace and that negative peace may be ambivalent to justice in ways that positive peace may not. Perhaps even more varied and contingent are understandings of *justice*. Competing understandings of what justice requires and what shape justice should take often fuel contestation in transitional societies. How peace relates to justice therefore depends in large part on how we understand those terms. The possibility of multiple meanings suggests that there are choices to be made as to what kind of peace and what kind of justice should be pursued. *See generally* Albin, *supra* note 125, at 581–82 (discussing various meanings of peace and justice and observing that "some principles or aspects of justice relax or even remove the tension with peace while others increase it"); Rama Mani, *Balancing Peace with Justice in the Aftermath of Violent Conflict*, 48 DEV. 25, 28 (2005) ("[I]gnoring justice claims may cause discontent and frustration among disenfranchized groups, and undermine longer term sustainable peace – or what is called 'positive peace'. . . . Overlooking justice claims may endanger short-term negative peace as well, if unmet grievances degenerate into renewed violence . . ."); Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28, 34 (2009) ("Sustainable peacebuilding requires pursuit of the twin objectives of preserving 'negative peace' (absence of physical violence) and building 'positive peace' (presence of social justice) . . . .").

128. While some commentators view peace and justice as harmonious, considering it possible and even necessary to pursue them together, others view them as being in tension, underscoring the ways in which the pursuit of one can threaten the other. Some aptly argue that the peace-justice dilemma is often oversimplified, because the pursuit of one does not categorically promote or undermine the other, and because transition requires pursuing both, if not at once, then across mechanisms and over the course of time. *Compare Peace versus Justice: A False Dilemma*, INT'L CTR. FOR TRANSITIONAL JUST. (May 9, 2011), https://www.ictj.org/news/peace-versus-justice-false-dilemma [https://perma.cc/VQ7A-PBVW] (describing "the relationship between peace and justice as mutually reinforcing goals"), *with* Michael P. Sharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 342 (2006)

practical importance and should one take priority over the other?[129] Is the relationship between peace and justice inherent and unchanging or is it contingent on particular circumstances and considerations?[130]

Each of these questions may be posed with respect to affirmative action in transitional societies. In theory, affirmative action is much more an actual response to injustice than transitional justice, which is concerned with both responding to injustice and creating stability and peace. However, in practice, affirmative action is often implemented with considerable attention to its consequences for peace. Accordingly, as noted earlier, the peace versus justice question figures prominently in affirmative action jurisprudence in South Africa and the United States.[131] A core question concerns whether the amelioration of racial inequality through affirmative action is in tension with the achievement of racial harmony. For instance, some scholars suggest that policies that avoid explicit racial distinctions in remedying current and historical

("[A]chieving peace and obtaining justice are sometimes incompatible goals—at least in the short term."); *see also* Chandra Lekha Sriram, *Transitional Justice and Peacebuilding*, *in* PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA 1, 5 (Chandra Lekha Sriram & Suren Pillay eds., 2009) (describing peace versus justice dilemma as "often overstated" and "grossly oversimplified"); Sriram, *supra* note 125, at 580 (arguing that "simply presuming that justice generates or equates to peace is potentially quite problematic"); Albin, *supra* note 125, at 581 ("In many situations, particularly in a longer-term perspective, the issue is not whether peace or justice is to be chosen or prioritized, for both are clearly needed in some sense for conflict resolution and a durable settlement.").

129. Those who believe that these goals are interdependent (no peace without justice and no justice without peace) or that one goal naturally follows from the other (justice follows peace or peace follows justice) might question the impulse to prioritize between them. However, others caution that there are choices to be made, for instance, between "backward-looking" approaches that assign responsibility and consequences for the past (promoting justice but perhaps threatening peace) and "forward-looking" approaches that aim to foster new social relations and national identity for the future (pursuing peace but perhaps threatening justice). *See* I. William Zartman, *Negotiating Forward- and Backward-Looking Outcomes*, *in* PEACE VERSUS JUSTICE: NEGOTIATING FORWARD- AND BACKWARD-LOOKING OUTCOMES 1, 1–3 (I. William Zartman & Victor Kremenyuk eds., 2005).

130. While some have theorized general positive and negative relationships between peace and justice, many consider the relationship to be importantly context-dependent—one that changes and evolves over time. Factors that shape this relationship include the different stages of transition, the principles and understandings of peace and justice involved, the distribution of power between constituencies, and the time-horizon in consideration. Timing and sequencing therefore seem to matter in the pursuit of peace and justice, although the correct approach is contextual and not always clear. *See* Jon Elster, *Justice, Truth, Peace*, 51 NOMOS 78, 93–94 (2012); Albin, *supra* note 125, at 581 (emphasizing the importance of "contextual details" in understanding the relationship between peace and justice).

131. *See supra* notes 106–107 and accompanying text. I intend to study the relationship between racial justice and peace in other work.

discrimination promote racial harmony at the expense of racial justice.[132] Viewing the affirmative action debate as a variation of the peace versus justice dilemma helps us resist a rigid dichotomy between racial peace and justice and reconsider the relationship between them. Affirmative action in turn provides a new context for exploring the peace versus justice dilemma where insights from transitional justice scholarship may be applied and enriched.

B. Affirmative Action Highlights the Socioeconomic Dimensions of Transition

Transitional justice has also been criticized for marginalizing socioeconomic concerns.[133] Echoing broader critiques of human rights remedies,[134] critiques of transitional justice maintain that although the scope of wrongs that have been committed against oppressed groups as well as their demands for justice are wide-ranging, transitional justice measures are often limited.[135] These measures, it is argued, prioritize civil

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132. *See* Darren L. Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 7 (2015) (charging that "[t]he Court appears to believe that social cohesion is more important than racial justice").

133. *See* Zinaida Miller, *Effects of Invisibility: In Search of the 'Economic' in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUST. 266, 267 (2008) ("The literature, institutions and international enterprise of transitional justice historically have failed to recognize the full importance of structural violence, inequality and economic (re)distribution to conflict, its resolution, transition itself and processes of truth or justice seeking and reconciliation." (footnote omitted)). For discussions of socioeconomic rights in South Africa and the United States, see Rosalind Dixon & Tom Ginsburg, *The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps,'* 4 CONST. CT. REV. 1 (2011); Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283 (2018).

134. *See generally* Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996) (arguing that mainstream human rights theory and practice has sought to replicate essentially Western liberal models of governance); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002) (discussing how human rights discourse and practice privilege the state, the international, the individual, and the civil and political); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018) (discussing the limits of human rights in addressing material inequality).

135. *See* Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2 INT'L J. TRANSITIONAL JUST. 331, 333 (2008) ("What about redress for historical inequality and violations of economic, social and cultural rights that often pre-date, run concurrently with and follow episodes of political violence?"); Pilar Riaño Alcalá & Erin Baines, *Editorial Note*, 6 INT'L J. TRANSITIONAL JUST. 385, 386 (2012) ("The privileging of the rule of law, human rights and democratization in the dominant transitional justice discourse sidelines the perspectives and practices of survivors and ordinary people."); Sharp, *supra* note 127, at 784 ("[O]ne way to achieve a more balanced approach is to reconceptualize and reorient the 'transition' of transitional justice not simply

and political rights violations over other forms of structural violence, including socioeconomic violence, whose consequences may linger long after a political regime has changed or violent conflict has ceased.[136] For instance, in the wake of South Africa's Truth and Reconciliation Commission, Ugandan scholar Mahmood Mamdani argued that its narrow framing of the harms of apartheid impeded the wider pursuit of economic justice.[137] Other critiques charge that transitional justice focuses on political-institutional change while largely ignoring political economy. On this line of argument, the field of transitional justice obscures the socioeconomic dimensions of conflict, fails to account for the economic beneficiaries of injustices, overlooks the importance of distribution to democratic legitimation and peacebuilding, and even helps to legitimize a neo-liberal restructuring of states.[138]

Affirmative action, more so than some other transitional justice measures, brings attention to the socioeconomic dimensions of transition. The existence of affirmative action acknowledges (sometimes explicitly and often implicitly) the socioeconomic legacies of historical injustice and the need to remedy those harms in a transition. Furthermore, the implementation of affirmative action gives rise to debates about the relationship between socioeconomic status and racial inequality, as well as about how socioeconomic inequalities (even apart from those resulting

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as a transition to democracy and the 'rule of law,' the paradigm under which the field originated, but as part of a broader transition to 'positive peace,' in which justice for both physical violence and for economic violence receives equal pride of place.").

136. *See* Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 4 (2007) ("It is necessary to examine why economic, social, and cultural rights have not traditionally been a central part of transitional justice initiatives and whether there are real impediments to the pursuit of such a comprehensive ideal of justice in societies in transition."); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 276–77 (2008) ("[P]redominant views construct human rights violations fairly narrowly to the exclusion of structural and gender-based violence. There is a privileging of legal responses which are at times detrimentally abstracted from lived realities. Little attention, if any, is paid to the role that established, Western democracies have in violence. Together, these tendencies profoundly affect perceptions of the nature of violence, victimhood and perpetration, and they skew the direction of truth, justice and reconciliation."); Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up*, 35 J.L. SOC'Y 265, 273 (2008) ("'Transition', as normally conceived within transitional justice theory, tends to involve a particular and limited conception of democratization and democracy based on liberal and essentially Western formulations of democracy.").

137. 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).

138. *See* Hannah Franzki & Maria Carolina Olarte, *Understanding the Political Economy of Transitional Justice: A Critical Theory Perspective*, *in* TRANSITIONAL JUSTICE THEORIES 201, 213 (Susanne Buckley-Ziestel et al. eds., 2014); Miller, *supra* note 133.

from legacies of racial injustice) should be addressed.[139] Insights gleaned from affirmative action debates and critiques can therefore help transitional justice better understand and address socioeconomic concerns.

Some commentators caution that affirmative action may become a barrier rather than a bridge to socioeconomic equality in two primary ways. First, affirmative action may address historical injustice and socioeconomic inequalities in some ways and for some constituencies while neglecting others. Group-based remedies that are intended to repair past injustice and close the gap *between* historically privileged and marginalized groups may end up widening differences *within* marginalized groups.[140] In this vein, some literature observes that race-based affirmative action can end up helping the relatively privileged in the beneficiary group, rather than cutting across lines of race and class.[141] In the South African context, commentators have observed that redress policies do not consistently address the needs of the poor and might even inhibit the ability of the poor to influence policy outcomes.[142] The South African Human Rights Commission's 2018 Equality Report draws explicit

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139. An important strand of South African and American debates focuses on whether race or socioeconomic status should be the primary target of affirmative action measures. *See, e.g.*, RAMPHELE, *supra* note 67, at 249–50 (describing the race versus socio-economic status debate in South African affirmative action); Bentley & Habib, *supra* note 10, at 347 (proposing redress measures based on both race and class); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996) (describing the race versus socio-economic status debate in American affirmative action); Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55 (2016) (critiquing class-based affirmative action in the U.S.).

140. *See* Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 POL. THEORY 64, 65 (2000) (describing the "paradox of multicultural vulnerability" that arises where "state accommodation policies intended to mitigate the power differential between groups end up reinforcing power hierarchies within them").

141. *See infra* notes 142–144 and accompanying text.

142. *See* Nicoli Nattrass and Jeremy Seekings, *Democracy and Distribution in Highly Unequal Economies: The Case of South Africa*, 39 J. MOD. AFR. STUD. 471 (2001) (arguing that some redistributive policies do little to help the poor in South Africa and others serve to disadvantage them); Sandra Fredman, *Facing the Future: Substantive Equality Under the Spotlight*, *in* EQUALITY IN THE WORKPLACE: REFLECTIONS FROM SOUTH AFRICA AND BEYOND (Ockert Dupper & Christoph Garbers eds., 2009) ("[I]n practice, reverse discrimination [in South Africa] is often found to do no more than favour middle class women or blacks who are already relatively privileged in society."); Dupper, *supra* note 106, at 443 (calling for "a complex understanding of inequality and disadvantage [in South Africa]—one that recognizes that inequalities follow many axes, of which race is only one"); 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, 186 (2009) (observing that while "[t]here seems to be a fragile societal consensus regarding the [South African] government's commitment to progressive, incremental redress of structural inequalities . . . the failure of the government to provide sufficient material improvements to its poor populations may, over time, cause this compact to be renegotiated").

links between affirmative action and "socio-economic transformation" and recommends that the Employment Equity Act "be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators."[143] Similarly in the United States, William Julius Wilson describes the "creaming" process whereby "those with the greatest economic, educational, and social resources among the less advantaged individuals are the ones who are actually tapped for higher paying jobs and higher education through affirmative action."[144]

Affirmative action can be implemented with attention to socioeconomic concerns. For instance, India's "creamy layer" principle excludes certain members of eligible groups from enjoying the benefits of affirmative action on the grounds that they are economically advanced or educationally forward.[145] Affirmative action of this kind attends to the evolving relationship between group membership and disadvantage and aims to ameliorate differences within (as well as across) social groups.

Second, rather than serving as a catalyst for broader reflections and reforms addressing material inequality, affirmative action may serve as a modestly redistributive measure that legitimates existing arrangements and stunts structural reforms. As Mamdani worried at the dawn of the South African transition: "[W]ill not embracing the language and vision of 'affirmative action' obscure the very task that must be central to democratisation in a 'new' South Africa, that of institutional transformation?"[146] By institutional transformation, Mamdani means not merely adding more blacks and women to existing institutional

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143. S. AFR. HUM. RTS. COMM., EQUALITY REP. 2017/18, at 39 (2018), https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf [https://perma.cc/J77Q-54WE].

144. WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 115 (1987); *see also* Brown-Nagin, *supra* note 116, at 1473 ("The minorities who suffer most and in the greatest number from socioeconomic ills typically are not well-positioned to graduate from high school, much less compete for admission to universities like Michigan."); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 49 (1998) (showing that nine of ten black students admitted to competitive colleges hailed from the upper two tiers of the socio-economic strata); DONALD MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMAN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES (2003) (showing that eighty percent of Asians, sixty-six percent of Latino, and sixty percent of African Americans freshman at competitive colleges were from families where the father was a college graduate).

145. The scope of India's "creamy layer" principle continues to be litigated. *See* D. Shyam Babu, *The Creamy Layer of Social Justice*, THE HINDU (Oct. 4, 2018, 12:02 AM), https://www.thehindu.com/opinion/op-ed/the-creamy-layer-of-social-justice/article25115370.ece [https://perma.cc/8HK6-9WXH].

146. Mahmood Mamdani, *Research and Transformation: Reflections on a Visit to South Africa*, 27 ECON. & POL. WKLY. 1055, 1061 (1992). *See also* Daniel R. Magaziner, THE LAW AND THE PROPHETS: BLACK CONSCIOUSNESS IN SOUTH AFRICA, 1968–1977, 81 (2010) (characterizing "affirmative action in postapartheid society" under which "pictures on the wall change, but the fundamental power relationships remain the same").

arrangements, but fundamentally altering those arrangements in ways that promote justice.[147]

Affirmative action has sometimes been linked to broader institutional transformation. The "Rhodes Must Fall" movement, which emerged in March 2015 as a campaign to remove a statue of Cecil Rhodes from the University of Cape Town's campus, linked demands for affirmative action to the transformation and decolonization of the university.[148] Yet, as South Africa's "state capture" scandal involving an alleged manipulation of Black Economic Empowerment demonstrates,[149] affirmative action can be coopted by privileged interests. Even before the scandal, some commentators criticized Black Economic Empowerment for legitimizing business interests while doing little to remedy enduring poverty and economic inequality, which can themselves be understood as legacies of apartheid.[150] In the United States, critical race scholar Derrick Bell observed how affirmative action in higher education legitimizes traditional indexes of merit that privilege mainly well-off, white applicants and diverts concerns and resources from addressing poverty.[151]

Affirmative action by itself may not be enough to alleviate socioeconomic inequalities. Even so, affirmative action and its critiques somewhat uniquely bring attention to this dimension of transition. By analyzing the distributive functions that affirmative action does and does not perform, transitional justice can gain a better understanding of

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147. Mahmood Mamdani, *University Crisis and Reform: A Reflection on the African Experience*, 20 REV. AFR. POL. ECON. 7, 19 (1993).

148. For a first-hand account of the "Rhodes Must Fall" movement, see Mangcu, *supra* note 72.

149. For an account of how anti-apartheid-figure-turned-industrialist Gavin Watson allegedly manipulated the Black Economic Empowerment, see Mark Gevisser, *'State capture': The Corruption Investigation that has Shaken South Africa*, THE GUARDIAN (July 11, 2019), https://www.theguardian.com/news/2019/jul/11/state-capture-corruption-investigation-that-has-shaken-south-africa [https://perma.cc/WB6L-JJRL] ("Black economic empowerment aims to give black people a greater share of an economy still overwhelmingly owned by whites. But the evidence given to the inquiry against Gavin Watson and Bosasa suggests how easily manipulated it can be: the accusation against Watson is that he and his colleagues have abused the system to line their own pockets, and have 'captured' the organs of state to do so. . . . [A]ccording to the testimony before the state capture commission, Watson played race two ways. He offered his black collaborators a quicker route to self-enrichment than might otherwise be available to them, and his white ones a solution from the impoverishment they imagined might befall them, now that black South Africans were in the ascendant.").

150. MACDONALD, *supra* note 120, at 154; Roger Tangri & Roger Southall, *The Politics of Black Economic Empowerment in South Africa*, 34 J. S. AFR. STUD. 699, 715 (2008) (noting the "mounting black criticism of a [Black Economic Empowerment] policy that emphasises only modest changes in the ownership and management of the corporate sector, that has been to the disproportionate benefit of a politically connected black elite, and that preserves the dominant economic position of white capital.").

151. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

socioeconomic inequalities and develop strategies for addressing those inequalities.

C. Affirmative Action Illuminates and Expands Transitional Justice's Boundaries

The field of transitional justice has expanded significantly beyond its original focus. This expansion has been "vertical" in the sense of non-state actors becoming involved in transitional justice processes, as well as "horizontal" in the sense of transitional justice being applied to new contexts.[152] The field continues to be in a state of flux, with ongoing debates about its parameters.

Incorporating affirmative action into transitional justice analyses sheds light on the field's boundaries in several ways. First, while the early field of transitional justice focused on liberalizing transitions from authoritarianism to democracy and from conflict to peace, transitional justice discourses are increasingly common in contexts without a clearly defined transition.[153] Consonant with this trend, affirmative action designed to address the legacies of past injustice appears in many contexts, illustrating that transitional justice is not always or only aimed at achieving regime change and may serve a wide range of goals.

Second, affirmative action makes clear that transition extends beyond the consolidation of a liberal democratic regime and is not connected to "an exclusive 'moment' in time."[154] Even by the extremely modest estimation of the U.S. Supreme Court, affirmative action is predicted to last at least fifty years (until 2028), suggesting that historic injustice casts a long shadow and societal transition takes time.[155]

Third, whereas transitional justice is commonly associated with a limited set of paradigmatic measures (such as truth commissions and criminal prosecutions), affirmative action demonstrates that transition takes place beyond these measures.[156] In their empirical evaluation of transitional justice scholarship, Fletcher and Weinstein found that "[t]here have been no major breakthroughs in the 'toolkit' of transitional justice."[157] Affirmative action's addition to the 'toolkit' of transitional

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152. Thomas Obel Hansen, *The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field*, *in* TRANSITIONAL JUSTICE THEORIES 117 (Susanne Buckley-Ziestel et al. eds., 2014).

153. *Id.* at 106, 117.

154. 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 6 (Kieran McEvoy & Lorna McGregor eds., 2008); *see also* Hansen, *supra* note 152, at 109.

155. *See infra* note 181 and accompanying text.

156. Hansen, *supra* note 152, at 110.

157. Fletcher & Weinstein, *supra* note 1, at 192.

justice could be precisely such a breakthrough, bringing into the fold an intervention that is already shaping transitions in a number of contexts.

Finally, as discussed above, examining affirmative action expands conventional understandings of the harms that transitional justice addresses and the remedies it offers.[158]

In these several ways, affirmative action may play a critical role in defining the boundaries of transitional justice. Studying affirmative action can help reveal assumptions underlying transitional justice theory and whether theoretical assumptions reflect or diverge from practice. Furthermore, affirmative action can illuminate transitional justice's emancipatory potential as well as its relationship to other frameworks for pursuing constitutional and social transformation, such as transformative constitutionalism.[159] Finally, affirmative action can help steer the field of transitional justice away from a limited set of cases and concepts and toward new places and perspectives, which may render the field better equipped to understand and facilitate societal transitions.

While some transitional justice scholars welcome the field's expansion, others voice concerns about how far the field should be extended, including "whether transitional justice theory is sufficiently equipped to deal with the very diverse set of cases in which some form of justice process is launched to address human rights abuses and/or breaches of international humanitarian law."[160] There is a concern that the continued expansion of transitional justice may end up eroding the field's boundaries, weakening its insights, and diminishing its relevance.[161] Some scholars have proposed new frameworks for pursuing work that transitional justice was not originally designed to perform, with some advocating a shift from "transitional" to "transformative" justice.[162]

Although concerns about the ever-expanding boundaries of transitional justice merit engagement, they do not justify excluding affirmative action from transitional justice analyses. Over the past few decades, transitional justice has emerged as a primary language of societal transition from an oppressive or conflictual past. As this primary language, transitional justice should capture the realities of the places in which it is

158. *See supra* Part II.B.

159. *See* Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351 (2006).

160. Hansen, *supra* note 152, at 110.

161. Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field,'* 3 INT'L J. TRANSITIONAL JUST. 5, 13 (2009).

162. *See* Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2001); Wendy Lambourne, *Transformative Justice, Reconciliation and Peacebuilding*, *in* TRANSITIONAL JUSTICE THEORIES 31 (Suzanne Buckley-Zistel et al. eds., 2013); Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 INT'L J. TRANSITIONAL JUST. 339 (2014).

pursued. Studying the experiences of South Africa and the United States reveals the centrality of affirmative action within their societal transitions. Instead of treating affirmative action as extraneous to transitional justice, we should allow affirmative action to enrich transitional justice's descriptive and normative insights.

III. WHAT AFFIRMATIVE ACTION GAINS FROM TRANSITIONAL JUSTICE

Affirmative action plays a significant transitional role and would benefit from more concrete anchoring in transitional justice concepts and debates. However, American scholars do not generally discuss affirmative action in terms of transitional justice.[163] Instead, justice-based accounts of affirmative action are grounded in corrective justice, which is aimed at rectifying past wrongs, and distributive justice, which seeks equitable allocation of resources.[164] While these accounts may be normatively appealing, they are often detached from how affirmative action operates in practice. Affirmative action as currently practiced in the U.S. is neither primarily corrective nor primarily distributive; instead, it is primarily *transitional*, aimed at moving away from the past. Transitional justice provides a better account of affirmative action because although it can encompass concerns of remediation and distribution, it treats those concerns as elements of a larger project of societal transition.

When U.S. scholars *do* conceive of affirmative action in transitional justice terms, their discussions tend to be limited to moral and political arguments about reparations.[165] Affirmative action is seldom situated within the broader concerns that animate transitional justice, such as the balancing of ethical principles with political constraints.[166] While South African scholars recognize affirmative action as a transitional measure,[167]

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163. A few scholars, including Robert Meister, Reva Siegel, Ruti Teitel, and Andrew Valls, have drawn parallels between transitional justice strategies and affirmative action measures in the U.S. *See* MEISTER, *supra* note 9, at 103–06 (discussing transitional dimensions of U.S. affirmative action); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1336–37 n.165 (2011) (proposing that "concern with the social form of civil rights interventions can be understood as a concern with cultivating cohesion in a period of regime transition"); TEITEL, *supra* note 108 and accompanying text; Valls, *supra* note 9.

164. *See* Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL'Y 37, 37–38 (1997).

165. *See, e.g.*, Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 683, 690 (2004) (bridging moral arguments about affirmative action and reparations); MEISTER, *supra* note 9, at 103–04 (discussing affirmative action as reparations).

166. *See, e.g.*, Fiss, *supra* note 164.

167. *See, e.g.*, Bentley & Habib, *supra* note 61.

even their discussions underutilize insights from general transitional justice theory.

Looking through a transitional justice lens allows us to recognize how the circumstances of transition inform affirmative action and how affirmative action influences the process of transition.[168] It also brings into focus the possibilities and limitations of affirmative action as a transitional pathway.[169] This analysis leads to an enhanced understanding of the role that affirmative action plays in South Africa and the United States and one that it might play in other transitional societies.

A. Affirmative Action is Contingent and Contextual

Transitional justice theory tells us that the meaning of justice during a period of transition is informed by the prior injustice and by the legal and political circumstances of transition.[170] The manner in which a society remembers its past injustice informs which justice claims are considered legitimate and illegitimate in the present. This insight frames affirmative action as contingent and contextual rather than fixed and universal. Recognizing the context-sensitivity of affirmative action in turn explains why affirmative action assumes particular forms and serves particular functions and how those forms and functions evolve over time.

How historical memory shapes affirmative action is apparent in several opinions. For instance, South African Constitutional Court Judges Cameron, Froneman, and Majiedt advise vigilance in using affirmative action because "these remedial measures often utilise the same racial classifications that were wielded so invidiously in the past,"[171] even if "[t]heir motivation is the opposite of what inspired apartheid."[172] Staking out a more extreme position, U.S. Supreme Court Justice Clarence Thomas

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168. *See infra* Part III.A–B.

169. *See infra* Part III.C–E.

170. *See* TEITEL, *supra* note 1, at 8 (arguing that in transitional societies "what is deemed just is contingent and informed by prior injustice"); de Greiff, *supra* note 1 (emphasizing the importance of context in the application of justice measures in transitional situations); Fletcher, Weinstein & Rowen, *supra* note 142, at 209 (studying seven transitional societies and finding that "history and current context exert a profound influence on the ability of a society to respond to state repression or mass violence"); Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 117 (2008) (observing "a greater recognition of the idea that if transitional justice institutions are to advance political reconciliation, they must be responsive to local context, transitions, and political dynamics"); COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 41 (2017) (emphasizing "the circumstances of transitional justice" including "pervasive structural inequality" and "normalized collective and political wrongdoing").

171. *South African Police Service v. Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) at para. 93 (Cameron, Froneman, JJ., and Majiedt, AJ., concurring).

172. *Id.*

describes affirmative action as akin to slavery and Jim Crow laws 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."[173] Once racial categorization is understood as the root evil of slavery and segregation, affirmative action becomes recast as a barrier rather than a bridge to racial transition.[174] Adopting an explicit transitional justice framework invites us to more closely examine the past from which a nation is transitioning and the role that affirmative action has to play within that transition.

Similarly, evolving political and legal circumstances also influence how affirmative action is practiced and received. As perceptions of current and historical discrimination evolve, policies benefitting the descendants of those who were historically disadvantaged often become contested as unfair. Such challenges to affirmative action arise not only from members of historically privileged groups who do not view themselves as the beneficiaries of historical injustice, but also from those who are poor or otherwise marginalized from society and can therefore make competing claims of disadvantage.[175] As their political resistance becomes inscribed into law, it imposes constraints on permissible forms of affirmative action and (at least in the U.S.) may eventually proscribe the use of race-sensitive affirmative action altogether. Reaction to political and legal contestation is thus one way in which affirmative action changes over the period of transition. By situating affirmative action in its larger transitional context

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173. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 328 (2013) (Thomas, J., concurring).

174. Such appeals to historical injustice are sometimes selective and inattentive to social realities. For instance, even as Justice Thomas equates benign racial classifications that today benefit racial minorities to invidious classifications that historically harmed them, he rejects comparisons between laws denying marriage to same-sex couples to those that historically denied interracial couples as "both offensive and inaccurate." *See Obergefell v. Hodges*, 135 S. Ct. 2584 n.5 (2015) (Thomas, J., dissenting). For critiques of Justice Thomas's reasoning in affirmative action cases, see 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, 297–99 (2015); Khiara M. Bridges, *Race Matters: Why Justice Scalia and Justice Thomas (and the Rest of the Bench) Believe that Affirmative Action Is Constitutional*, 24 S. CAL. INTERDISC. L.J. 607, 621 (2015).

175. *See South African Police Service* (10) BCLR at para. 31 (Moseneke, ACJ) ("We must be careful that the steps taken to promote substantive equality do not unwittingly infringe the dignity of other individuals—especially those who were themselves previously disadvantaged."); Sandra Fredman, *Reimagining Power Relations: Hierarchies of Disadvantage and Affirmative Action*, 2017 ACTA JURIDICA 124, 128–31 (2017) (discussing competing disadvantages in South African affirmative action cases); JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? 120 (2006) (finding "substantial antipathy toward black South Africans . . . [a]mong Colored people" that "seemed to focus on affirmative action and other means by which black South Africans were able to gain economic advantage over Colored people").

and appreciating its highly contingent nature, we can make better sense of its evolving forms and functions.

B. Affirmative Action Frames the End Point of Transition

The manner in which the end of the transition process is characterized shapes the kinds of justice claims that may be advanced and adopted.[176] This insight draws our attention to how affirmative action frames the end point of transition and how that framing informs the role that affirmative action plays in shaping transition. For instance, some South Africans would prefer a transition to socialism over the transition to democracy. Reasoning partly from a socialist vision of transition, Neville Alexander argues against race-based affirmative action and in favor of alternate strategies for the fulfilment of that vision.[177]

Affirmative action in the United States is frequently justified as an interim measure that will become unnecessary once racial transition is complete, although people disagree about how the end point of that transition process should be defined and when it might be achieved.[178] In affirmative action cases, a dominant conception of the end point of transition is a society in which race no longer matters. In the 2003 decision in *Grutter v. Bollinger*,[179] Justice O'Connor insisted that race-sensitive affirmative action "must have a logical end point" so as to "do away with all governmentally imposed discrimination based on race."[180] O'Connor famously predicted that "[twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today," a timeline that she came to doubt after retiring.[181]

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176. *See* Arthur, *supra* note 6, at 341, 359 (observing that "transitions to socialism may entail very different kinds of justice claims than transitions to democracy" and that "the question of whether and how the chosen end point of a transition (e.g., democracy, socialism, enlightened despotism, etc.) may matter for the kinds of justice claims advanced").

177. Alexander, *supra* note 77, at 105. For a discussion of Alexander's influence in the University of Cape Town affirmative action debate, see Mangcu, *supra* note 72, at 250–52.

178. This also reflects an international understanding of affirmative action as an impermanent measure. *See* G.A. Res. 2106 (XX), annex, Convention on the Elimination of All Forms of Racial Discrimination, at Art. 2(2) (Jan. 4, 1969) (endorsing affirmative action measures, but stipulating that such measures should cease "after the objectives for which they were taken have been achieved").

179. 539 U.S. 306 (2003).

180. *Id.* at 341–42 (quotations omitted).

181. *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." *See* 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/P889-CTXN]. For a critical perspective on

In reflecting on the end point of transition, some justices emphasize the need to end not only racial categorization, but also the larger legacies of racial subordination. Justice Blackmun declared in 1978 that racial transition would be complete when "persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us."[182] Keeping with the metaphor of an ugly mark on history, Justice Ginsburg wrote in 2003: "The stain of generations of racial oppression is still visible in our society . . . and the determination to hasten its removal remains vital."[183]

The legal understanding of the end point of transition (e.g., a society where race no longer matters) imposes constraints on the practical structuring of transition and modulates the sorts of claims that stakeholders can make. For instance, if the U.S. Supreme Court treats making race everless salient as a primary goal of affirmative action, then institutions will struggle to employ practices that would more directly address minority underrepresentation, and individuals and groups will struggle to make claims for proportional representation.[184] Ultimately, how affirmative action discourse imagines the end point of transition has bearing on how the transition unfolds.

C. Affirmative Action is a Negotiation Between Goals

The goals of transitional justice are evolving, multiple, open-ended, and potentially conflicting.[185] Not only are transitional goals marked by fierce contestation over their meanings, but the pursuit of certain transitional goals can render the achievement of others more difficult, thus stimulating contests among different stakeholders about which goals

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Justice O'Connor's twenty-five-year timeline, see Kevin R. Johnson, *Constitutionalizing and Defining Racial Equality: The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172–73 (2004).

182. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun, J., concurring in part and dissenting in part); *see also id.* (Blackmun, J., concurring in part and dissenting in part) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. . . . But the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond 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." (citation omitted)).

183. *Gratz v. Bollinger*, 539 U.S. 224, 304 (2003) (Ginsburg, J., dissenting).

184. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 747 (2007) (striking down Seattle's school assignment program that sought to ensure proportional representation "within [ten] percentage points of the district's overall white/nonwhite racial balance").

185. *See* Leebaw, *supra* note 170 (discussing how "transitional justice institutions generally have a conflicting set of aspirations"); Elster, *supra* note 130, at 78 (discussing tensions among the aims of achieving justice, truth, and peace in transitions from one political state to another).

should be privileged and pursued.[186] This understanding of transitional justice, as a negotiation among multiple moral and pragmatic considerations, sheds light on questions about affirmative action.

For instance, the question of whether or not affirmative action should rely on racial categories is best understood as a negotiation between transitional goals. In an epoch of transition, there is expressive and practical importance in both addressing group-based marginalization and disturbing extant social categories and divisions. However, instead of examining how race-based affirmative action facilitates or impedes the achievement of different transitional goals, the American affirmative action debate has calcified around being for and against the use of race. A transitional justice approach encourages us to recognize and negotiate between the multiple transitional goals that are implicated by affirmative action. It openly acknowledges that different transitional goals may come into tension with one another and some may therefore need to be prioritized.

Similarly, there are questions about what kind of equality affirmative action policies should aim to achieve. Although different forms of equality are necessary to achieve transition, affirmative action may be better equipped to alleviate certain inequalities and to do so primarily for certain individuals—thus facilitating certain transitional goals while neglecting others.[187] By looking through a transitional justice lens, we may come to recognize affirmative action as a negotiation between multiple transitional goals that may not be fully realized together, and thus proceed with a better understanding of the goals that affirmative action may be well- or ill-suited to realize.

D. Affirmative Action is Non-ideal and Imperfect

Characterized by compromises and concessions, transitional justice measures are often non-ideal and imperfect. Because transitional justice often takes place in "a very imperfect world," levels of justice never reach perfection, and even efforts to pursue and implement imperfect justice

186. *See* Bell, *supra* note 161, at 25 (describing normative contests over transitional justice as "the battle between those who seek to 'do good' in protracted social conflict but who have competing ideas of what doing good requires" and political contests over transitional justice that "enable the victor to tilt all transitional mechanisms towards an end point for transition that approximates to the victor's battlefield goals.").

187. For instance, as discussed above, affirmative action may integrate certain historically segregated spaces and redistribute certain opportunities from the historically privileged to marginalized groups, while at the same time neglecting to help "the truly disadvantaged" among the historically marginalized and to address broader demands of social and economic justice. *See* WILSON, *supra* note 144.

carry risks.[188] Some scholars caution against expecting perfection from individual transitional justice measures, overburdening them with multiple objectives, and overestimating their ability to achieve those objectives.[189] This insight invites us to recognize affirmative action's non-idealness and to recalibrate our expectations about the functions that affirmative action might perform.

The experiences of South Africa and the United States suggest that affirmative action is frequently non-ideal. For instance, affirmative action measures may be over- or under-inclusive in their scope, they may be inadequately responsive to a nation's racial history and current racial conditions, or they may distract or detract from other reform measures. Nevertheless, many supporters of affirmative action convey expectations of something nearing ideal justice.[190] In particular, many progressive scholars expect affirmative action to address the expressive, distributive, and transformative dimensions of justice and to address these dimensions simultaneously.[191] Accordingly, some lament when political backlash and legal or political constraints prevent affirmative action from addressing all these elements of justice.[192]

Although we should not let transitional justice measures be unduly constrained by political viability, accounting for political dynamics provides a clearer assessment of affirmative action programs than looking at the operation of programs in a political vacuum. Transitional justice scholarship reminds us about the need to balance the ethical principles

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188. *See* de Greiff, *supra* note 1, at 34 (describing transitional justice as "requirements of a general understanding of justice when applied to the peculiar circumstances of a very imperfect world, that is, a world characterized by massive rule breakdown and great risks to the institutions that attempt to overcome such breakdowns"); TEITEL, *supra* note 1, at 70 (arguing that as a jurisprudence associated with political flux, transitional justice is related to a higher politicization of the law and to some degree of compromise in rule-of-law standards).

189. *See* Matiangai V.S. Sirleaf, *Beyond Truth & Punishment in Transitional Justice*, 54 VA. J. INT'L L. 223, 226–27 (2014).

190. Susan Sturm & Lana Guiner, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 954–55 (1996).

191. *See, e.g.*, Fredman, *supra* note 175, at 127 ("Affirmative action measures need to be calibrated to address all of these dimensions of substantive equality simultaneously.").

192. *See, e.g.*, Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 285 (2016) (calling for an alternative U.S. affirmative action jurisprudence which is "neither subservient to popular views nor cabined by damaging precedent"); Melissa Murray, *That Affirmative Action Ruling Was Good. Its Rationale, Terrible.*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/opinion/harvard-affirmative-action.html [https://perma.cc/KMM8-4MFY]. Such progressive accounts of affirmative action serve an important transitional function by offering normatively grounded understandings of justice, instead of pragmatically lowering expectations about justice in the face of political opposition.

involved and the "actual political opportunities and constraints."[193] In order to remain politically viable, transitional justice measures frequently require compromises. Affirmative action itself may be forged (or may come to be interpreted) within a strategic calculus about how much "justice" the community or powerful forces within it would be prepared to accept.[194] Effective evaluation of affirmative action's transitional role therefore requires understanding how the parameters of affirmative action are determined, by whom, and in what fora. In the United States, for instance, a predominantly white judiciary has been sympathetic to the grievances of white non-beneficiaries of affirmative action.[195] Consequently, affirmative action has shifted from programs explicitly based on race toward those in which the reliance on race is less conspicuous, even as race continues to be a consideration.[196] Moreover, affirmative action has moved away from justice-based rationales toward the more universal rationale of "diversity," even as affirmative action continues to be engaged in the transition process.[197]

Acknowledging the non-idealness of affirmative action does not require us to accept all compromises. In the United States, for example, courts have limited race-based affirmative action in order to mitigate resentment among white applicants, while largely ignoring resentment and estrangement among racial minorities.[198] This imbalance arguably reflects an undue concession to privileged interests that should be criticized and, ideally, corrected. At the same time, acknowledging the transitional

193. 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).

194. *See* Bentley & Habib, *supra* note 61, at 6 (identifying the challenge of "how to ensure redress, promoting the political and socio-economic affirmation of those who were historically excluded, while simultaneously retaining the commitment of the descendants of those who were historically advantaged.").

195. Successful challenges to affirmative action have involved white applicants alleging that they bore the burden of consideration of race in admissions decisions. *See, e.g.*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277–78 (1978) (discussing how Allan Bakke, a white man denied admission to the University of California, Davis School of Medicine in 1973 and 1974, "alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race"); *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003) (discussing how Jennifer Gratz and Patrick Hamacher, white people denied admission to the University of Michigan College of Literature, Science, and the Arts in 1995 and 1997, respectively, filed a class action suit arguing that the College's policies discriminated against them because of their race).

196. Examples of such less conspicuous programs include "holistic" programs that consider race as one of many factors, and "percent plans" in which race is not an explicit factor but is an implicit consideration.

197. *See* Joshi, *Racial Indirection*, *supra* note 52, at 2499; Daniel Hirschman & Ellen Berrey, *The Partial Deinstitutionalization of Affirmative Action in U.S. Higher Education, 1988 to 2014*, 4 SOC. SCI. 449, 449–50 (2017).

198. *See* Joshi, *Racial Indirection*, *supra* note 52 at 2544–47.

politics of affirmative action invites us to think differently about the work that affirmative action might ultimately perform. Forged in transitional compromises, affirmative action may take different forms at different stages of transition and may not address all dimensions of justice at a given point in time. From this transitional justice perspective, instead of expecting affirmative action to be a perfect solution to an enduring problem, we may be better served by expecting and correcting for some of its imperfections.

E. Affirmative Action is Part of a Whole

Finally, transitional justice is a holistic notion, comprising constituent elements that should be understood in relation with one another.[199] Transitional justice allows us to recognize affirmative action as one measure among many that make up a broader process of transition. In so doing, it draws our attention to the possibilities and limitations of affirmative action as a singular solution. Furthermore, transitional justice underscores the risk of overreliance on affirmative action as a means to transition and the need for a multifaceted approach to societal change.

Understanding affirmative action as constitutive of a larger transitional justice project maintains fidelity with the anti-apartheid and Civil Rights movements. In South Africa, affirmative action measures were introduced as part of a series of reforms aimed at undoing the legacy of apartheid. The ANC's policy guidelines for a democratic South Africa thus addressed affirmative action alongside property, social, educational, health, welfare, women's, children's, and workers' rights.[200] In the United States, affirmative action was part of the Civil Rights program of the 1960s. The 1966 report of the White House Conference on Civil Rights endorsed "[a]ffirmative action by both private and government employers, labor organizations and community groups [as] essential and urgent to generate more and better jobs for Negroes, assure access to existing jobs by Negro men and women, and to eliminate discrimination in employment and occupational advancement."[201] Far from being a discrete remedy, affirmative action was one of nine proposed reforms relating to the promotion of "economic security and welfare" for blacks, in addition to reforms relating to education, housing, and the administration of justice,

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199. *See* Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFF. 17, 19 (2006) (proposing "a holistic approach to transitional justice, which attempts to complement retributive justice with restorative justice"); de Greiff, *supra* note 1, at 34 (arguing that transitional justice measures "are not elements of a random list" but "[r]ather, they are parts of a whole"); Valls, *supra* note 9, at 60 (noting "the possibility of defensible trade-offs" between various transitional justice measures and goals).

200. ANC, *supra* note 57, at 7–11.

201. THE REPORT OF THE WHITE HOUSE CONFERENCE "TO FULFILL THESE RIGHTS," 28 (1996).

which were covered separately.[202] Dr. Martin Luther King, Jr., whose words are sometimes invoked to challenge race-based affirmative action, supported both racial quotas and a war on poverty.[203]

As these historical moments show, affirmative action (as one part of a package of reforms) was never meant to accomplish all the work that racial transition requires. Today, some commentators worry that affirmative action has come to play too central a role in societal reform efforts, obscuring the possibility and necessity of other modes of response.[204] In relation to South Africa, some observe that changing the racial composition of the middle and upper classes through affirmative action has become the central feature, rather than one aspect, of societal transition.[205] Along similar lines, some U.S. scholars caution that securing inclusion through policies such as affirmative action has not only become the chief egalitarian project, but has also lost much of its transformative potency.[206] For instance, although many have proposed a radical re-envisioning of U.S. higher education in order to make it more inclusive and just, preserving the constitutionality of diversity-based admissions policies has largely taken the place of such re-envisioning.[207] By recognizing affirmative action as but one element of transitional justice, we can gain a deeper understanding of affirmative action's place in the broader transitional policies and politics.

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How might we do affirmative action differently from this transitional vantage point? Our aim should be to develop a better understanding of the transitional functions affirmative action performs and to seek other complementary strategies for those functions it may not fulfill.[208] Literature on transitional justice has theorized how the potential inadequacies of individual transitional justice measures may be overcome

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202. *Id.* at 10.

203. *See* David Oppenheimer, *Dr. King's Dream of Affirmative Action*, 21 HARV. LATINX L. REV. 55, 58–60 (2018).

204. *See, e.g.*, *Affirmative Action Is Not Enough. It Will Take New and More Aggressive Approaches to Make Universities Look Like America.*, BLOOMBERG (June 23, 2016, 3:04 PM CDT), https://www.bloomberg.com/opinion/articles/2016-06-23/affirmative-action-is-not-enough [https://perma.cc/XQ2X-85GA].

205. *See* MACDONALD, *supra* note 120, at 173.

206. *See* RANA, *supra* note 123, at 328.

207. *See, e.g.*, Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) (cautioning against using "the diversity argument to defend affirmative action at elite universities and law schools without questioning the ways that traditional admissions criteria continue to perpetuate race and class privilege").

208. By looking through a transitional lens, some commentators have identified the limitations of current implementation of South African affirmative action and proposed ways to improve implementation. *See, e.g.*, Bentley & Habib, *supra* note 10, at 337.

by employing them in tandem.[209] But to undertake this analysis, it is necessary to understand the specific goals that individual transitional justice measures are designed to achieve and examine whether trade-offs between different measures are appropriate.

To perform this analysis with respect to affirmative action, we should proceed in three steps. First, we should seek to understand the actual and potential functions of affirmative action with attention to what is normatively desirable and politically feasible, both in the short and long term. Second, we should employ different forms of affirmative action with an understanding of the strengths and shortcomings of various measures, both individually and collectively. Third, we should evaluate alternatives to affirmative action—from reparations and apologies for past wrongdoing to more universal political and economic reforms—based on their prospects for facilitating transition.

Based on the foregoing analysis, if we find that affirmative action contributes to societal transition in some important respect, we should be slow to limit affirmative action in ways that diminish its contributions. As is true of all transitional justice measures, affirmative action does not have to be perfect in order to be valuable and worth pursuing.[210] Nevertheless, if we find that affirmative action does not adequately express egalitarian values or address material inequalities, or that it otherwise distracts or detracts from transitional goals, we should reorient affirmative action in better directions while simultaneously seeking different paths toward transition. In undertaking this analysis, we can gain a deeper understanding of societies in transition and fresh insights into possibilities for and modes of response.

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209. *See* Tricia D. Olsen et al., *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); Sirleaf, *supra* note 189, at 233 (discussing the "mutually reinforcing effects" of truth and punishment mechanisms); Jeremy Webber, *Forms of Transitional Justice*, 51 NOMOS 98, 106 (2012) (observing that retrospective and prospective responses "may work in tandem"); de Greiff, *supra* note 1, at 37 ("[B]eneficiaries of reparations programs are given stronger reasons to regard the sort of benefits usually conferred by these programs as reparations (as opposed to merely compensatory measures) if they proceed in tandem with efforts to punish human rights violators"); RICHARD A. WILSON, *Justice and Legitimacy in the South African Transition*, *in* THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 190, 204 (2001) ("National legal systems and truth commissions are to an extent complementary and work in tandem, with the latter compensating for the limitations and deficiencies of the former.").

210. Judge Allison D. Burroughs reflected this understanding of affirmative action when she wrote in *Students for Fair Admissions v. Harv. Univ.*: "There is always the specter of perfection, but strict scrutiny does not require it and a few identified imperfections, after years of litigating and sifting through applications and metrics, do not alone require a finding that Harvard's admissions program is not narrowly tailored." *See* 397 F. Supp. 3d 126, 204 (D. Mass. 2019).

CONCLUSION

This Article has begun to bridge affirmative action and transitional justice in ways that illuminate both. When affirmative action and transitional justice shed light on one another, they bring each other's limitations and possibilities more clearly into view. Transitional justice places too much emphasis on a limited set of measures, neglecting a wider range of practices that are needed and used to facilitate transition. Furthermore, the field focuses too narrowly on particular kinds of harms and reforms, concerned much more with political-institutional change than with structural inequalities. Transitional justice may begin to overcome these limitations by paying closer attention to affirmative action and other means through which transition could, and often already does, occur.

Transitional justice theory, on the other hand, elucidates affirmative action's emancipatory potential and its place in broader social change. It shows that affirmative action does not, and perhaps cannot, accomplish all transitional goals, nor should we expect it to do so. By recognizing affirmative action as a subset of transitional justice, we can acknowledge that affirmative action may contribute to societal transition, but only in some ways and only so far. Affirmative action's limitations may be overcome to some extent by understanding it in relation to, and employing it in tandem with, other transitional justice measures. In making these linkages, this Article hopes to launch new conversations among scholars and practitioners who, previously isolated, can learn from one another and better effect change.