

Racial Time

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Racial time describes how inequality shapes people’s experiences and perceptions of time. This Article reviews the multidisciplinary literature on racial time and then demonstrates how Black activists have made claims about time that challenge prevailing norms. While white majorities often view racial justice measures as both too late and too soon, too fast and too long-lasting, Black activists remind us that justice measures are never “well timed” within hegemonic understandings of time. This Article ultimately argues that U.S. law embodies dominant interests in time. By inscribing dominant experiences and expectations of time into law, the Supreme Court enforces unrealistic timelines for racial remedies and “neutral” time standards that disproportionately burden subordinated groups. Because the legal enactment of dominant time perpetuates structural inequalities, this Article urges U.S. legal actors to consider and incorporate subordinated perspectives on time. The Article concludes with a series of recommendations for centering these perspectives and rendering them intelligible and actionable in law.

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INTRODUCTION

U.S. legal opinions routinely invoke the passing of time to limit measures that could otherwise advance racial equality. These opinions are particularly detrimental to the pursuit of racial justice because they reflect a dominant perspective on time. White Americans tend to perceive greater progress toward racial equality than Black Americans, and more progress than has actually been achieved, and they often feel resentment toward periods of racial progress.¹ These assumptions and feelings create the foundation of the United States' dominant perspective on time.

The effects of these biased perspectives on time are poignantly illustrated in Supreme Court cases around affirmative action. In June 2023, the Court struck down the race-sensitive admissions programs at Harvard College and the University of North Carolina (UNC).² Writing for the Court, Chief Justice John Roberts referenced Justice Sandra Day O'Connor's prediction from the 2003 opinion in *Grutter v. Bollinger*³ that in twenty-five years, "the use of racial preferences [would] no longer be necessary."⁴ But evidence suggests that an end to race-sensitive admissions in the United States is premature. The racial opportunity

¹ See Jessica C. Nelson, Glenn Adams & Phia S. Salter, *The Marley Hypothesis: Denial of Racism Reflects Ignorance of History*, 24 PSYCH. SCI. 213, 214 (2013) (discussing the "Marley hypothesis," which suggests that "[a]ccurate knowledge about documented incidents of past racism will be greater in subordinate-group communities than in dominant-group communities," and "this difference in reality attunement will partly account for (i.e., mediate) group differences in perception of racism in current events," and finding that, relative to Black Americans, white Americans perceived less racism in both isolated and systemic forms, demonstrated less historical knowledge of racism and less ability to differentiate historical fact from fiction, and overestimated past and present racial economic equality); Michael W. Kraus, Julian M. Rucker & Jennifer A. Richeson, *Americans Misperceive Racial Economic Equality*, 114 PROC. NAT'L ACAD. SCI. 10324, 10329 (2017) (finding that Americans, especially high-income white Americans, largely misperceived progress toward racial economic equality); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. PSYCH. SCI. 215, 217 (2011) (finding that white Americans perceived greater progress toward equality than Black Americans and believed that this progress is at their expense).

² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022); see also Ian Millhiser, *The Supreme Court Will Hear Two Cases That Are Likely to End Affirmative Action*, VOX (Jan. 24, 2022), <https://perma.cc/PDT4-KKTF>.

³ 539 U.S. 306 (2003).

⁴ *Id.* at 343. For an early critique of Justice O'Connor's timeline in *Grutter*, see Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 188 (2004) (arguing that the view that affirmative action will not be needed by 2028 is

gap in education that Justice O'Connor thought would dissipate by 2028 has endured.⁵ Ending race-sensitive admissions processes would decrease the enrollment of Black and Latinx applicants, and increase the enrollment of white applicants, more than any other group.⁶

Meanwhile, time has also been invoked to advance dominant political interests in voting rights cases. When striking down key equality-seeking provisions of the 1965 Voting Rights Act⁷ in *Shelby County v. Holder*⁸ in 2013, Chief Justice Roberts expressed frustration that “[n]early fifty years later, [Sections 4 and 5 of the Act] are still in effect . . . and are now scheduled to last until 2031.”⁹ He considered this timeframe excessively long on the basis that modern voting discrimination practices were less egregious than the “extraordinary problem” of the past.¹⁰ “Nearly fifty years later, things have changed dramatically,” Chief Justice Roberts declared, detailing how Southern states had progressed while dismissing current forms of racist vote-distorting practices, like racial gerrymandering.¹¹

“wrong on its face”). For recent invocations of Justice O'Connor’s timeline, see *infra* notes 249–56 and accompanying text.

⁵ See *generally Racial and Ethnic Achievement Gaps*, STAN. CTR. FOR EDUC. POL’Y ANALYSIS, <https://perma.cc/8BLE-FBX8> (documenting “still very large” racial achievement gaps); EDBUILD, \$23 BILLION, at 2, app. A (2019) (finding that nonwhite school districts received \$23 billion less in funding than white districts, and that for every student enrolled, nonwhite school districts received \$2,226 less than white districts); Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 1, 3 (Prudence L. Carter & Kevin G. Welner eds., 2013) (proposing an “opportunity gap” frame that “shifts our attention from outcomes to inputs”).

⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 180 (1st Cir. 2020) (“[E]liminating race as a factor in admissions, without taking any remedial measures, would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%.”); see also Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 656–57 (2008) (finding that eliminating race-sensitive admissions would result in a significant decrease in the production of Black lawyers, whether assessed by raw numbers or as a proportion of applicants); María C. Ledesma, *California Sunset: O’Connor’s Post-Affirmative Action Ideal Comes of Age in California*, 42 REV. Higher Educ. 227, 235–41 (2019) (detailing the harmful consequences of prematurely ending affirmative action in California).

⁷ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

⁸ 570 U.S. 529, 546 (2013).

⁹ *Id.* at 535.

¹⁰ *Id.* at 534.

¹¹ *Id.* at 547.

Chief Justice Roberts's perspective on time in *Shelby County* facilitated the proliferation of facially neutral laws that disproportionately prevent minorities from voting. Following this decision, Alabama restricted voting for its Black residents by requiring photo identification to vote while simultaneously closing dozens of driver's license offices, several of which were located in counties representing the highest percentages of Black voters.¹² North Carolina introduced one of the most restrictive voting laws in the country, and Texas restored a voter identification law that had been blocked under the 1965 Voting Rights Act.¹³ A decade later, similar laws have been enacted in several jurisdictions previously covered by the Act, as well as in other states where minority votes present a threat to dominant interests.¹⁴

Using *Shelby County* and other examples, this Article argues that U.S. legal opinions enact dominant interests in time, or what political theorist Charles Mills calls "white time."¹⁵ By inscribing a dominant group's experiences and expectations of time into law, the Supreme Court enforces unrealistic timelines for racial remedies and "neutral" time standards that disproportionately burden minorities.¹⁶ Achieving racial equality requires challenging

¹² See Maggie Astor, *Seven Ways Alabama Has Made It Harder to Vote*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/us/politics/voting-rights-alabama.html>.

¹³ See Richard L. Hasen, *Supreme Error*, SLATE (Aug. 19, 2013), <https://perma.cc/HY5A-JRWN>.

¹⁴ See Madiba Dennie & Wendy Weiser, *Voting Rights: A Critical Two Years*, DEMOCRACY J. (Summer 2022), <https://perma.cc/NW5H-WSZV>; see also Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. POL. 1088 (2013) (finding that voting restriction proposals are more common in states with larger Black populations and higher minority turnouts); Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight Under the Voting Rights Act*, 11 AM. ECON. J.: APPLIED ECON. 1, 35–36 (2019) (finding that, following *Shelby County*, white voter turnout remained constant while "minority participation dropped by 2.1 percentage points," providing "early evidence that the [*Shelby County*] ruling may jeopardize decades of voting rights progress").

¹⁵ See generally Charles W. Mills, *White Time: The Chronic Injustice of Ideal Theory*, 11 DU BOIS REV. 27 (2014) [hereinafter Mills, *White Time*]. Previous research has shown that discrimination is perceived differently by "insiders"—dominant groups who benefit from societal privileges—and "outsiders"—subordinated groups who are targets of discrimination. The same research shows that these perceptual differences have legal implications. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1151 (2008). In a similar vein, this Article highlights how dominant and subordinated group members may perceive *time* differently and how this has legal consequences.

¹⁶ Through this analysis, this Article contributes to a growing international and multidisciplinary body of research exploring the relationship between time and law. See generally, e.g., Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631 (1989); Emmanuel Melissaris, *The Chronology of the Legal*, 50 MCGILL L.J. 859 (2005); MARIANA VALVERDE, CHRONOTOPES OF LAW: JURISDICTION,

the bias of dominant “white time” and recognizing the validity of subordinated nonwhite times.¹⁷

To make this argument, this Article synthesizes perspectives from multiple disciplines,¹⁸ incorporates insights from Black history and political thought,¹⁹ and then applies these insights to earlier cases such as *Grutter* and *Shelby County* as well as more recent ones like *Brnovich v. Democratic National Committee*,²⁰ *Allen v. Milligan*,²¹ and *Students for Fair Admissions v. Harvard (SFFA)*.²² While previous scholarship has explored the logical role played by time in equal protection jurisprudence, this Article examines the influence of racialized experiences and perceptions of time.²³ Although its primary focus is on equal protection jurisprudence, the Article also invites a broader discussion of “racial time” throughout the U.S. legal system.²⁴

SCALE AND GOVERNANCE (2015); THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY (Irus Braverman et al. eds., 2014); TEMPORAL BOUNDARIES OF LAW AND POLITICS: TIME OUT OF JOINTS (Luigi Corrias & Lyana Francot, eds., 2018). *See also* Kathryn McNeilly, *Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change*, 28 SOC. LEGAL STUD. 817 (2019); TANZIL CHOWDHURY, TIME, TEMPORALITY AND LEGAL JUDGMENT 3–4 (2020).

¹⁷ To be clear, acknowledging how subordinated people experience time does not imply uncritical acceptance of all their time-related claims. Instead, it involves recognizing that their lived experiences of time can provide insight into the reality of a racially stratified society.

¹⁸ *See infra* Part I.

¹⁹ *See infra* Part II.

²⁰ 141 S. Ct. 2321 (2021).

²¹ 143 S. Ct. 1487 (2023).

²² *See infra* Part III.

²³ Previous legal scholarship has highlighted the role of time in equal protection jurisprudence without directly engaging with theories of racial time. *See generally, e.g.*, Elise C. Boddie, *The Contested Role of Time in Equal Protection*, 117 COLUM. L. REV. 1825 (2017) (arguing that the Supreme Court has used time to limit racial progress and definitions of racial discrimination); Alison L. LaCroix, *Temporal Imperialism*, 158 U. PENN. L. REV. 1329 (2010) (discussing the Supreme Court’s role as “an actor in time”); Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007) (discussing the time periods in which the constitutionality of voting regulations are evaluated). On the role of time in legal opinions, see generally CHOWDHURY, *supra* note 16 (theorizing “adjudicative temporalities”); ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 124–27 (2009) (discussing legal time as narrative storytelling).

²⁴ In examining the criminal legal system, geographer Ruth Wilson Gilmore argues that prisons are extractive and “[w]hat’s extracted from the extracted is *the* resource of life—time.” RUTH WILSON GILMORE, ABOLITION GEOGRAPHY: ESSAYS TOWARDS LIBERATION 474 (2022) (emphasis added). Indeed, “[U.S.] sentences are frequently two to three times longer than those in Britain and France for the same criminal conduct,” and if current rates remain constant, then “one in three [B]lack baby boys born in the United States can expect to serve time in prison.” David Cole, *Punitive Damage*, N.Y. TIMES (May 16, 2014), <https://www.nytimes.com/2014/05/18/books/review/inferno-by-robert-a-ferguson.html> (reviewing ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT (2014)).

Part I introduces the concept of racial time,²⁵ drawing from research in African American studies,²⁶ political theory,²⁷ and other disciplines.²⁸ This research has explored how perceptions of time can differ based on distinctive group experience. Scholars argue that Black perspectives on time are shaped by consistently having to wait for the enjoyment of basic democratic goods and

Political scientist P.J. Brendese argues that discussions of mass incarceration tend to focus on the visible time served in prison, overlooking the time served by Black people after their release as they navigate the dual stigmas of Blackness and conviction. The legalization of discrimination against formerly incarcerated people in areas like employment and housing means that they effectively “serve time as lifelong members of a permanent ‘racial undercaste.’” P.J. Brendese, *Black Noise in White Time: Segregated Temporality and Mass Incarceration*, in RADICAL FUTURE PASTS: UNTIMELY POLITICAL THEORY 81, 92 (Romand Coles et al. eds., 2014). Communications scholar Nicole Fleetwood highlights the concept of “penal time,” which “encompasses the multiple temporalities that impact the lives of the incarcerated and their loved ones.” Nicole R. Fleetwood, *Marking Time: Art in the Age of Mass Incarceration*, in RACISM IN AMERICA: A READER 194, 202 (2020).

²⁵ Alongside racialized experiences of time, scholars have also examined the concepts of colonial and postcolonial times, gendered times, queer and transgender times, as well as the notion of “crip time.” See generally, e.g., LAW AND TIME (Siân M. Beynon-Jones & Emily Grabham eds., 2018); J. JACK HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES (2005); Ellen Samuels, *Six Ways of Looking at Crip Time*, 37 DISABILITY STUD. Q. (2017). Scholars have also studied how conceptions of time have been integral to supremacist ideologies, such as the eugenics movement. See generally Douglas C. Baynton, ‘These Pushful Days’: Time and Disability in the Age of Eugenics, 13 HEALTH HIST. 43 (2011).

²⁶ See generally Tamika L. Carey, *Necessary Adjustments: Black Women’s Rhetorical Impatience*, 39 RHETORIC REV. 269 (2020); Logan Rae Gomez, *Temporal Containment and the Singularity of Anti-Blackness: Saying Her Name in and Across Time*, 51 RHETORIC SOC’Y Q. 182 (2021); Ersula Ore, *The Lost Cause, Trump Time, and the Necessity of Impatience*, 51 RHETORIC SOC’Y Q. 237 (2021); Erica Onugha, *Aberrant Time: The Peculiar Temporalities of Black Women’s Labors in Nineteenth-Century African American Autobiographies* (2018) (Ph.D. dissertation, UCLA); Collin Bjork & Frida Buhre, *Resisting Temporal Regimes, Imagining Just Temporalities*, 51 RHETORIC SOC’Y Q. 177 (2021) [hereinafter Bjork & Buhre, *Resisting Temporal Regimes*]; Collin Bjork & Frida Buhre, *Braiding Time: Sami Temporalities for Indigenous Justice*, 51 RHETORIC SOC’Y Q. 227 (2021); Matthew Houdek & Kendall R. Phillips, *Rhetoric and the Temporal Turn: Race, Gender, Temporalities*, 43 WOMEN’S STUD. COMM’N 369 (2020); Naa Oyo A. Kwate, *The Race Against Time: Lived Time, Time Loss, and Black Health Opportunity*, 14 DU BOIS REV. 497 (2017).

²⁷ See generally Michael Hanchard, *Afro-Modernity: Temporality, Politics, and the African Diaspora*, 11 PUB. CULTURE 252 (1999); Mills, *White Time*, *supra* note 15; Charles W. Mills, *The Chronopolitics of Racial Time*, 28 TIME SOC’Y 297 (2020) [hereinafter Mills, *The Chronopolitics of Racial Time*]. See also ELIZABETH F. COHEN, THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE 48–52 (2018).

²⁸ See generally, e.g., Gilbert C. Gee, Anna Hing, Selina Mohammed, Derrick C. Tabor & David R. Williams, *Racism and the Life Course: Taking Time Seriously*, 109 AM. J. PUB. HEALTH S43 (2019) (public health); Gordon B. Moskowitz, Irmak Olcaysoy Okten & Cynthia M. Gooch, *On Race and Time*, 26 PSYCH. SCI. 1783 (2015) (social psychology).

rights²⁹ and by regularly having time “stolen” via shorter life expectancy,³⁰ mass incarceration,³¹ slavery,³² segregation,³³ and other forms of oppression. This “stolen” time is also evident in everyday life, including the countless hours spent addressing racial injustice or navigating bureaucratic processes to access essential social safety nets.³⁴ Similarly, Indigenous perspectives on time are said to be shaped by the imposition of the colonizer’s and settler’s sense of time and by the relegation of Indigenous experiences to the annals of history.³⁵ Sociologists have also emphasized the racialized nature of legal time,³⁶ while transitional justice scholarship underscores temporal considerations for societies transitioning from an oppressive past.³⁷ Despite this wealth of literature, these theories about the relationship between race, time,

²⁹ See Hanchard, *supra* note 27, at 256 (discussing “waiting” as a facet of racial time); Brady Dennis, *If I Could Afford to Leave, I Would.* In *Flint, a Water Crisis with No End in Sight.*, WASH. POST (Oct. 22, 2016), <https://perma.cc/T56U-WCNP> (documenting “[a] lot of waiting” for drinkable water in the majority Black city of Flint, Michigan).

³⁰ See Mills, *White Time*, *supra* note 15, at 31–32.

³¹ See Brendese, *supra* note 23, at 82–83.

³² See Hanchard, *supra* note 27, at 254.

³³ See *id.* at 263–65.

³⁴ See, e.g., Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 677, 684 n.189 (2009) (describing the temporal demands and indignities experienced by welfare recipients).

³⁵ See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006) (describing this “logic of elimination”); MARK RIFKIN, *BEYOND SETTLER TIME: TEMPORAL SOVEREIGNTY AND INDIGENOUS SELF-DETERMINATION* (2017) (discussing the problems with seeking to include Indigenous peoples within “settler time”). On the relationship between settler colonialism and white supremacy, see generally Iyko Day, *Being or Nothingness: Indigeneity, Antiblackness, and Settler Colonial Critique*, 1 CRITICAL ETHNIC STUD. 112 (2015); Andrea Smith, *Indigeneity, Settler Colonialism, White Supremacy*, in *RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 66 (Daniel Martinez HoSang et al. eds., 2012); NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW* (2020); Shannon Speed, *The Persistence of White Supremacy: Indigenous Women Migrants and the Structures of Settler Capitalism*, 122 AM. ANTHROPOLOGY 77 (2020).

³⁶ See Renisa Mawani, *Law as Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65, 71 (2014) (arguing that “law is fundamentally about time” and that the keeping of time in law is racialized); Rahsaan Mahadeo, *Why Is the Time Always Right for White and Wrong for Us? How Racialized Youth Make Sense of Whiteness and Temporal Inequality*, 5 SOCIO. RACE ETHNICITY 186 (2019).

³⁷ Transitional justice is aimed at guiding societies’ move away from oppression and violence toward a more just and peaceful order. Scholars in this field observe that countries often adopt a limited perspective on time and justice, referred to as “temporal governance.” States emerging from conflict and oppression tend to narrowly define victimhood based on past violence, disregarding the enduring effects of multigenerational harms and present-day inequalities resulting from dispossession. See generally Noha Aboueldahab, *The Politics of Time, Transition, and Justice in Transitional Justice*, 21 INT’L CRIM. L. REV. 809 (2021); Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT’L CRIM. L. REV. 848 (2021); Thomas Obel Hansen, *The Multiple Aspects of ‘Time’*

and injustice are virtually absent from mainstream U.S. legal scholarship.³⁸ Part I synthesizes this literature to delineate three dimensions of racial time—experiential,³⁹ perceptual,⁴⁰ and structural⁴¹—that are especially relevant to the operation of U.S. law.

Building on these insights, Part II highlights the persistent use of time-based arguments to impede the progress of Reconstruction, civil rights, reparations, and other measures aimed at advancing racial equality. For many people, racial justice measures always seem to arrive too soon or too late, cause change too fast, or last too long. By drawing on archival and other

Rendering Justice for War Crimes in Iraq, 21 INT'L CRIM. L. REV. 878 (2021); Pádraig McAuliffe, *Transitional Justice, Institutions and Temporality: Towards a Dynamic Understanding*, 21 INT'L CRIM. L. REV. 817 (2021); Randle C. DeFalco, *Time and the Visibility of Slow Atrocity Violence*, 21 INT'L CRIM. L. REV. 905 (2021); Douglas Antônio Rocha Pinheiro, *Taking Transitional Justice Carefully: Multi-Temporalities, Care, and Inclusion in Times of Transition*, in COMPARING TRANSITIONS TO DEMOCRACY: LAW AND JUSTICE IN SOUTH AMERICA AND EUROPE 279 (Cristiano Paixão & Massimo Meccarelli eds., 2021); Natascha Mueller-Hirth, *Temporalities of Victimhood: Time in the Study of Postconflict Societies*, 32 SOCIO. F. 186 (2017); Alejandro Castillejo-Cuéllar, *Historical Injuries, Temporality and the Law: Articulations of a Violent Past in Two Transitional Scenarios*, 25 L. CRITIQUE 47 (2014).

While most transitional justice scholars have examined temporal issues in countries other than the United States, a transitional justice framework can also enhance our understanding of a transition from white supremacy in the United States. *See generally* Yuvraj Joshi, *Racial Equality Compromises*, 111 CALIF. L. REV. 529 (2023) (using transitional justice theory to demonstrate that U.S. racial equality decisions are compromises); Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. 1325 (2022) [hereinafter Joshi, *Racial Justice and Peace*] (examining U.S. racial equality decisions as versions of the peace-versus-justice dilemma discussed in transitional justice); Yuvraj Joshi, *Weaponizing Peace*, 123 COLUM. L. REV. 1411 (2023) [hereinafter Joshi, *Weaponizing Peace*] (similar, with a focus on dominant appeals to peace that undermine racial justice); Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181 (2021) [hereinafter Joshi, *Racial Transition*] (evaluating U.S. racial equality decisions in light of transitional justice values); Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1 (2020) (comparing affirmative action in South Africa and the United States as transitional justice measures); Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495 (2019) [hereinafter Joshi, *Racial Indirection*] (detailing transitional arguments in the U.S. affirmative action debate); Yuvraj Joshi, *Racial Transitional Justice in the United States*, in RACE & NATIONAL SECURITY 191 (Matiangai Sirleaf ed., 2023) [hereinafter Joshi, *Racial Transitional Justice in the United States*] (proposing that the centuries-long oppression of Black Americans necessitates a systematic response through transitional justice).

³⁸ For example, as of August 2023, a search for Hanchard's and Mills's leading essays on this topic on Westlaw yields three and one citations, respectively. *See* Hanchard, *supra* note 27; Mills, *White Time*, *supra* note 15.

³⁹ Experiential dimension describes dominant and subordinated groups' different lived experiences of time. *See infra* Part I.A.

⁴⁰ Perceptual dimension describes how perceptions of time can differ based on distinctive group experience. *See infra* Part I.A.

⁴¹ Structural dimension describes how societal structures embody dominant perceptions of and interests in time and exclude subordinated understandings of time. *See infra* Part I.A.

sources, Part II demonstrates how Black activists such as W.E.B. Du Bois, James Baldwin, Fannie Lou Hamer, and Dr. Martin Luther King, Jr. actively challenged these dominant arguments by asserting subordinated experiences and conceptions of time. King believed that justice measures are never “well timed” under dominant understandings of time, a revealing insight that helps to explain the racial equality jurisprudence of the Supreme Court.⁴²

Part III argues that Supreme Court opinions have enacted and universalized dominant perspectives on time. In school integration cases, the Court has rendered integration programs “out of time,” deeming them no longer necessary on the basis that present-day segregation is discontinuous from the Jim Crow segregation of the past. This jurisprudence treats the transition to an integrated school system as a one-time process that has already been completed.⁴³ In affirmative action cases, the Court initially invalidated racial quotas for starting “too late” in U.S. history, suggesting that past discrimination alone is insufficient to justify robust racial remedies in the present.⁴⁴ Recently, the Court has invalidated even more modest measures aimed at racial inclusion for lasting “too long.”⁴⁵ Additionally, whereas the Voting Rights Act⁴⁶ sought to shift time-based advantages from vote suppressors to minority voters, recent voting rights cases have returned those advantages to vote suppressors. This recent voting rights jurisprudence has taken time constraints that seem “ordinary” enough for privileged citizens to overcome and imposed them upon everyone.⁴⁷ Part III examines legal briefs to highlight how racial justice advocates consistently challenge the law’s embodiment of dominant time. Understanding these alternative temporalities opens up space for critiquing and reimagining the law.⁴⁸

Because the legal enactment of dominant time perpetuates structural inequalities, true transformative progress can be achieved only when subordinated temporalities are acknowl-

⁴² Martin Luther King, Jr., *Letter from a Birmingham Jail*, (Apr. 16, 1963), <https://perma.cc/3TRB-GSNW> [hereinafter King, *Letter from a Birmingham Jail*].

⁴³ See *infra* Part III.A.

⁴⁴ *Bakke*, 438 U.S. at 295 (asserting that it is “far too late” in U.S. history to recognize “special wards” for Black Americans under the Fourteenth Amendment).

⁴⁵ See *infra* Part III.B.

⁴⁶ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

⁴⁷ See *infra* Part III.C.

⁴⁸ See *infra* note 63 and accompanying text.

edged, considered, and, where appropriate, integrated into the legal framework. The Conclusion examines the proposed Native American Voting Rights Act as an illustrative example and recommends a variety of measures aimed at advancing temporal justice. These include measures enhancing the law's responsiveness to subordinated experiences of time and limiting its deleterious control over subordinated people's time.

The Article adopts historical, contextual, and multidimensional⁴⁹ analyses to examine how inequality shapes people's lived experiences and perceptions of time, and how the law incorporates and ignores specific temporal interests. For example, research suggests that the intersection of Blackness and disability can compound certain temporal disadvantages,⁵⁰ while the intersection of Blackness and class privilege does not necessarily alleviate such disadvantages.⁵¹ This underscores the absence of a singular racialized experience of time and highlights a dynamic interplay between inequality, time, and the legal system.

I. THE NATURE OF RACIAL TIME

In a stratified society such as the United States, people occupying dominant and subordinate positions often have divergent experiences and perceptions of time.⁵² However, mainstream legal discourse frequently overlooks this reality, treating dominant perspectives of time as neutral and universally applicable.⁵³ To address this oversight, Part I draws from various disciplines, including African American studies, political theory, philosophy, psychology, sociology, rhetorical studies, and transitional justice. By synthesizing insights from these fields, we gain valuable tools for understanding how time has been used in debates about racial equality throughout U.S. history and law.

⁴⁹ See Kimberlé Williams Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 151–52 (1989) (arguing that race and gender are not singular identities to be compared); Darren L. Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309 (2001) (discussing how various forms of privilege and oppression may contextually overlap and cosynthesize).

⁵⁰ See *infra* note 65.

⁵¹ See generally Holt & Vinopal, *infra* note 71.

⁵² See *supra* note 1.

⁵³ Anthropologist Carol Greenhouse argues that time is never socially neutral because many different concepts of time are present in a single social system. See Greenhouse, *supra* note 16, at 1633.

A. Racial Time

“Racial time” encapsulates several ideas about how racial power dynamics shape group experiences and expectations of time. Scholars discuss how racial time is evident in subordinated racial groups’ unequal access to democratic goods and power, how dominant ideas of progress and countries’ historical timelines are defined, and how a dominant group’s perceptions of time are reproduced rhetorically and structurally in society.⁵⁴

Inequality often manifests in delayed access to democratic goods, services, resources, knowledge, and power.⁵⁵ Political philosopher Michael Hanchard describes “racial time” as the “inequalities of temporality that result from power relations between racially dominant and subordinate groups.”⁵⁶ Hanchard highlights the experience of “waiting” as a significant dimension of racial time, wherein members of subordinated groups perceive the material consequences of inequality because they must wait while goods and services are being delivered first to members of a dominant group.⁵⁷

Racial time also structures dominant narratives of history, interpretations of the present, and ideas about the future. Political theorist Charles Mills observes how “racial times” define the contemporary world order through concepts such as “developed”

⁵⁴ Racial time also intersects with gendered time. English professor Erica Onugha explores how enslaved Black women and men experienced time differently, creating a gendered temporal experience shaped by the reproductive and sexual labor imposed on Black women during slavery. Onugha, *supra* note 26, at 29. These gendered differences persisted beyond slavery. Onugha analyzes how female narratives of “fugitive time,” the period between slavery and freedom, diverge from male narratives due to Black women’s circumstances related to motherhood and reproduction. *Id.* at 99. In a contemporary context, interdisciplinary scholar Tamika Carey outlines the efforts Black women undertake to adjust the duration and nature of their social interactions. Carey, *supra* note 26, at 270. Rhetorical scholar Logan Rae Gomez similarly discusses how racism profoundly influences the experience of time for Black women and girls, as living in constant fear of being perceived as a threat shapes their experience of how much time is left, how much is theirs, and how much they have to share with loved ones. Gomez, *supra* note 26, at 187.

⁵⁵ Hanchard, *supra* note 27, at 254; *see also* Bjork & Buhre, *Resisting Temporal Regimes*, *supra* note 27, at 177 (pointing to several “asymmetrical temporal regimes”).

⁵⁶ Hanchard, *supra* note 27, at 253.

⁵⁷ *Id.* at 256. Hanchard identifies two additional facets to racial time. The first additional facet is “time appropriation,” where members of subordinated groups must seize time for themselves to “eradicate the chasm of racial time.” *Id.* The second additional facet is the relationship between temporality and notions of human progress, reflecting the belief that “the future should or must be an improvement on the present.” *Id.* at 257.

and “undeveloped” nations.⁵⁸ Sociologist Renisa Mawani examines the temporalizing force of law in settler colonies, where the future is often envisioned through the annihilation of Indigenous peoples and their relegation to history.⁵⁹

Rhetoric scholars have examined the formation of hegemonic racial times and how these dominant frames are contested by those who experience time differently.⁶⁰ The concept of “temporal rhetorics” refers to repetitive discourses that shape how a particular group perceives its existence within time.⁶¹ For example, the slogan “Make America Great Again” symbolizes nostalgia for a mythical “great white past.”⁶² While dominant temporal rhetorics are often imbued with logics of racism, anti-Blackness, colonialism, patriarchy, and other oppressive systems, they can be challenged through the articulation of “alternative temporalities.”⁶³

This Article outlines three dimensions of racial time that have particular relevance in U.S. law. The *experiential* dimension is reflected in racial groups’ disparate lived experiences of time—for example, in Black Americans having to wait (across generations and on a daily basis) for rights that many white Americans take for granted.⁶⁴ Not only did Black Americans have to wait until the 1965 Voting Rights Act for a meaningful right to vote, but research shows that areas with more Black residents experienced significantly longer wait times to vote during the 2016 presidential elections compared to areas with white residents.⁶⁵ The *perceptual* dimension captures how dominant and subordinated

⁵⁸ Mills, *The Chronopolitics of Racial Time*, *supra* note 27, at 304, 312.

⁵⁹ Mawani, *supra* note 36, at 76. Mawani uses the phrase “doubling of time” to refer to “the ways that law produced colonial subjects as inhabiting specific temporalities (as past, present, and future) and how colonial subjects contested these temporalizations through their own fractured and dislocated conceptions of lived time.” *Id.* at 94.

⁶⁰ See generally Houdek & Phillips, *supra* note 26.

⁶¹ *Id.* at 371.

⁶² *Id.* at 373.

⁶³ *Id.* at 371. The articulation of alternative temporalities enables “resistance and solidarity, hope and community, healing, survival, Black rage, and much more.” *Id.* Rhetorical scholars Collin Bjork and Frida Buhre similarly argue that every dominant temporality is “intermeshed with a plurality of alternative temporalities that can be mobilized to erect more just temporal landscapes.” Bjork & Buhre, *Resisting Temporal Regimes*, *supra* note 26, at 179.

⁶⁴ See Hanchard, *supra* note 27, at 256.

⁶⁵ M. Keith Chen, Kareem Haggag, Devin G. Pope & Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, 104 REV. ECON. & STAT. 1341, 1346–48 (2020); see Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 536 (2017) (finding that a voter in a predominantly minority precinct is six times more likely to wait more than an hour to vote); Hannah Klain, Kevin Morris, Max Feldman & Rebecca Ayala,

group members can perceive time differently based on these experiences.⁶⁶ Centuries-long racial disparities may influence perceptions of historical time and views on the appropriate timeframes for measures like voter protections and affirmative action.⁶⁷ Moreover, due to factors such as holding multiple jobs,⁶⁸ working nighttime and irregular schedules,⁶⁹ and lacking paid leave⁷⁰ (among other structural time constraints⁷¹), many Black Americans may have less available time to vote and thus different understandings of the appropriate “time, place, and manner” of voting.⁷² Finally, the *structural* dimension describes how societal structures, including the law, embody dominant perceptions of time and serve dominant interests.⁷³ This Article demonstrates how these dimensions of racial time manifest in U.S. legal opinions. We can better understand legal opinions that declare the end of racism or impose unrealistic timelines for racial remedies once we recognize them as enacting dominant experiences and expectations of time while erasing subordinated ones.

WAITING TO VOTE 8 (Brennan Ctr. for Just. ed., 2020) (similar); Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1508 (2016) (noting that long lines can “add to the ‘time tax’” that voting imposes on individuals with some disabilities). Racial disparities in wait times are not limited to voting. *See, e.g.*, Deborah Gurewich, Erin Beilstein-Wedel, Michael Shwartz, Heather Davila & Amy K. Rosen, *Disparities in Wait Times for Care Among US Veterans by Race and Ethnicity*, 6 JAMA NETWORK OPEN 1,4–8 (2023) (finding that Black and Hispanic veterans waited longer than white veterans to receive care from the U.S. Veterans Health Administration and that racial disparities in wait times worsened during the COVID-19 pandemic); Megan E. Deichen Hansen, Samantha S. Goldfarb, Ariadna Mercouffer, Tyra Dark, Hanna Lateef & Jeffrey S. Harman, *Racial Inequities in Emergency Department Wait Times for Pregnancy-Related Concerns*, 18 WOMEN’S HEALTH 1, 3–5 (2022) (finding that emergency department wait times during pregnancy-related visits differed substantially by race).

⁶⁶ *See, e.g.*, Mahadeo, *supra* note 36 at 189–93 (finding that youth of color expressed feelings of “temporal inequality” due to the educational and employment opportunities denied to them while being made available to white youth).

⁶⁷ *See infra* Parts III.B. and III.C.; *see also* text accompanying *infra* notes 129–30.

⁶⁸ *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., <https://perma.cc/4SXZ-Q9GN>.

⁶⁹ *Spotlight on Statistics*, U.S. BUREAU OF LAB. STAT. (Feb. 2020), <https://perma.cc/2DF2-DDLX>.

⁷⁰ *Id.*

⁷¹ *Black Americans Spend More of the Day Being Kept Waiting*, ECONOMIST (May 8, 2021), <https://perma.cc/HG54-LRYD>; Stephen B. Holt & Katie Vinopal, *Examining Inequality in the Time Cost of Waiting*, 7 NATURE HUM. BEHAV. 545, 547 (2023) (finding that “wealthier Black people wait [for common services (e.g., shopping, medical care, or household, legal, financial, or educational services for household children and adults)] as long as or longer than lower-income Black people and wealthy non-Black people”).

⁷² *See infra* text accompanying notes 333–38.

⁷³ *See* Hanchard, *supra* note 27, at 254–55; Bjork & Buhre, *Resisting Temporal Regimes*, *supra* note 26, at 177.

B. White Time

Time is a tool by which those holding power govern others.⁷⁴ Whereas the concept of racial time describes how time shapes inequalities between groups, white time, according to Mills, is a particular temporality shaped by white interests.⁷⁵ Mills urges an understanding of how white time protects white racial privilege from the encroachments of racial justice.⁷⁶ This scholarship describes various mechanisms through which dominant conceptions of time impede the pursuit of justice.

The first mechanism is erasure, wherein white time omits or subsumes the existence of nonwhite lives and times. Mills observes that by asserting its universality, white time asserts itself as both timeless and raceless, positioning white experiences as representative of the entire human experience.⁷⁷ For example, in the context of white settler states, white time “sets the historical chronometer” to the point of contact, erasing any acknowledgment of time preceding settlement.⁷⁸

The second mechanism is domination, where white time exercises control over how people of color spend their time. Mills describes how racist regimes differentiate time by race: “Working times, eating and sleeping times, free times, commuting times, waiting times, and ultimately, of course, living and dying times.”⁷⁹ White time not only revolves around white-centric periodization, but it also dictates norms of time utilization, influencing work and leisure rhythms.⁸⁰ Domination further manifests in the physical, psychic, and emotional labor extracted from people of color. Referencing the era of Trumpism, African American studies scholar Ersula Ore contends that white supremacist regimes exploit and deplete the “lived time” of others.⁸¹

The third mechanism is containment, wherein white time isolates time periods and erases linkages between the past and present to conceal structural racism. Rhetorical scholar Logan Rae Gomez argues that gendered anti-Black policing is often framed

⁷⁴ See Hanchard, *supra* note 27, at 263 (describing how British colonialism in Ghana structured time to move quickly to extract capital, but slowly for developing education for Ghanaian people). See generally COHEN, *supra* note 27 (studying time as a political tool).

⁷⁵ Mills, *White Time*, *supra* note 15, at 28.

⁷⁶ *Id.* at 28.

⁷⁷ *Id.* at 32.

⁷⁸ *Id.* at 31.

⁷⁹ *Id.* at 28.

⁸⁰ Mills, *White Time*, *supra* note 15, at 31.

⁸¹ Ore, *supra* note 26, at 238 (citing Gomez, *supra* note 26, at 186).

as isolated, singular moments in time, disregarding the recurring, accumulating, and overlapping nature of these incidents.⁸² This framing prevents acknowledgement of “an ever present climate of anti-Blackness.”⁸³ The use of white time diverts attention from connecting related events, encouraging selective remembrance and forgetting of the past.⁸⁴ Gomez also highlights the practice of “freezing,” which confines the legacies of Black women and girls to singular moments, disregarding the significance of their entire lives.⁸⁵

A fourth, related mechanism is linear chronology, where white time frames historic racism as temporary and assumes that society is continually progressing toward recovery. This framework dismisses any notions of time that diverge from the linear developmental narrative. Gomez highlights how white time’s linear chronology constructs an incomplete timeline by neglecting the enduring effects of enslavement and Jim Crow, which continue to haunt and steal time from Black people.⁸⁶ Furthermore, the U.S. myth of linear progress discourages structural changes by relying on time, rather than policy change, to deliver justice.⁸⁷

Finally, there is alternative history, which encompasses whitewashed accounts of the past that serve white political interests. For example, “The Lost Cause” deliberately misremembers Southern efforts in the Civil War as being just, heroic, and disconnected from the institution of slavery, constructing an

⁸² Gomez, *supra* note 26, at 188.

⁸³ *Id.* at 187 (emphasis omitted).

⁸⁴ *Id.* at 189. For a transitional justice critique of an oversimplified compartmentalization of time, see generally DeFalco, *supra* note 37; Miller, *supra* note 37; Castillejo-Cuellar, *supra* note 37.

⁸⁵ Gomez, *supra* note 26, at 184.

⁸⁶ *Id.* at 188. In the South African context, political sociologist Natascha Mueller-Hirth similarly finds that “while this dominant linear temporality of peace processes and transitional justice [] sees victimhood as temporary and healing as taking place progressively, understandings of victimhood and senses of time appear much more cyclical.” Mueller-Hirth, *supra* note 37, at 187. On the European origins of linear time, see Greenhouse, *supra* note 16, at 1635.

⁸⁷ Michael W. Kraus, Brittany Torrez & LaStarr Hollie, *How Narratives of Racial Progress Create Barriers to Diversity, Equity, and Inclusion in Organizations*, 43 CURRENT OP. PSYCH. 108, 111 (2022). Social psychologist Michael Kraus and colleagues explain: “In essence, if we can rely on the passage of time to solve our [racial] problems, then more radical policy changes, requiring fundamental changes to organizational procedure and structure, are more likely to be seen as risky and less likely to develop support from policymakers.” *Id.*

“imagined past” to legitimize present-day feelings of white resentment.⁸⁸ Ore argues that, similar to its predecessor, “Trump’s Lost Cause insulates a ‘self-serving reality’ that creates an ‘imagined time’ of valor and greatness.”⁸⁹ These distorted narratives not only glorify earlier eras like the Confederacy but also actively fuel white supremacist ideology and the oppressive conceptions of time associated with it.

Understanding the imposition of white time as a legacy and exercise of racial injustice provides a fresh perspective on U.S. legal cases. Decisions like *Brnovich v. Democratic National Committee*⁹⁰ erase the temporal experiences of marginalized groups and enable temporal domination by disregarding the time constraints these groups face when voting and by imposing ostensibly “neutral” voting procedures that disproportionately burden these communities. Decisions such as *Parents Involved v. Seattle*⁹¹ and *Regents of the University of California v. Bakke*⁹² employ strategies of temporal containment and narratives of linear progress to distance the present-day United States from its antebellum and Jim Crow past. Decisions like *SFFA*⁹³ construct alternative histories that distort the true objectives and significance of racial remediation efforts during the First and Second Reconstructions, emphasizing colorblindness. Additionally, under the banner of originalism, the Roberts Court increasingly universalizes white men’s perspectives from centuries ago to discipline the lives of marginalized people today.⁹⁴ Recognizing and resisting hegemonic notions of time is crucial in analyzing U.S. legal frameworks.

⁸⁸ Ore, *supra* note 26, at 237.

⁸⁹ *Id.* at 238.

⁹⁰ 141 S. Ct. 232; *see infra* notes 324–56 and accompanying text.

⁹¹ 551 U.S. 701 (2007); *see infra* notes 202–15 and accompanying text.

⁹² 438 U.S. 265 (1978); *see infra* notes 220–36 and accompanying text.

⁹³ *See infra* notes 275–87 and accompanying text.

⁹⁴ *See* Reva Siegel, *The Trump Court Limited Women’s Rights Using 19th-Century Standards*, WASH. POST (June 25, 2022), <https://perma.cc/835H-CAG8> (discussing this trend in relation to *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022)). In condemning slavery in 1860, author and abolitionist leader Frederick Douglass asked: “What will the people of America a hundred years hence care about the intentions of the scribes who wrote the Constitution? . . . They were a generation, but the Constitution is for ages.” Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar. 26, 1860).

C. Black Time

Hanchard argues that inequalities in the United States have produced a distinct Black temporality, because “to be black in the United States meant that one had to wait for nearly everything.”⁹⁵ Enslavement imposed the enslaver’s construction of temporality,⁹⁶ while emancipation abolished the temporal constraints of slave labor and enabled the construction of an autonomous temporality distinct from that of the former enslavers.⁹⁷ However, the era of Jim Crow frustrated this freedom by imposing a disjunctive time structure, wherein Black people received essential services such as health care, education, protection, and transportation *after* those services were provided to white people.⁹⁸ This history of being made to wait makes it especially difficult when Black people are expected to continue waiting for equality in the interest of maintaining peace.⁹⁹

Mills examines the contrasting “material realities” embodied by white and Black experiences of time,¹⁰⁰ exploring the relationship between these experiences and whether the appropriation of Black time directly contributes to the privileges afforded by white time.¹⁰¹ The related concept of “Colored People’s Time” has been used to describe how Black resistance has manifested through

⁹⁵ Hanchard, *supra* note 27, at 263. While this section centers Black time, there exist additional subordinated conceptions of time. *See, e.g.*, Samantha Chisholm Hatfield, Elizabeth Marino, Kyle Powys Whyte, Kathie D. Dello & Philip W. Mote, *Indian Time: Time, Seasonality, and Culture in Traditional Ecological Knowledge of Climate Change*, 7 *ECOL. PROC.* 1 (2018) (interviewing Indigenous elders and traditional knowledge holders to illustrate their perspectives on time and climate change).

⁹⁶ Hanchard, *supra* note 27, at 254. Hanchard explains that under slavery, “no time belonged solely to the slave,” and thus “racial time was a more ‘total’ imposition of a dominant temporality than an abstract, acultural labor time.” *Id.* at 256.

⁹⁷ *Id.* at 255. However, a loophole in the Thirteenth Amendment’s abolition of slavery permitted the forced labor of those convicted of a crime, allowing Southern states to tie recently emancipated people to their former enslavers through “Black Codes” that criminalized such “offenses” as loitering and vagrancy. *See* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 *N.Y.U. L. REV.* 1465, 1529 (2019); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1, 105–06 (2019).

⁹⁸ Hanchard, *supra* note 27, at 263.

⁹⁹ *See generally* Joshi, *Racial Justice and Peace*, *supra* note 37; Joshi, *Weaponizing Peace*, *supra* note 37.

¹⁰⁰ Mills, *White Time*, *supra* note 15, at 28.

¹⁰¹ *Id.* at 32.

intentional acts of reclaiming time, such as work stoppages or delays, as a means of rejecting oppressive conditions.¹⁰² These scholars argue that achieving material equality requires challenging the hegemony of white time and reclaiming Black time.¹⁰³

Despite their richness and relevance to the field of law, these theories of racial time are neglected in mainstream U.S. legal scholarship.¹⁰⁴ Integrating these theories into legal discourse would enable better understanding and consideration of racialized experiences, as well as the differentiation between legal, historical, and sociological conceptions of time, which are frequently blurred in legal cases.¹⁰⁵ A theoretically grounded and historically informed analysis is necessary to critique prevailing temporal frameworks. In the following Part, Black civil rights activists demonstrate how challenging the bias of white time and asserting the validity of Black time are crucial to advancing racial justice demands.

¹⁰² Roland Walcott describes “CP Time” or “Colored People’s Time” as “an example of Black people’s effort to evade, frustrate, and ridicule the value-reinforcing strictures of punctuality that so well serve this coldly impersonal technological society.” Ronald Walcott, *Ellison, Gordone, and Tolson: Some Notes on the Blues, Style, and Space*, 22 BLACK WORLD 4, 9 (1972). Scholars have noted instances where enslaved people in Southern plantations resisted the time imposed by plantation owners, as well as how Black workers in the early twentieth century used work hours for personal purposes as a means of resisting exploitation in the workplace. See John Streamas, *Closure and “Colored People’s Time”*, in TIME: LIMITS AND CONSTRAINTS 219, 222 (Jo Alyson Parker et al. eds., 2010); Rahsaan Mahadeo, *Funk the Clock: Transgressing Time While Young*, Prescient and Black 51 (2019) (Ph.D. dissertation, University of Minnesota) (on file with the University of Minnesota Digital Conservancy). Sociologist Rahsaan Mahadeo has documented how some Black youth continue to embrace CP Time, refusing to abide “by a time that doesn’t abide by [them] and other [B]lack people.” *Id.* at 72.

¹⁰³ Community activist and lawyer Rasheedah Phillips explores the potential of Afrofuturism in addressing these challenges. Rasheedah Phillips, *Race Against Time: Afrofuturism and Our Liberated Housing Futures*, 9 CRITICAL ANALYSIS L. 16 (2022). Afrofuturism is characterized as “a way of imagining possible futures through a [B]lack cultural lens.” *Id.* at 29 (citing TEDx Talks, *TEDxFortGreeneSalon – Ingrid LaFleur – Visual Aesthetics of Afrofuturism*, YOUTUBE (Sept. 25, 2011), <https://perma.cc/4HX6-9WRK>). Afrofuturism serves as a transformative framework that unlocks potential futures that Black people have historically been denied. By rejecting entrenched notions of time and space, Afrofuturism seeks to dismantle systems that perpetuate temporal and spatial inequities. *Id.* For example, criminal records and eviction records serve as snapshots of an individual’s past, often used to unjustly restrict their access to housing in the long term. Afrofuturistic approaches to shaping legal policies recognize the barriers that prevent Black people from accessing future opportunities and strive for futures where Black people are housed, healthy, and thriving. *Id.* at 32–34.

¹⁰⁴ *But see* Anjali Vats, *Temporality in a Time of TAM, or Towards a Racial Chronopolitics of Intellectual Property Law*, 61 IDEA 673 (2020).

¹⁰⁵ See *infra* text accompanying notes 202–03 (discussing how *Parents Involved v. Seattle* conflated legal and societal time to deem school integration programs untimely).

II. BLACK POLITICAL RESISTANCE TO WHITE TIME

“[I]f there’s something supposed to be mine three hundred years ago, . . . I’m not going to take it by just a taste now and a taste another hundred years, because I’ll never know what it was like and I don’t want it like that.”

—Fannie Lou Hamer (1968)¹⁰⁶

“You always told me, ‘It takes time.’ It’s taken my father’s time, my mother’s time, my uncle’s time, my brothers’ and my sisters’ time, my nieces’ and my nephews’ time. How much time do you want, for your progress?”

—James Baldwin (1989)¹⁰⁷

Throughout history, Americans resisting racial justice measures have raised time-based objections, claiming that these measures arrive either too soon or too late, cause change too fast, or last too long. Black activists’ rejoinders to these complaints, like activist Fannie Lou Hamer’s and writer James Baldwin’s in the epitaphs above, also center time, highlighting the pain of waiting on the unrealized promise of justice.¹⁰⁸ Their arguments foreground the reality that Black people’s time is still regularly stolen by hegemonic institutions, as it was when Black people were enslaved and segregated.

A. Too Soon, Too Fast

In 1954, *Brown v. Board of Education*¹⁰⁹ declared racial segregation in public education unconstitutional. Writing in *Brown*’s wake in 1956, Mississippi-born Nobel laureate William Faulkner urged the NAACP to abandon the pursuit of immediate integration and instead to: “Go slow now. Stop now for a time, a moment.”¹¹⁰ Faulkner pleaded for more time for “emotional” white Southerners to adjust to the idea of integration without the pressures of implementing court decisions.¹¹¹

¹⁰⁶ Fannie Lou Hamer, “*What Have We to Hail?*”, in *THE SPEECHES OF FANNIE LOU HAMER: TO TELL IT LIKE IT IS* 78 (Maegan Parker Brooks & Davis W. Houck eds., 2011) [hereinafter *THE SPEECHES OF FANNIE LOU HAMER*].

¹⁰⁷ *James Baldwin: How Much Time Do You Want for Your “Progress?”*, YOUTUBE (Apr. 28, 2015), <https://www.youtube.com/watch?v=UBFDdTIYZ6Q>.

¹⁰⁸ *Id.*

¹⁰⁹ 347 U.S. 483 (1954). See *infra* notes 175–77 and accompanying text.

¹¹⁰ William Faulkner, *Letter to a Northern Editor* (Mar. 5, 1956).

¹¹¹ *Id.*

In a series of rejoinder essays, writer and activist Baldwin countered Faulkner's thesis by centering Black people's experiences and expectations of time.¹¹² This Faulkner-Baldwin exchange perfectly illustrates how dominant notions of time are both deployed and resisted in struggles over racial equality.¹¹³

Responding to Faulkner's lament that integration was happening too soon for white Americans, Baldwin pointed out that it was long overdue for white America to rectify this injustice.¹¹⁴ He noted that white Southerners had had two hundred years of slavery and ninety years of Jim Crow to correct their racist society, yet they clung to racist institutions.¹¹⁵ To Baldwin, Faulkner's proposal not only wasted Black people's time but also extracted undue "generosity" to "allow white people . . . the time to save themselves, as though they had not had more than enough time already, and as though their victims still believed in white miracles."¹¹⁶

Because white Southerners would never willingly relinquish their power, Baldwin believed that Faulkner's ask would endlessly delay justice. "The time he pleads for is the time in which the southerner will come to terms with himself But the time Faulkner asks for does not exist," Baldwin said.¹¹⁷ "There is never time in the future in which we will work out our salvation. The challenge is in the moment, the time is always now."¹¹⁸

¹¹² See generally JAMES BALDWIN, *THE PRICE OF THE TICKET: COLLECTED NONFICTION: 1948–1985* (1st ed. 1985) [hereinafter *THE PRICE OF THE TICKET*].

¹¹³ This Faulkner-Baldwin exchange is underdiscussed in legal scholarship: a search for it produced no results in the legal texts available on Westlaw and Google Scholar in August 2023.

¹¹⁴ "[T]he time is forever behind us when Negroes could be expected to 'wait.'" JAMES BALDWIN, *East River, Downtown*, in *THE PRICE OF THE TICKET*, *supra* note 113, at 267.

¹¹⁵ JAMES BALDWIN, *Faulkner and Desegregation*, in *THE PRICE OF THE TICKET*, *supra* note 112, at 148.

¹¹⁶ JAMES BALDWIN, *No Name in the Street*, in *THE PRICE OF THE TICKET*, *supra* note 112, at 474. Baldwin asked, "what, in their history to date, affords any evidence that they have any desire or capacity to do this," and "just what Negroes are supposed to do while the South works out . . ." integration. JAMES BALDWIN, *Faulkner and Desegregation*, in *THE PRICE OF THE TICKET*, *supra* note 112, at 148.

¹¹⁷ JAMES BALDWIN, *Faulkner and Desegregation*, in *THE PRICE OF THE TICKET*, *supra* note 112, at 152.

¹¹⁸ *Id.* For similar arguments from the Reconstruction era, see JOHN WESLEY BLASSINGAME, *BLACK NEW ORLEANS, 1860–1880*, at 181–82 (1973) (discussing how Black people rejected arguments that racial justice measures were "too soon" or that time would resolve racial injustice).

Similarly, Mississippi civil rights activist Fannie Lou Hamer argued that white people had been allowed too much time already, linking the need for voting rights to cross-generational struggles for racial justice. Responding to the “sob story” that change “takes time,” Hamer said: “For three hundred years, we’ve given them time. And I’ve been tired so long, now I am sick and tired of being sick and tired, and we want a change.”¹¹⁹ The change that Black Mississippians longed for was a true democracy.¹²⁰ Accordingly, when Hamer tried to register to vote and was told that, “We’re not ready for that in Mississippi,” she responded: “I been ready a *long* time.”¹²¹

In his “Letter from a Birmingham Jail,” Dr. Martin Luther King, Jr. explained why white American fears could not set the timetable for Black equality.¹²² King pointed out that racial justice was *never* “well timed” to those who have “never felt the stinging

¹¹⁹ FANNIE LOU HAMER, “*I’m Sick and Tired of Being Sick and Tired*,” in THE SPEECHES OF FANNIE LOU HAMER, *supra* note 106, at 62. On another occasion, Hamer similarly said: “[This] white man [who] is saying, ‘It takes time’ . . . For three hundred and more years they have had ‘time,’ and now it is time for them to listen. We have been listening year after year to them and what have we got?” LYNNE OLSON, FREEDOM’S DAUGHTERS: THE UNSUNG HEROINES OF THE CIVIL RIGHTS MOVEMENT FROM 1830 TO 1970 320 (2001).

Tamika Carey highlights Hamer’s speeches as exemplifying an early “rhetoric of impatience,” which encompasses “time-based arguments that reflect or pursue haste for the purpose of discipline.” Carey, *supra* note 27, at 270. Contemporary examples Carey cites include Congresswoman Maxine Waters “reclaiming [her] time,” filmmaker Bree Newsome stating, “We removed the flag today because we can’t wait any longer,” when taking down a confederate flag from the South Carolina Capital building herself, media mogul Oprah Winfrey igniting a social media movement with the phrase “#shegottimetoday” in response to a disrespectful online comment, and Oklahoma city resident Kimberly Wilkins saying, “Ain’t nobody got time for that.” *Id.* at 273–83.

¹²⁰ “[A]fter we would work ten and eleven hours a day for three lousy dollars and couldn’t sleep we couldn’t do anything else but think. And we have been thinking a long time. . . . We want to see is democracy real?” HAMER, *supra* note 119, at 63.

¹²¹ FANNIE LOU HAMER, “*We’re On Our Way*,” in THE SPEECHES OF FANNIE LOU HAMER, *supra* note 106, at 48 (emphasis in original). Similarly, the NAACP’s then-Executive Secretary Roy Wilkins characterized resistance to voting rights as “the tantrums of a people long past the weaning period who refuse to give up their bottle of specialized pap” a century after the Civil War. Statement of Roy Wilkins (Jan. 4, 1960) (on file with the Library of Congress) (available at <https://perma.cc/V7D4-7U9T>).

¹²² King, Letter from a Birmingham Jail, *supra* note 42. King said that Black people had been asked to “Wait!” for over 340 years, where “‘Wait’ has almost always meant ‘Never.’” *Id.* Whereas it was easy to say “Wait” when whites “have never felt the stinging darts of segregation,” it was difficult to *hear* “Wait” when Black people “are no longer willing to be plunged into the abyss of despair.” *Id.* King thus observed that white and Black people’s diametrically opposed experiences of Jim Crow had colored their different perceptions of time.

darts of segregation.”¹²³ He especially rebuked the “white moderate” who “lives by a mythical concept of time” and “paternalistically believes he can set the timetable for another man’s freedom.”¹²⁴ King also believed that white people suffered from “a tragic misconception of time” based on the misbelief that time could cure all ills.¹²⁵ By contrast, Black people suffering from segregation had a “fierce urgency of now” and had “no time” for gradualism.¹²⁶

Ultimately, King urged *constructive* uses of time which “make real the promise of democracy,” as opposed to *destructive* uses in which “time itself becomes an ally of the forces of social stagnation.”¹²⁷ He cautioned that a failure to use time constructively would lead to social unrest.¹²⁸

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Martin Luther King, Jr., *I Have a Dream* (1963), reprinted in “Read Martin Luther King Jr.’s ‘I Have a Dream’ Speech in its Entirety,” NPR (Jan. 16, 2023), <https://perma.cc/5MXE-TY6Y>. Roy Wilkins observed in 1963: “No one today who deplores ‘going too fast’ . . . can understand the impatient mood of the Negro of the Sixties unless he knows something of the history that has gone before.” Conference on “100 Years of Emancipation,” Univ. of Chi. (Jan. 31–Feb. 3, 1963) (on file with the Library of Congress), <https://perma.cc/RLP5-TLPH>. Similarly, historian John Hope Franklin said: “If ever a nation pursued a course of ‘gradualism,’ we have done it. But today most Americans know in their hearts that the time for explanations is over, and that the time for action is here.” John Hope Franklin, *The Negro’s Dilemma* (1960) (on file with the Library of Congress, available at <https://perma.cc/L4G2-JNLJ>). Revolutionary activist Malcolm X concluded in 1964: “It isn’t that time is running out—time has run out!” Malcolm X, *The Ballot or the Bullet*, Speech in Cleveland, Ohio (Apr. 3, 1964) (transcript available at <https://perma.cc/EBU4-HRDM>). Such “[r]hetorics of protest” convey that the previous way of life is no longer tolerable, emphasizing the present moment as a pivotal time in history. Houdek & Phillips, *supra* note 27, at 369–70.

¹²⁷ King, *I have a Dream*, *supra* note 126. Critiquing *destructive* uses of time, NAACP leader Gloster Current said in 1966 that politicians were “cunningly contriving to play on white fears and prejudices by advocating turning the civil rights clock back from fast integration daylight to slow standard segregation time.” Address of Gloster B. Current, Dir. of Branches and Field Admin., NAACP (Oct. 1, 1966) (on file with the Library of Congress). Similarly, Baldwin recounted how Charlotte, North Carolina “begged for ‘time’: and what she did with this time was work out legal stratagems designed to get the least possible integration over the longest possible period.” JAMES BALDWIN, *Nobody Knows My Name: A Letter from the South*, in *THE PRICE OF THE TICKET*, *supra* note 112, at 188. The United States, he added, “has spent a large part of its time and energy looking away from one of the principal facts of its life”—racism. *Id.* at 193. As a constructive approach, Baldwin urged the recognition that Black and white American temporalities are intertwined, stating: “[W]e are bound together forever. . . . What is happening to every Negro in the country at any time is also happening to you. There is no way around this.” JAMES BALDWIN, *In Search of a Majority*, in *THE PRICE OF THE TICKET*, *supra* note 112, at 234.

¹²⁸ King, Letter from a Birmingham Jail, *supra* note 42. On King’s views on the relationship between justice and peace, see Joshi, *Racial Justice and Peace*, *supra* note 37, at

Generations of living under violent and racist regimes had given these Black advocates a different perspective on time than whites who had benefited from oppressive institutions but did not want to be held accountable for them.¹²⁹ Whereas Faulkner, whose great-grandfather was an enslaver, embraced gradualism, Baldwin, Hamer, and King's urgency stemmed from their experiences of injustice in the Jim Crow present, the painful past experienced by their ancestors, and the uncertainty of whether they or their children would see a more just future.¹³⁰

B. Too Long

Following the Civil War, Reconstruction aimed to rectify the injustices of more than two centuries of indenture and slavery.¹³¹ Founded in 1865, the Freedmen's Bureau opened schools that educated approximately one hundred thousand students each year.¹³² It also provided funding, land, and support to help create colleges and universities for the education of Black students.¹³³

However, not long after the Bureau was established, Reconstruction's opponents argued that it had lasted too long. As the Bureau's expiration approached in 1866, President Andrew Johnson proclaimed that remedial measures were no longer necessary "in

1341–42; Yuvraj Joshi, *MLK Believed 'No Justice, No Peace'*, JUST SEC. (Jan. 18, 2021), <https://perma.cc/GC64-M5KA>.

¹²⁹ As Baldwin put it, "white people had a much better time in the house of bondage than we did, and God bless their souls, they're going to miss it." JAMES BALDWIN, *Notes on the House of Bondage*, in THE PRICE OF THE TICKET, *supra* note 112, at 672. "[T]heir most desperate desire is to make time stand still," he added. *Id.* at 673. "If time stands still, it can neither judge or accuse nor exact payment." *Id.*

¹³⁰ "I might not live two hours after I get back home," Hamer once said, "but I want to be a part of helping set the Negro free in Mississippi." FANNIE LOU HAMER, *Testimony Before the Subcommittee on Elections of the Committee on House Administration, House of Representatives, Washington, D.C., September 13, 1965*, in THE SPEECHES OF FANNIE LOU HAMER, *supra* note 106, at 68. Baldwin said that Black people could not "go slow" because "they had made a rendezvous with history for the purpose of taking their children out of history's hands." BALDWIN, *supra* note 112, at 474.

¹³¹ In addition to adopting three constitutional amendments, Congress enacted legislation including the 1866 Civil Rights Act, 42 U.S.C. §§ 1982–1992, which was the nation's first federal civil rights law, and the 1865 Freedman's Bureau Act, Pub. L. No. 38-38, 13 Stat. 507 and 1866 Freedmen's Bureau Act, Pub. L. No. 39-37, 14 Stat. 173, which established the nation's first federal welfare agency.

¹³² Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 780–81 (1985).

¹³³ *Id.* at 781.

a time of peace, and after the abolition of Slavery.”¹³⁴ President Johnson claimed that these measures had already served their purpose and that if they were allowed to continue, they “will have no limitation in point of time, but will form a part of the permanent legislation of the country.”¹³⁵

Several politicians opposed civil rights laws by asserting that Black people had taken up too much of white people’s time. Senator William Richardson complained that discrimination *in favor* of Black people “has characterized the legislation of Congress and all the acts of the President and his Cabinet for the past three years.”¹³⁶ Senator Willard Saulsbury similarly lamented: “Scarcely a single day . . . has passed that the African race has not occupied a considerable portion of the attention of the Senate.”¹³⁷ Senator Lazarus Powell called for devoting more legislative time to white Americans: “We have legislated a great deal for the negro, and I think we ought to give a day or two for the white man.”¹³⁸ Whereas Charles Mills ponders whether the appropriation of Black time feeds into white time, these nineteenth-century lawmakers made a parallel claim: granting Black people more time was seen as a direct threat to white time.

Ultimately, the Freedmen’s Bureau lasted less than a decade, as a waning Reconstruction gave way to Jim Crow.¹³⁹ Du Bois later attributed Reconstruction’s failure to an aversion to giving Black time its due: “A Freedmen’s Bureau established for ten, twenty, or forty years, with a careful distribution of land and capital and a system of education for the children, might have prevented such an extension of slavery. But the country would not listen to such a comprehensive plan.”¹⁴⁰

Meanwhile, the Supreme Court decided that Reconstruction laws were no longer needed in U.S. society.¹⁴¹ In 1883, the *Civil Rights Cases*¹⁴² declared the public accommodation sections of the

¹³⁴ Andrew Johnson, *An Important Veto Message from President Johnson*, N.Y. TIMES (Feb. 20, 1866), <https://perma.cc/4C3E-F735>. On peace-based arguments against racial justice, see generally Joshi, *Weaponizing Peace*, *supra* note 37.

¹³⁵ Johnson, *supra* note 134.

¹³⁶ Schnapper, *supra* note 132, at 758 n.19.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 783.

¹⁴⁰ W.E.B. DU BOIS, THE NEGRO 211 (1915).

¹⁴¹ *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁴² *Id.*

1875 Civil Rights Act¹⁴³ unconstitutional.¹⁴⁴ “When a man has emerged from slavery,” the Court said only twenty years after the issuance of the Emancipation Proclamation, “there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.”¹⁴⁵ Although parts of the 1875 Civil Rights Act were later readopted in the 1964¹⁴⁶ and 1968¹⁴⁷ Civil Rights Acts, the claim that racial justice measures had endured for too long and risked becoming permanent if not halted became a staple argument against them.¹⁴⁸

Reconstruction concluded with emancipated people facing restricted rights, scarce resources, and unfulfilled promises.¹⁴⁹ Du Bois thus rejected the “silently growing assumption of this age . . . that the probation of races is past” because it reflected “the arrogance of peoples irreverent toward Time.”¹⁵⁰

Since Reconstruction, Black activists have invoked different temporal horizons to defend racial justice measures. Clergyman Alexander Crummell defended colleges and scholarships for Black students by asserting that “‘the Negro mind, imprisoned for nigh three hundred years,’ needs breadth and freedom.”¹⁵¹ During the Civil Rights era, the NAACP’s Roy Wilkins rejected the notion that Black Americans had enjoyed full citizenship rights since 1883 and thus required no special protection, noting

¹⁴³ Pub. L. No. 43-114, 18 Stat. 335 (1875).

¹⁴⁴ *Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁴⁵ *Id.* at 25.

¹⁴⁶ Pub. L. No. 88-352, 78 Stat. 241.

¹⁴⁷ Pub. L. No. 90-284, 82 Stat. 73.

¹⁴⁸ Reciting the above passage from 1883, segregationist Senator Sam Ervin told the NAACP’s Roy Wilkins during a 1961 hearing, “it is now 76 years later [sic] . . . and [you] still want the members of the colored race to have superior rights.” Statement of Roy Wilkins, Executive Secretary of the National Association for the Advancement of Colored People, on Behalf of the NAACP and Certain Other Organizations in Support of Pending Civil Rights Legislation Before the Senate Judiciary Committee, May 16, 1956, at 19 (on file with the Library of Congress) (available at <https://perma.cc/T79P-PJD6>) [hereinafter Roy Wilkins Statement]. Wilkins, however, challenged Ervin’s assumption of linear temporal progress. See *infra* note 152 and accompanying text.

¹⁴⁹ When *Plessy v. Ferguson*’s “separate but equal” ruling maintained racial apartheid, 163 U.S. 537, 550–51 (1896), Justice John Marshall Harlan’s dissent endorsed a “color-blind” Constitution only with the assumption that the “white race . . . will continue to be [the dominant race in this country] for all time.” *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

¹⁵⁰ W.E.B. Du Bois, *The Sorrow Songs*, in *THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES* 241, 253 (2018).

¹⁵¹ Alexander Crummell, *The Attitude of the American Mind Toward the Negro Intellect* (Dec. 28, 1897) (transcript available at <https://perma.cc/Q9U4-M3RM>).

that a federal civil rights commission found “the wholesale denial of the right to vote” for Black Americans in Montgomery, Alabama, “in 1958—and not 1883.”¹⁵² Given the long shadow of slavery and segregation and the nonlinear path toward equality, it was not yet time to abandon racial remedies.

C. Too Late

More than two centuries after freedwoman Belinda Sutton successfully petitioned for a pension from her former enslaver’s estate, the United States has yet to provide comprehensive reparations for slavery, Jim Crow practices, and ongoing discrimination.¹⁵³ Courts have dismissed legal claims to slavery reparations for being untimely under statutes of limitations,¹⁵⁴ relegating repair to the political domain, where attempts to secure nationwide reparations have similarly stalled.¹⁵⁵ From 1989 until his retirement in 2017, Representative John Conyers, Jr. introduced a bill (H.R. 40) in every Congress to study reparations for slavery.¹⁵⁶ As of 2023, H.R. 40 remains pending.¹⁵⁷

Opponents of H.R. 40 argue that it is “too late” for reparations,¹⁵⁸ citing the passage of time and intervening occurrences

¹⁵² Roy Wilkins Statement, *supra* note 148, at 25. Shifting the temporal focus to Black time, Wilkins argued that “we are only asking to catch up to where we should have been a long time ago.” *Id.*

¹⁵³ “The face of your Petitioner, is now marked with the furrows of time, and her frame feebly bending under the oppression of years,” the petition read, foregrounding Sutton’s claim to a pension after a lifetime of servitude. Belinda Sutton, Petition (Feb. 14, 1783) (transcript available at <https://perma.cc/296Z-TW5E>); see also Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://perma.cc/586D-GYYW> (situating Sutton’s story in the history of the struggle for reparations).

¹⁵⁴ *In re Afr.-Am. Slave Descendants Litig.*, 471 F.3d 754, 762 (7th Cir. 2006).

¹⁵⁵ See Juana Summers, *A Bill to Study Reparations for Slavery Had Momentum in Congress, but Still No Vote*, NPR (Nov. 12, 2021), <https://perma.cc/28P4-TH8K>.

¹⁵⁶ See Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 115th Cong. (2017).

¹⁵⁷ *Id.*; see also Booker Reintroduces Legislation to Form Commission for Study of Reparation Proposals for African Americans (Jan. 24, 2023), BOOKER.SENATE.GOV <https://perma.cc/9U32-T8Q2>.

¹⁵⁸ This argument became especially prominent with the triumphalist narrative of “post-racialism” that emerged during the years of President Barack Obama’s administration. See, e.g., Richard Cohen, *President Needs to Move Court into a Post-Racial Era*, TIMES HERALD-REC. (May 6, 2009), <https://perma.cc/Z7EV-BBTZ>. Post-racialism refers to the belief that race no longer matters in the United States because the nation has already transcended or is on the verge of transcending its racial past. See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).

since slavery and Jim Crow as reasons against systematic compensation. They assert that it is unfair to impose the duty of addressing historical wrongs on present “innocent” generations.¹⁵⁹

In June 2019, then-Senate Majority Leader Mitch McConnell echoed this sentiment, opposing reparations “for something that happened 150 years ago, for whom none of us currently living are responsible.”¹⁶⁰ Journalist Ta-Nehisi Coates retorted that “[McConnell] was alive for the redlining of Chicago and the looting of black homeowners of some \$4 billion.”¹⁶¹ “Victims of that plunder are very much alive today. I am sure they’d love a word with the majority leader.”¹⁶²

Coates challenged those who isolate this racist past from the present and consider slavery as the only wrong worth repairing.¹⁶³ “[W]hile emancipation dead-bolted the door against the bandits of America, Jim Crow wedged the windows wide open,” he said.¹⁶⁴ “And so, for a century after the Civil War, [B]lack people were subjected to a relentless campaign of terror, a campaign that extended well into the lifetime of Majority Leader McConnell.”¹⁶⁵ By tracing continuities between past and present forms of racism, Coates recast McConnell’s remarks through a different temporal lens: “[T]hat is the thing about Senator McConnell’s ‘something:’ It was 150 years ago. And it [is] right now.”¹⁶⁶

¹⁵⁹ Organizations such as the National Coalition of Blacks for Reparations in America challenge the dominant notions of time embedded in the resistance to reparations. For example, a primer on H.R. 40 called *Seize the Time!* reads:

The time to aggressively support movement on HR 40 has long since come. Yet for years we have been told that the time is not right for such a heated discussion! Are we to say justice will never visit people of African descent in America? No, we will not conclude that! We must Seize the Time!

Nat’l Coal. of Blacks for Reparations in Am., *HR 40 Primer—Seize the Time!*, Nat’l Afr.-Am. Reparations Comm’n (Jan. 18, 2018), <https://perma.cc/6R3G-KA7Z>.

¹⁶⁰ Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. Times (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html>.

¹⁶¹ Olivia Paschal & Madeleine Carlisle, *Read Ta-Nehisi Coates’s Testimony on Reparations*, ATLANTIC (June 19, 2019), <https://perma.cc/E9ZM-YZ37>.

¹⁶² *Id.*

¹⁶³ *Id.* Coates also dismissed the notion that “American accounts are somehow bound by the lifetime of its generations,” noting that the United States paid Civil War–era pensions well into the twenty-first century. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Paschal & Carlisle, *supra* note 161.

¹⁶⁶ *Id.* Rejecting McConnell’s attempts at temporal containment, Coates asked “not whether we will be tied to the somethings of our past but whether we are courageous enough to be tied to the whole of them.” *Id.*; see also Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF.

In a May 2021 hearing considering reparations for the 1921 Tulsa massacre, survivors shared their lifelong wait for justice. “America is full of examples where people in positions of power, many just like you, have told us to wait,” one such survivor, Lessie Benningfield Randle, age 106, said.¹⁶⁷ “Others have told us it’s too late. It seems that justice in America is always so slow, or not possible for Black[] [people].”¹⁶⁸

Black activists across different movements disrupt the prevailing understanding of time characterized by time-limited responsibility and linear progress. Instead, they trace throughlines connecting slavery to the present day, underscoring time as a key site of contestation in the struggle for justice. While white majorities often view racial justice efforts as untimely in various ways, these Black voices amplify King’s argument that justice measures are never “well timed” within white time, which denies the re-cency of racial apartheid and the continuation of racial injustice in the United States.¹⁶⁹

The “alternative temporalities” proposed by Black activists present a fundamental challenge to white time.¹⁷⁰ First, where white time is individualized, these activists highlight collective temporalities that span generations and communities, offering cohesive visions for a racially just and democratic future.¹⁷¹ Second, where white time is presented as a universal experience, Black activists acknowledge how individual and group experiences all color our understanding of time and trouble this neutrality.¹⁷²

L. REV. 283, 288 (2008) (discussing conservative arguments that “minimize[] the connections between the time of slavery and now”).

¹⁶⁷ *Continuing Injustice: The Centennial of the Tulsa-Greenwood Race Massacre: Hearing Before the Subcomm. on the Const., C.R., and C.L., 117th Cong. 18* (2021) (statement of Lessie Benningfield Randle).

¹⁶⁸ *Id.*

¹⁶⁹ King, Letter from a Birmingham Jail, *supra* note 42. While resisting hegemonic ideas about time, Black activists have also had to assure racially fatigued Black people that it is “not too late . . . for America to change.” FANNIE LOU HAMER, “*Is It Too Late?*,” in THE SPEECHES OF FANNIE LOU HAMER, *supra* note 106, at 132. As Hamer told an audience in Tougaloo, Mississippi, in the summer of 1971: “Miles of paper and film cannot record the many injustices this nation has been guilty of, but there is still time.” *Id.* at 133. Others have pointed to the timelessness of the racial justice struggle—“a faith in the ultimate justice of things.” DU BOIS, *supra* note 150, at 252.

¹⁷⁰ See *supra* note 63 and accompanying text.

¹⁷¹ See Houdek & Phillips, *supra* note 26, at 371. Professor K. Sabeel Rahman describes a multiracial democracy as one in which Black and Brown people have “full equal standing . . . as members of the polity.” K. Sabeel Rahman, *Democracy Reform Symposium*, 109 CALIF. L. REV. 979, 981 (2021).

¹⁷² Houdek & Phillips, *supra* note 26, at 371.

Third, where many Americans use time as an excuse for inaction and regression on racial justice matters, Black activists press for constructive uses of time to drive real progress.¹⁷³ Recognizing these alternative temporalities is vital to reorienting the law in genuinely emancipatory directions.

III. THE WHITE TIME OF RACIAL EQUALITY LAW

Supreme Court opinions routinely rely on dominant conceptions of time to limit measures that could advance racial equality. Time's alleged neutrality obscures the law's enactment of dominant experiences and expectations and its erasure of subordinated ones, which reproduces structural inequalities. Meanwhile, the Supreme Court asserts itself as supreme creator of temporal frameworks.¹⁷⁴ Accordingly, achieving racial equality requires innovative legal arguments that critique dominant time and center subordinated people's times, as well as structural reforms that make these arguments intelligible and actionable in law.

A. School Integration

In the 1954 *Brown v. Board of Education*¹⁷⁵ decision, the Supreme Court declared racial segregation in public education unconstitutional. Faced with significant opposition to school integration, the Court's ruling one year later in *Brown v. Board of Education*¹⁷⁶ (*Brown II*) emphasized the importance of upholding constitutional principles even in the face of disagreement. But when *Brown II* announced that *Brown* should be implemented "with all deliberate speed," this ambiguous phrasing empowered resisters to end segregation on their own schedule, as slowly as they thought appropriate.¹⁷⁷

¹⁷³ Letter from Birmingham Jail, *supra* note 42.

¹⁷⁴ Professor Alison LaCroix defines the Supreme Court's "temporal imperialism" through an analysis of cases where the Court "assert[s] its own supremacy as the creator of temporal frameworks." LaCroix, *supra* note 23, at 1367. She underscores the Court's rhetorical insistence on a seamless historical narrative from the Republic's inception in 1789 to the present, and its insistence on a linear progression of legal time and the alignment of legal and societal timelines. *Id.* at 1332, 1372.

¹⁷⁵ *Brown*, 347 U.S. 483.

¹⁷⁶ 349 U.S. 294, 300 (1955).

¹⁷⁷ *Id.* at 301. See CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* 10–14 (2004) (summarizing the significance of the phrase "with all deliberate speed" in *Brown II*).

After Arkansas state officials refused to abide by *Brown* in 1957, the Little Rock School Board petitioned to delay its integration plan by two and a half years.¹⁷⁸ The Board protested that the *Brown* decision was too fast and too soon: the decision had “pronounced a rule of law which is well in advance of the mores of the people of this region and violent opposition to its principle has erupted.”¹⁷⁹ The Board further posited integration could only proceed if courts would “allow time for the subsidence of forces” bent on violent resistance.¹⁸⁰

In response, then-NAACP counsel Thurgood Marshall argued that a two-and-a-half-year delay would encourage segregationists’ resistance.¹⁸¹ Conceding time to them would “subvert our entire constitutional framework.”¹⁸² By contrast, enforcing integration would “restate in unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small.”¹⁸³

¹⁷⁸ Brief for the Petitioners, *Cooper v. Aaron*, 358 U.S. 1 (1958) (No. 58-1), reprinted in 54 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 553, 566 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS]. Segregationists held a nostalgic attachment to the era of Jim Crow and sought to shield it from integration efforts in Little Rock. For example, Mississippi Senator John Stennis wrote that whereas segregation “has afforded generations of peaceful and harmonious cooperation among the people of the two races,” integration would destroy that peace and harmony. Telegram from Senator John Stennis to President Dwight D. Eisenhower (Oct. 1, 1957) (on file with the Dwight D. Eisenhower Library, <https://perma.cc/ML6W-ZJRN>). Marjorie King, a radio commentator from San Francisco, California, proposed resolving the Little Rock Crisis by “leasing for 1000 years or buying [a] large unused portion of Africa and giv[ing] Negroes back their heritage,” a “new country named Lincoln Land” to which “ships could carry colored people home in style.” Telegram from Marjorie King to President Dwight D. Eisenhower (Oct. 1, 1957) (on file with the Dwight D. Eisenhower Library, <https://perma.cc/44XE-9755>); see Joshi, *Racial Justice and Peace*, *supra* note 37, at 1347–63.

¹⁷⁹ Brief for the Petitioners, *Cooper*, 358 U.S. 1 (No. 58-1), reprinted in LANDMARK BRIEFS, *supra* note 178, at 584.

¹⁸⁰ Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *Cooper*, 358 U.S. 1 (No. 58-1), reprinted in LANDMARK BRIEFS, *supra* note 178 at 534, 539.

¹⁸¹ Brief for Respondents, *Cooper*, 358 U.S. 1 (No. 58-1), reprinted in LANDMARK BRIEFS, *supra* note 178, at 602–03.

¹⁸² *Id.* at 602.

¹⁸³ *Id.* at 603. In this case, perspectives on time were central to navigating the peace-versus-justice dilemma. The Board claimed that postponing integration by two-and-a-half years was not a case of justice denied but merely justice delayed for the sake of immediate peace. In contrast, the NAACP responded that further delays both denied justice to Black people and rendered enduring peace more difficult to achieve. At the district court level, Judge Harry Lemley held that having “a peaceful interlude” was in the interest of both white and Black students and did not “constitute a yielding to unlawful force or violence.” *Aaron v. Cooper*, 163 F. Supp. 13, 32, 27 (E.D. Ark.), *rev’d*, 257 F.2d 33 (8th Cir. 1958),

In 1958, the Supreme Court in *Cooper v. Aaron*¹⁸⁴ unanimously rejected the Board's proposal to reverse and postpone integration.¹⁸⁵ In so doing, *Cooper* declared that steps toward racial justice were not to be taken according to dominant ideas of time.¹⁸⁶ In particular, Justice Felix Frankfurter's concurrence argued that although segregation had been "hardened by time," that did not justify continuing it.¹⁸⁷ Delaying integration was not "a constructive use of time," he said, because it would advance neither justice nor peace and would cause even greater strife further down the road.¹⁸⁸ "The progress that has been made in respecting the constitutional rights of the Negro children . . . would have to be retraced," Justice Frankfurter warned, "perhaps with even greater difficulty . . . against the seemingly vindicated feeling of those who actively sought to block that progress."¹⁸⁹ *Cooper* embodied King's prescription that time should be used constructively to advance democracy instead of destructively to breed stagnation.¹⁹⁰

But *Cooper* was an exceptional case,¹⁹¹ as the Supreme Court's school integration jurisprudence remained relatively dormant from *Brown II* until the passage of the Civil Rights Act of 1964.¹⁹² The implementation of *Brown* faced significant delays,

aff'd, 358 U.S. 1 (1958). However, the Court of Appeals reversed Judge Lemley's order. It noted that a "temporary delay" in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means" and refused to incentivize this destructive use of time. *Aaron v. Cooper*, 257 F.2d 33, 40 (8th Cir. 1958). For a description of the peace-versus-justice dilemma and its relevance for the United States, see Joshi, *Racial Justice and Peace*, *supra* note 37 and Joshi, *Racial Transitional Justice in the United States*, *supra* note 37.

¹⁸⁴ 358 U.S. 1 (1958).

¹⁸⁵ *Cooper*, 358 U.S. at 16. The Court decisively concluded that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.* For a detailed treatment of *Cooper v. Aaron*, see Joshi, *Racial Justice and Peace*, *supra* note 37, at 1347–63.

¹⁸⁶ *Cooper* clarified that *Brown II* permits a district court to consider "relevant factors" that might justify delaying complete integration but stated that this analysis excludes hostility to racial integration. *Cooper*, 358 U.S. at 7.

¹⁸⁷ *Id.* at 25 (Frankfurter, J., concurring).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 25–26.

¹⁹⁰ King, Letter from a Birmingham Jail, *supra* note 42.

¹⁹¹ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 324 (2004) (naming *Cooper* as "the sole exception" to desegregation jurisprudence immediately following the *Brown* decisions).

¹⁹² J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 486 (1978) (criticizing how "from 1955 to 1968 the Court abandoned the field of public school desegregation," taking a "non-jurisprudential" role); see also *id.* at 502–03 (noting that even if "the Court would have

and it was only prompted by the federal government's ability to withhold funds from states, as white resistance and conceptions of time prolonged Black people's wait for justice.¹⁹³ Furthermore, just as integration efforts were gaining momentum, a more reactionary Court emerged in the late twentieth century, with appointees from Presidents Richard Nixon, Ronald Reagan, and George H.W. Bush, who acted to limit the timeline of integration.¹⁹⁴

In 1991, for instance, the Supreme Court in *Board of Education v. Dowell*¹⁹⁵ held that court-ordered desegregation decrees were not "to operate in perpetuity," regardless of whether they were needed.¹⁹⁶ Chief Justice William Rehnquist said that "transition" to an integrated school system suggests "a temporary measure to remedy past discrimination" rather than something more enduring.¹⁹⁷ Justice Thurgood Marshall's dissent in *Dowell* rejected the majority's preoccupation with "temporariness and permanence" because "the continued need for a [desegregation] decree will turn on whether the underlying purpose of the decree has been achieved."¹⁹⁸ Justice Marshall argued that this purpose was not

risked violence and righteously stormed the barricades," it possessed nothing "with which to storm them" and "needed executive leadership and support").

¹⁹³ See Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 252, 283–84 (2014) (discussing how "funding cut-offs played a significant role in desegregating Southern schools in the late 1960s"); Ian Milhiser, 'Brown v. Board of Education' Didn't End Segregation, Big Government Did, THE NATION (Jan. 2, 2014), <https://www.thenation.com/article/archive/brown-v-board-education-didnt-end-segregation-big-government-did/>.

¹⁹⁴ See Joshi, *Racial Transition*, *supra* note 37, at 1208–14 (documenting this shift); see also JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 267 (2019) (linking the "[Nixon] administration's opposition to expanding efforts to achieve meaningfully integrated schools" and its Supreme Court appointments); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C.L. REV. 1597, 1601–02 (2002) (observing that "[f]our Justices appointed by President Richard Nixon are largely to blame for the decisions of the 1970s" that "undermined desegregation," while "[f]ive Justices appointed by Presidents Ronald Reagan and George H.W. Bush are responsible for the decisions of the 1990s that have contributed substantially to resegregation of schools").

¹⁹⁵ 498 U.S. 237 (1991).

¹⁹⁶ *Id.* at 248; see Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 21–25, 30–35 (1992) (discussing the *Dowell* litigation and its implications); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 820–25, 829–30 (2010) (arguing that *Dowell* "reconstitutionalized segregation").

¹⁹⁷ *Dowell*, 498 U.S. at 247.

¹⁹⁸ *Id.* at 267 n.11 (Marshall, J., dissenting).

achieved “so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist.”¹⁹⁹

Dowell's insistence on time limits for racial justice measures was mirrored in later cases.²⁰⁰ For instance, in 2007, *Parents Involved v. Seattle*²⁰¹ invalidated student assignment plans in Louisville and Seattle that promoted integration by taking explicit account of a student's race.²⁰² Racial time provides a useful lens for analyzing the Court's time-based arguments against racial integration in *Parents Involved*.

Chief Justice Roberts's plurality opinion asserted that because Jefferson County in Kentucky had implemented a mandatory desegregation plan until 2000, it had completed its transition to an integrated school system.²⁰³ Furthermore, Chief Justice Roberts argued that because Seattle had never officially maintained a segregated school system (a contention that was disputed by the dissenting Justices), it could not rely on race-based integration to address contemporary linkages between educational and residential segregation patterns.²⁰⁴ This conflation of legal and societal time rendered Louisville's reckoning with Jim Crow segregation untimely, while deeming Seattle's reckoning never timely to begin with. Reflecting dominant society's weariness toward racial remedies, Chief Justice Roberts concluded that the time had come to embrace absolute colorblindness in the school setting.²⁰⁵

¹⁹⁹ *Id.* at 252.

²⁰⁰ See *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time.”); *Shelby County*, 570 U.S. at 546 (arguing that, “[a]t the time,” protections against voting discrimination “made sense”); *Students for Fair Admissions*, 143 S. Ct. 2141 (Kavanaugh, J., concurring) (citing *Dowell* to argue that “race-based affirmative action in higher education may [not] extend indefinitely into the future”).

²⁰¹ 551 U.S. 701 (2007).

²⁰² *Id.*; see Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. STATE L. REV. 633 (criticizing *Parents Involved* for exacerbating the problem of highly separate and unequal schools in an environment where federal incentive to pursue desegregation is already lacking); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1112 (2014) (arguing that *Parents Involved* extinguishes hope for integration in public school settings and pushes toward school choice that retrenches segregation and exempts states from addressing racial inequality).

²⁰³ *Parents Involved*, 551 U.S. at 725 n.12.

²⁰⁴ *Id.* at 712.

²⁰⁵ Chief Justice Roberts famously declared: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Id.* at 748; see Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2008) (discussing white Americans' exhaustion with racial justice measures throughout history); Gross, *supra* note 166, at 293–94 (outlining conservative appeals to a “timeless” colorblindness principle).

Justice Clarence Thomas's concurrence argued that Seattle's and Louisville's plans were inappropriate because present circumstances could not be directly linked to prior discrimination. "[T]he further we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation," he asserted, without substantiating why time alone would diminish the consequences of segregation.²⁰⁶ Justice Thomas distinguished between a "one-time process involving the redress of a discrete legal injury inflicted by an identified entity," which may be a permissible remedy for de jure segregation, and "a continuous process with no identifiable culpable party and no discern[i]ble end point," which he said "the Court has never permitted."²⁰⁷ Racial time theorists would reject this linear chronology confining time to isolated moments in a linear progression because it disregards the recurring and cumulative nature of racist experiences and how the past continues to "steal time" from Black people in the present.²⁰⁸

Justice Stephen Breyer's dissent highlighted the persistent and cyclical temporalities of racism, arguing that the purpose of Seattle's and Louisville's plans was not only "eradicating earlier school segregation" but also "bringing about integration" and "preventing retrogression."²⁰⁹ He further pointed out that Seattle had its own set of school board policies and actions that contributed to racial segregation, which the plurality opinion overlooked in the absence of an official judicial decree of desegregation.²¹⁰

The transition from racial apartheid to a multiracial democracy in the United States requires an understanding of the past, present, and future stages of this transformation.²¹¹ Judicial opinions like *Parents Involved* serve as official markers of this transitional period.²¹² However, this decision reveals a disconnect between the law's concept of time and the actual historical

²⁰⁶ *Parents Involved*, 551 U.S. at 756 (Thomas, J., concurring).

²⁰⁷ *Id.* at 756–57.

²⁰⁸ Gomez, *supra* note 26, at 188.

²⁰⁹ *Parents Involved*, 551 U.S. at 806 (Breyer, J., dissenting).

²¹⁰ *Id.* at 807.

²¹¹ Joshi, *Racial Transition*, *supra* note 37, at 1196. Such an account is needed to make decisions about the legitimacy of various practices (what aspects of the past cannot be tolerated in the present?), to develop strategies (what is necessary to create a future distinct from the past?), and to determine progress (what of the past is safely behind and what is still present?). *Id.*

²¹² *See id.* at 1212–14 (detailing the transitional logic of *Parents Involved v. Seattle*).

timeline,²¹³ as it recasts the histories and legacies of segregation to limit integration.²¹⁴ By examining integration through the lens of racial time, we can recognize the cross-generational impact of discriminatory policies, not just in education but also in other areas.²¹⁵ It becomes evident that the passage of time alone does not heal wounds; instead, it potentially deepens them through inter-generational effects, while providing an excuse for the majority to avoid actively addressing racial inequities.

B. Affirmative Action

Affirmative action originated as a response to generations of racial oppression,²¹⁶ but the Supreme Court in *Bakke*²¹⁷ and *Grutter*²¹⁸ curtailed affirmative action's potential by adopting dominant understandings of time. The recent *SFFA* case went even further by implying that affirmative action had endured for too long, deeming most race-sensitive admissions outdated and no longer appropriate.²¹⁹

In 1978, the Court in *Bakke* prohibited racial quotas on the belief that it was “far too late” in U.S. history to recognize “special wards” for Black Americans under the Fourteenth Amendment.²²⁰ Justice Lewis Powell declared that changes in U.S. society since

²¹³ See Renisa Mawani, *The Times of Law*, 40 LAW & SOC. INQUIRY 253, 261 (2015) (discussing how the law, “by emphasizing, erasing, and recasting historical events,” creates its own “temporal synthesis of past, present, and future”).

²¹⁴ Joshi, *Racial Transition*, *supra* note 37, at 1212–14.

²¹⁵ See Dahlia Bazzaz, *Why Seattle Schools Are More Segregated Today Than the 1980s*, SEATTLE TIMES (May 28, 2023), <https://www.seattletimes.com/education-lab/why-seattle-schools-are-more-segregated-today-than-the-1980s/> (examining intergenerational effects driving current educational inequities in Seattle).

²¹⁶ As President Lyndon B. Johnson said in a 1965 speech that paved the way for affirmative action: “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.” Lyndon B. Johnson, President, Commencement Address at Howard University: “To Fulfill These Rights” (June 4, 1965) in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT 1965, at 635, 636 (1966). On the development of affirmative action law, see Joshi, *Racial Indirection*, *supra* note 37, at 2513–24.

²¹⁷ *Bakke*, 438 U.S. at 294–95.

²¹⁸ *Grutter*, 539 U.S. at 320.

²¹⁹ Millhisser, *supra* note 2.

²²⁰ *Bakke*, 438 U.S. at 295; see Joshi, *Racial Indirection*, *supra* note 37, at 2513–24 (detailing *Bakke* and its progeny); Yuvraj Joshi, *Bakke to the Future: Affirmative Action After Fisher*, 69 STAN. L. REV. ONLINE 17, 17–22 (2016) (showing that Justice Anthony Kennedy dissented in *Grutter* because it diverged from *Bakke* and wrote *Fisher* in ways that maintain fidelity to *Bakke*).

1868 meant that “it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority.”²²¹ He asserted that the United States had become “a Nation of minorities” in which “[e]ach had to struggle” and none had a singular claim to reckoning.²²² Despite the Equal Protection Clause’s aim to repair slavery’s harms, Justice Powell contended that “[t]he clock of our liberties . . . cannot be turned back to 1868.”²²³

While maintaining that the constitutional meaning of the Equal Protection Clause had evolved with time, Justice Powell insisted that it must endure in this newly conceived way. He argued that because the groups facing discrimination in the United States change over time, relying on such “transitory considerations” impedes “consistent application of the Constitution from one generation to the next.”²²⁴ Instead, he endorsed a legal doctrine that prioritizes “continuity over significant periods of time” and transcends “the pragmatic political judgments of a particular time.”²²⁵

Justice Powell thus dismissed direct racial remedies under the Constitution as both belated and perennially inappropriate. His temporal assumptions were rooted in an alternative history in which Black Americans faced no greater disadvantage than white Americans and the formal abolition of slavery and segregation sufficed to democratize the United States, with laws equally enforced and executed for all.²²⁶ This perspective overlooked the fact that such equality has never been fully realized, with systemic disparities persisting throughout history.²²⁷

²²¹ *Bakke*, 438 U.S. at 292.

²²² *Id.*

²²³ *Id.* at 295.

²²⁴ *Id.* at 298.

²²⁵ *Id.* at 299. Other affirmative action cases (beyond those discussed here) have also used temporal reasoning. For example, in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court invalidated an affirmative action policy that insulated minority teachers from layoffs to avoid “remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.” *Wygant*, 476 U.S. at 276.

²²⁶ See Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1063 (2007).

²²⁷ See, e.g., Emma Pierson, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 740–41 (2020) (finding racial disparities in police stops); Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat’l Bureau of Econ. Rsch., Working Paper No. 22399, 2018), (finding racial disparities in police use of force); Gia M. Badolato, Meleah D. Boyle, Robert McCarter, April M. Zeoli, William Terrill & Monika K. Goyal, *Racial and Ethnic Disparities in Firearm-Related Pediatric Deaths Related to Legal Intervention*, 146 PEDIATRICS 1,

Four Justices in *Bakke*—Justices William Brennan, Harry Blackmun, Marshall, and Byron White—conveyed a different understanding of time.²²⁸ Writing for all four in dissent, Justice Brennan recounted “how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.”²²⁹ Observing that *Brown* was “only twenty-four years ago” and racial discrimination cases pervade court dockets “even today,” Justice Brennan’s opinion highlighted the subordination of racial minorities “within our lifetimes.”²³⁰

In a separate opinion, Justice Blackmun expressed his hope for a time “within a decade at the most” when affirmative action is no longer necessary but predicted that this time would not come soon, perhaps *ever*, without a genuine reckoning with racial disparities.²³¹ Justice Marshall found it “more than a little ironic” that the Court for most of its history upheld the worst forms of discrimination against Black people, but now, a mere twenty-four years after *Brown*, was refusing to correct the legacy of those decisions by upholding race-based remedies for centuries-long race-based discrimination.²³²

Bakke showed how time could be cyclical, not linear. “I fear that we have come full circle,” Justice Marshall said, noting *Bakke*’s repetition of historical patterns in the *Civil Rights Cases* and *Plessy v. Ferguson*²³³ that “destroyed the movement toward

at 1 (2020) (finding racial disparities in firearm-related police killings of children); David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 73–74 (2008) (same in arrests); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1213–38 (2018) (finding racial disparities in plea bargaining); Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 657 (2020) (finding racial disparities in court-ordered evictions).

²²⁸ *Bakke*, 438 U.S. at 324 (Brennan, White, Marshall & Blackmun, J.J., concurring in the judgment in part and dissenting in part).

²²⁹ *Id.* at 326.

²³⁰ *Id.* at 327.

²³¹ *Id.* at 403 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun hoped that this “time will come . . . within a decade at the most” but predicted based on almost a quarter century since *Brown* that that “that hope is a slim one.” *Id.* He added that “[i]n order to get beyond racism, we must first take account of race.” *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in part and dissenting in part).

²³² *Id.* at 400 (Marshall, J., concurring in part and dissenting in part). Justice Marshall added that *Brown* and its progeny did not actually produce racial equality because the “legacy of years of slavery and of years of second-class citizenship . . . could not be so easily eliminated.” *Id.* at 394.

²³³ 163 U.S. 537 (1896).

complete equality.”²³⁴ Limiting affirmative action in *Bakke* was wrong both because Black people had been excluded from public life for “far too long” and because the United States would “forever remain a divided society” without robust inclusion.²³⁵ Although this prediction did not make it into his opinion, Justice Marshall told his colleagues that he believed some form of affirmative action would be necessary for the next *hundred* years.²³⁶

When the next major affirmative action case, *Grutter*, reached the Court in 2003, these opinions grounded in subordinated ideas of time were cast aside in favor of Justice Powell’s opinion.²³⁷ *Grutter* allowed indirect reliance on race in admissions but maintained that such reliance “must be limited in time.”²³⁸ Justice O’Connor acknowledged that race-sensitive admissions policies were still needed due to serious racial disparities in education.²³⁹ Based on perceived progress during the previous twenty-five years, she predicted that “twenty-five years from now, the use of racial preferences will no longer be necessary,” without specifying the kinds of changes that would be required to ensure this kind of progress over the next generation.²⁴⁰ By contrast, Justice Ruth Bader Ginsburg described Justice O’Connor’s twenty-five-year timeline as a “hope, but not [a] firm[] forecast,” pointing out the nonlinear progress of the previous twenty-five years and that past improvements could not be simply and arithmetically used to predict future progress.²⁴¹ Progress toward racial equality had

²³⁴ *Bakke*, 438 U.S. at 402 (Marshall, J., concurring in part and dissenting in part).

²³⁵ *Id.* at 396, 401.

²³⁶ Nicholas Lemann, *Can Affirmative Action Survive?*, NEW YORKER (July 26, 2021), <https://perma.cc/D9HM-B2PQ>.

²³⁷ *Grutter*, 539 U.S. at 323–25.

²³⁸ *Id.* at 342. Justice O’Connor’s majority opinion recognized that affirmative action could “promote[] ‘cross-racial understanding,’ help[] to break down racial stereotypes, and ‘enable[] [students] to better understand persons of different races.’” *Id.* at 330. However, because it relied on “dangerous” classifications rooted in a racist past, Justice O’Connor maintained that affirmative action “must have a logical end point.” *Id.* at 342.

²³⁹ *Id.* at 338.

²⁴⁰ *Grutter*, 539 U.S. at 343. In contrast, Du Bois predicted that “[a] Freedmen’s Bureau established for ten, twenty, or forty years . . . might have prevented [] an extension of slavery,” but only “with a careful distribution of land and capital and a system of education for the children.” DU BOIS, *supra* note 140, at 211.

²⁴¹ *Grutter*, 539 U.S. at 345–46 (Ginsburg, J., concurring). Justice Thomas also resisted Justice O’Connor’s timeline based on the Black conservative principle of self-reliance. According to this view, because it was *always* dangerous for Black people to rely on dominant society for racial progress, it was *never* the right time for affirmative action. *Id.* at 375–76 (Thomas, J., dissenting). This claim stood in tension with the temporal arguments put forward by racial justice advocates, such as the NAACP Legal Defense Fund, who pointed to the enduring racial disparities stemming from U.S. history. *See* Brief for

already slowed by 2003, making Justice O'Connor's timeline doubtful from the start.²⁴²

Whereas King warned against “white moderate[s]” setting the timetable for Black equality, the majority opinion in *Grutter* attempted to do exactly that.²⁴³ After she retired from the Court, Justice O'Connor conceded that her twenty-five-year timeline “may have been a misjudgment.”²⁴⁴ Reflecting on her *Grutter* opinion in 2008, she remarked: “In today's America, I'm inclined to think that race still matters in painful ways.”²⁴⁵ She added, “I frankly haven't seen enormous changes in this country in the last five years.”²⁴⁶ When asked years later to predict how long affirmative action would be necessary, she answered: “There's no timetable. You just don't know.”²⁴⁷ Yet, the damage was done, and despite Justice O'Connor's later doubts, her timeline became a staple argument of commentators and litigants opposing affirmative action policies.²⁴⁸

In 2009, a commentator for the Heritage Foundation reasoned that “O'Connor's clock” should be adjusted for a post-racial time, considering President Barack Obama's election.²⁴⁹ But

the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae in Support of Respondents at 13, *Grutter*, 539 U.S. 306 (No. 02-241).

²⁴² Johnson, *supra* note 4, at 188.

²⁴³ King, Letter from a Birmingham Jail, *supra* note 42. In his early critique of Justice O'Connor's timeline, Professor Kevin Johnson argued that the Court lacked institutional competence to arbitrarily create the timeline in *Grutter*, adding that the Court “should not be in the business of establishing the precise limits on the duration of an affirmative action program,” as this is usually done by political decision-makers. Johnson, *supra* note 4, at 173.

²⁴⁴ Evan Thomas, *Why Sandra Day O'Connor Saved Affirmative Action*, ATLANTIC (Mar. 19, 2019), <https://perma.cc/BDX6-MCBS>.

²⁴⁵ Emily Dupraz, *Affirmative Action Is Still Necessary, Says O'Connor in HLS Key-note Address*, HARV. L. TODAY (Oct. 27, 2008), <https://perma.cc/YC7H-M5EK>.

²⁴⁶ *Id.*

²⁴⁷ Thomas, *supra* note 244.

²⁴⁸ Some affirmative action supporters have recalled Justice O'Connor's twenty-five-year timeline to suggest that ending affirmative action is premature. “I know that time flies,” Justice Breyer said during oral arguments in *Fisher I* in 2012, “but I think only nine of those years have passed.” Transcript of Oral Argument at 8, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) (No. 11-345). In contrast, affirmative action opponents have raised Justice O'Connor's timeline to insist on a fixed deadline for programs. “[I]t was important in *Grutter* to say, look, this can't go on forever, 25 years,” Chief Justice Roberts said during *Fisher II* oral arguments three years later. “And when do you think your program will be done?” Transcript of Oral Argument at 50, *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (No. 14-981).

²⁴⁹ Michael Franc, *Time to Set Aside Set-Asides?: With the Civil-Rights Race Won, Our Government Should Embrace Colorblindness*, HERITAGE FOUND., (Jan. 28, 2009), <https://perma.cc/VE4D-Q8Y4> (“With Obama's ascension to the Oval Office, shouldn't we dramatically accelerate the timetable?”).

Attorney General Eric Holder, serving under President Obama, rejected the notion that affirmative action had become obsolete. When asked in 2012 whether affirmative action should end, Holder reframed the question: “The question is not when does it end, but when does it begin. . . . When do people of color truly get the benefits to which they are entitled?”²⁵⁰

The abuse of Justice O’Connor’s timeline persisted in the Harvard and UNC cases, as affirmative action opponents twisted her words to argue that her *Grutter* opinion was primarily concerned with eliminating racial classifications rather than achieving racial equality. They recast Justice O’Connor’s timeline as a declaration of when affirmative action should be terminated, as opposed to a prediction of when affirmative action would no longer be necessary *as a result of* the elimination of racial disparities.²⁵¹ Yet, this argument belied both Justice O’Connor’s reasoning in *Grutter*²⁵² and her subsequent regrets.²⁵³ While Justice O’Connor initially hoped that twenty-five years would suffice to overcome racial disparities and later retracted by stating “[t]here’s no timetable,” SFFA’s briefs distorted her opinion and

²⁵⁰ Rebecca Hashad, *Holder Says Sotomayor’s Affirmative Action Dissent Was ‘Courageous’*, HILL (Apr. 23, 2014), <https://perma.cc/8DSS-CM7Q>.

²⁵¹ See, e.g., Brief for Petitioner at 80, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199) (asserting “*Grutter*’s deadline of June 2028”); Brief of the Liberty Justice Center and Momoko Takahashi, as Amicus Curiae in Support of Petitioner at 24, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199) (recasting *Grutter* as announcing a firm deadline for “abandoning race as a factor in admissions”).

²⁵² Justice O’Connor’s opinion emphasized the “unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.” *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). As she elaborated: “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.” *Id.* at 338. While O’Connor argued that race-sensitive affirmative action “must have a logical end point,” her broader opinion reveals that the “end point” she envisaged was not tied to the mere passage of time but rather connected to the reduction of racial disparities to a level where explicit racial considerations no longer remain indispensable. *Id.* at 342.

²⁵³ See *supra* notes 239, 247, and accompanying text.

ignored her regrets.²⁵⁴ Similar briefs²⁵⁵ omitted the fact that Justice O'Connor and Justice Blackmun disavowed such timetables as misjudged and unrealistic.²⁵⁶

Despite this abuse of Justice O'Connor's timeline, neither lower court considered it an obstacle to upholding Harvard's admissions program.²⁵⁷ Judge Allison Burroughs, sitting on the U.S. District Court for the District of Massachusetts, noted in 2019 that twenty-five years "might be optimistic and may need to change" amid "entrenched racism and unequal opportunity."²⁵⁸ First Circuit Judge Sandra Lynch stated in 2020 that the plaintiff's argument that "Harvard has not identified a stopping point for its use of race" was "not persuasive."²⁵⁹

²⁵⁴ Thomas, *supra* note 244.

²⁵⁵ Other briefs depicted Justice O'Connor's timeline as an "admonition" of affirmative action. Brief of Former Federal Officials of the Department of Education's Office for Civil Rights as Amici Curiae in Support of Petitioner at 5–6, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199). Some proclaimed "dramatic racial progress" has been achieved and thus affirmative action is no longer needed, while others declared that little progress has been made and thus affirmative action is no longer useful. Brief of Hamilton Lincoln Law Institute as Amicus Curiae in Support of Petitioner at 15, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199).

²⁵⁶ Compare Brief of Judicial Watch, Inc. and Allied Educational Foundation as Amici Curiae in Support of Petitioner at 15, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199) (citing selectively Justice O'Connor's and Justice Blackmun's timelines) with Thomas, *supra* note 244 (noting that Justice O'Connor called her twenty-five-year timeline "a misjudgment") and *Bakke*, 438 U.S. at 403 (Blackmun, J., concurring in part and dissenting in part) (noting the "slim" chances of affirmative action being unnecessary in a decade).

²⁵⁷ Tiana Headley, *Harvard Admissions Case Tests O'Connor's 2003 Call on Race Bias*, BLOOMBERG L. (Aug. 11, 2021), <https://perma.cc/NE2F-6ULT>.

²⁵⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 205 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020).

²⁵⁹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 192 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 20-1199) (rejecting Students for Fair Admissions' argument "derive[d] . . . from" *Grutter's* twenty-five-year timeline). Judge Lynch also observed that the Supreme Court had not addressed Justice O'Connor's timeline since *Grutter*. *Id.* Some anti-affirmative-action briefs presented this as a license to end affirmative action even sooner than 2028. See, e.g., Brief of Former Federal Officials of the Department of Education's Office for Civil Rights as Amici Curiae in Support of Petitioner, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 21-707, 5–6 (acknowledging that the twenty-five-year deadline is "approaching" but not here yet). In July 2022, both Harvard and UNC reminded the Court that "*Grutter* did not fix a hard-and-fast deadline." Brief of Former Federal Officials of the Department of Education's Office for Civil Rights as Amici Curiae in Support of Petitioner at 5–6, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (No. 20-1199); see also Brief by University Respondents at 46, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 143 S. Ct. 2141 (No. 21-707); Brief for Respondent President and Fellows of Harvard College at 52, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (No. 20-1199).

During oral arguments for both cases in October 2022, eight of the nine current Supreme Court Justices referenced this timeline.²⁶⁰ Conservatives elevated Justice O'Connor's twenty-five-year *obiter dictum*²⁶¹ into "*Grutter* precedent"²⁶² and demanded a discrete end point for affirmative action, asking "how long this will take"²⁶³ and "how will we know when the time has come?"²⁶⁴ Some Justices expressed concern that ameliorative policies would continue "indefinitely" unless curtailed at or before Justice O'Connor twenty-five-year mark.²⁶⁵ In response, an SFFA lawyer opined, "I think twenty years is enough to call it."²⁶⁶ But Harvard's counsel argued that data, as opposed to mere intuition or hope, should determine the timeline of affirmative action.²⁶⁷ He stated that the available data provided evidence that pursuing modestly race-sensitive admissions alongside facially-neutral policies was a constructive use of time and that shifting solely to facially-neutral policies at this stage would be premature.²⁶⁸ Solicitor General Elizabeth Prelogar added that *Grutter* did not establish an "inflexible" "twenty-five-year clock": "Instead it was an expectation about [] what changes we would see in society."²⁶⁹

Similar to Justice Marshall in *Bakke*, the two women of color on the current Court emphasized subordinated groups' experiences of time.²⁷⁰ Justice Sonia Sotomayor noted, for example, that in the "twenty-odd years" since *Grutter*, growing racial

²⁶⁰ See generally Transcript of Oral Argument, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 143 S. Ct. 2141 (No. 21-707) (transcript available at <https://perma.cc/7MYW-CDPY>) [hereinafter UNC Oral Argument]; Transcript of Oral Argument, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (No. 20-1199) (transcript available at <https://perma.cc/FYD2-ZDLU>) [hereinafter Harvard Oral Argument]. Justice Thomas was the only member of the Court not to directly address the timeline of affirmative action during oral arguments. Justice Brett Kavanaugh, however, invoked Justice Thomas's dissent in *Grutter* in which Justice Thomas discussed Justice O'Connor's timeline. See *id.* at 115.

²⁶¹ See Lawrence Solum, *25 Years Howard Bashman Has*, LEGAL THEORY BLOG (June 24, 2003), <https://perma.cc/8J9Z-4KPV> (explaining why Justice O'Connor's twenty-five-year prediction in *Grutter* is *obiter dictum*).

²⁶² UNC Oral Argument, *supra* note 260, at 85 (Kavanaugh, J.).

²⁶³ Harvard Oral Argument, *supra* note 260, at 84 (Gorsuch, J.).

²⁶⁴ UNC Oral Argument, *supra* note 260, at 166 (Kavanaugh, J.).

²⁶⁵ *Id.* at 85; see also Johnson, *supra* note 134 (expressing similar concern about the Freedmen's Bureau); *Civil Rights Cases*, 109 U.S. at 25 (expressing similar concern for the 1875 Civil Rights Act).

²⁶⁶ Harvard Oral Argument, *supra* note 260, at 40.

²⁶⁷ *Id.* at 80–83.

²⁶⁸ *Id.* at 44.

²⁶⁹ *Id.* at 116.

²⁷⁰ See *supra* notes 232–36 and accompanying text.

disparities had diminished the resources available to members of underrepresented groups.²⁷¹ Justice Ketanji Brown Jackson observed that “the sort of twenty-five-year expiration deadline can’t really be blanketly applied, because we start in different places with respect to how race has been considered to exclude people in [] our various communities.”²⁷²

In the end, Justice O’Connor’s timeline provided a convenient cover for Justices willing to depart from established precedents. All lower courts that extensively reviewed the record determined that Harvard and UNC’s admissions programs met the constitutional standards²⁷³ set by *Bakke*, *Grutter*, and *Fisher v. University of Texas at Austin*.²⁷⁴ As the Supreme Court could not explain how these programs differed from others it had previously upheld, it had to find additional grounds on which to invalidate race-sensitive admissions.

In the *SFFA* decision,²⁷⁵ Chief Justice Roberts elevated Justice O’Connor’s statement from a passing remark to a legally binding precedent, demanding a definitive endpoint for affirmative action.²⁷⁶ He claimed that this requirement was the sole reason *Grutter* allowed for the temporary use of race.²⁷⁷ He complained that “[t]wenty years later, no end is in sight” since neither university had established a specific termination date for their race-sensitive admissions policies,²⁷⁸ despite the fact that *Grutter* did not mandate predetermined deadlines. Therefore, the specific time limit imposed by *SFFA* was an invention of the Court passed off as binding precedent.

²⁷¹ *UNC Oral Argument*, *supra* note 260, at 101 (Sotomayor, J.).

²⁷² *Id.* at 91 (Jackson, J.).

²⁷³ *Students for Fair Admissions, Inc.*, 397 F. Supp. at 205; *Students for Fair Admissions v. Univ. of N.C.*, 567 F. Supp. 3d 580, 666 (M.D.N.C. 2021).

²⁷⁴ 579 U.S. 365 (2016) (*Fisher II*).

²⁷⁵ *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141.

²⁷⁶ *Id.*

²⁷⁷ *Id.* In reality, *Grutter* did not explicitly designate the twenty-five-year timeline as a holding of the case. Following *Grutter*, Professor Lawrence Solum described the timeline as “obviously an *obiter dictum*” and noted that even if the Court had labeled it as a holding, it would not have been part of the official ruling because the Court did not address future scenarios. See Solum, *supra* note 261. Prior to *Students for Fair Admissions*, Professor Cristina Rodríguez, a former clerk of Justice O’Connor during the Term *Grutter* was decided, stated that the twenty-five-year timeline should not be considered a holding of *Grutter* and characterized arguments suggesting otherwise as “distortion[s]” of Justice O’Connor’s opinion. Jeannie Suk Gersen, *What Justice John Paul Stevens’s Papers Reveal About Affirmative Action*, *NEW YORKER* (June 20, 2023), <https://perma.cc/9BTG-GCV5>.

²⁷⁸ *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166 (Roberts, C.J., majority opinion).

Justice Brett Kavanaugh's concurrence also honed in on the timeline of affirmative action.²⁷⁹ He portrayed *Grutter* as stating that affirmative action would lose constitutional justification after twenty-five years unless "unexpected" circumstances arose, overlooking the contradiction between the persistence of racial disparities, which he acknowledged, and Justice O'Connor's original expectations.²⁸⁰ Justice Kavanaugh depicted *Grutter* as having definitively settled the debate on the duration of affirmative action in higher education, treating Justice O'Connor's words as the final pronouncement despite her later expressing regret regarding her timeline.²⁸¹

The dissenting opinions challenged the majority's interpretation of the timeline of affirmative action, as well as their analysis of racial history, present circumstances, and future implications. Justice Sotomayor argued that *SFFA*'s new requirement for universities to specify an endpoint for their use of race resulted from selectively extracting aspirational remarks from *Grutter*.²⁸² She pointed out that *Grutter* did not mandate setting a predetermined date for the termination of race-sensitive programs but rather suggested that universities periodically assess the necessity of such programs.²⁸³ However, the Court used the respondents' efforts to analyze admissions statistics for such assessments

²⁷⁹ Justice Kavanaugh emphasized the legal significance of a timeline requirement by citing various opinions that themselves raised doubts about the validity of such timelines. For instance, he referenced Justice Blackmun's hope in *Bakke* that affirmative action would no longer be necessary within a decade, while disregarding Justice Blackmun's explicit rejection of that timeline due to deeply entrenched racial disparities. *Compare Students for Fair Admissions*, 143 S. Ct. at 2222–23 (Kavanaugh, J., concurring) *with Bakke*, 438 U.S. at 403, 407 (Blackmun, J., concurring in part and dissenting in part). Similarly, Justice Kavanaugh invoked Justice Ginsburg's concurring opinion in *Grutter*, supported by Justice Breyer, where she referred to Justice O'Connor's twenty-five-year timeline as a "hope" rather than a firm prediction. *Compare Students for Fair Admissions*, 143 S. Ct. at 2222–23 (Kavanaugh, J., concurring) *with Grutter*, 539 U.S. at 345–46 (Ginsburg, J., concurring). Furthermore, Justice Kavanaugh referenced Justice Thomas's dissent in *Grutter*, notwithstanding Justice Thomas's assertion that "the Constitution means the same thing today as it will in 300 months." *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting). By asserting that race-sensitive admissions were immediately unconstitutional, Justice Thomas effectively dismissed any chronological framework as devoid of constitutional relevance. *Compare Students for Fair Admissions*, 143 S. Ct. at 2223–24 (Kavanaugh, J., concurring) *with Grutter*, 539 U.S. at 375–76 (Thomas, J., dissenting).

²⁸⁰ *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2225 (Kavanaugh, J., concurring).

²⁸¹ *Id.* at 2224–25.

²⁸² *Id.* at 2254–55 (Sotomayor, J., dissenting).

²⁸³ *Id.* at 2255–56.

as evidence of racial balancing.²⁸⁴ Taking a broader temporal perspective, Justice Sotomayor characterized the Court's opinion as "grounded in the illusion that racial inequality was a problem of a different generation," emphasizing that "entrenched racial inequality remains a reality today" and that ignoring race will not lead to equality.²⁸⁵ Likewise, Justice Jackson argued that affirmative action programs are not "indefinite," but rather, the need for them has not yet ended.²⁸⁶

The majority's "let-them-eat-cake obliviousness" is not for a lack of exposure to racialized experiences of time.²⁸⁷ Over the years, proponents of affirmative action have presented arguments to the Supreme Court that emphasize the different experiences of time faced by marginalized groups.²⁸⁸ These briefs challenge the notion that the mere passage of time can resolve racial issues in the United States. They employ racial time frameworks to shed light on the experiences of marginalized groups that are often

²⁸⁴ *Id.*

²⁸⁵ *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2234 (Sotomayor, J., dissenting).

²⁸⁶ *Id.* at 2275 (Jackson, J., dissenting).

²⁸⁷ *Id.* at 2277.

²⁸⁸ For instance, in *Bakke*, UCLA's Black Law Students Association, Black Law Alumni Association, and Women's Alliance underscored the disparate timelines between white and nonwhite people, highlighting how nonwhite people experienced higher rates of disease and death. Brief of the UCLA Black Law Students Association, the UCLA Black Law Alumni Association, and the Union Women's Alliance to Gain Equality, as Amici Curiae in Support of Petitioner at 22, *Bakke*, 438 U.S. 265 (No. 76-811). Similarly, Yale's Black Law Students Union argued that centuries of racial subordination had afforded white people academic advantages not extended to people of color. See Brief of the Black Law Students Union of Yale University Law School, as Amicus Curiae in Support of Petitioner at 12, *Bakke*, 438 U.S. 265 (No. 76-811). Even the federal government's brief acknowledged that minority applicants might have had superior credentials if they had not endured discrimination themselves or if their ancestors had not experienced discrimination. See Brief for the United States as Amicus Curiae at 56, *Bakke*, 438 U.S. 265 (No. 76-811). More recent cases have seen briefs documenting the persistent disparities in progress toward racial equality and emphasizing the ongoing necessity of affirmative action. See, e.g., Brief of Brown University, University of Chicago, Columbia University, Cornell University, Dartmouth College, Duke University, Johns Hopkins University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Vanderbilt University, and Yale University in Support of Respondents at 11–12, *Fisher II*, 579 U.S. 365 (No. 14-981) (defending race-sensitive admissions based on "the ubiquitous persistence of segregated schools and communities"); Brief of Lieutenant General Julius W. Becton, Jr., General John P. Abizaid, Admiral Dennis C. Blair, General Bryan Doug Brown, Gen. George W. Casey, Lieutenant General Daniel W. Christman, General Wesley K. Clark, Admiral Archie Clemens, General Ann E. Dunwoody, General Ronald R. Fogleman, Admiral Edmund P. Giambastiani, Jr., et al., as Amici Curiae in Support of Respondents at 2–3, *Fisher II*, 579 U.S. 365 (No. 14-981) (arguing that while "[h]istory may prove Justice O'Connor's prediction prescient," that day "has not yet arrived").

overlooked due to the false universalization of dominant time. Yet, the Court's decisions have notably lacked these narratives. Instead, moderate conservatives have limited affirmative action using dominant ideas about time,²⁸⁹ while reactionary conservatives, as seen in the *SFFA* case, have used time to prohibit most race-sensitive admissions, further hindering efforts toward racial inclusion.

C. Voting Rights

Passed after the historic marches from Selma to Montgomery, the 1965 Voting Rights Act was enacted to remove barriers to the right to vote. When it was immediately challenged, the Supreme Court recognized the law's significance for shifting the advantages of "time and inertia" from those who sought to suppress votes to minority voters.²⁹⁰ However, recent decisions such as *Shelby County v. Holder*²⁹¹ and *Brnovich v. Democratic National Committee*²⁹² have reversed those gains and restored advantages to vote suppressors. Driven by majority frustration with enduring voter protections, these decisions have interpreted the Voting Rights Act as disconnected from "current needs"²⁹³ and indifferent to the time constraints experienced by minorities.²⁹⁴

In 1966, *South Carolina v. Katzenbach*²⁹⁵ observed that the Voting Rights Act "was designed by Congress to banish the blight of racial discrimination in voting" after nearly a century of Jim Crow.²⁹⁶ Congress, the Court said, had recognized the "inordinate amount of time and energy required to overcome [] obstructionist tactics" in voting and decided "to shift the advantage

²⁸⁹ Joshi, *Racial Indirection*, *supra* note 37, at 2523 (discussing the influence of moderate Justices in affirmative action cases); King, Letter From a Birmingham Jail, *supra* note 42 (critiquing "white moderate[s]" for their understanding of time).

²⁹⁰ *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966); see Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989) (describing how "[s]tarting in 1966, . . . jurisdiction after jurisdiction adopted measures designed to minimize the impact of the increased [B]lack vote").

²⁹¹ 570 U.S. 529 (2013).

²⁹² 141 S. Ct. 2321 (2021).

²⁹³ *Shelby County*, 570 U.S. at 535–36 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

²⁹⁴ *Brnovich*, 141 S. Ct. at 2338 (asserting that because "[v]oting takes time" for everyone, a voting system that that takes time from both whites and minorities is "equally open").

²⁹⁵ 383 U.S. 301 (1966).

²⁹⁶ *Id.* at 308.

of time and inertia from the perpetrators of the evil to its victims.”²⁹⁷ By eliminating enduring discrimination and protecting minority voters’ time, the Act would propel the United States towards true democracy.²⁹⁸

As voter suppression continued, Congress repeatedly reauthorized the Voting Rights Act. In 2006, Congress extended the Act for twenty-five years because “forty years has not been a sufficient amount of time to eliminate the vestiges of discrimination.”²⁹⁹ What mattered to Congress was not simply the passage of time but the achievement of effective and lasting enfranchisement for all Americans.

Frustrated by this extension, Shelby County, Alabama sought a declaration that Section 5 of the Voting Rights Act—which featured a preclearance requirement allowing limited federal oversight over racial discrimination—and Section 4—which contained a coverage formula that determined the states subject to this preclearance requirement—were unconstitutional.³⁰⁰ Alabama’s arguments against the Act, although couched in the language of racial progress and states’ rights,³⁰¹ were essentially temporal in nature. They contended that the effects of the state’s racist history had “faded away,” that Southern states had endured diminished sovereignty for long enough, and that voter protections were out of date and out of time.³⁰²

Briefs in support of the Voting Rights Act argued that voter protections remained timely. For example, Alabama’s Legislative Black Caucus and Association of Black County Officials urged the Court to uphold the Act because “the culture of white supremacy does not die so easily.”³⁰³ Without the Act’s protections, they warned, efforts to “isolate and minimize the political influence of

²⁹⁷ *Id.* at 328.

²⁹⁸ See generally Francisco E. González & Desmond King, *The State and Democratization: The United States in Comparative Perspective*, 34 BRIT. J. POL. SCI. 193 (2004) (distinguishing between “restricted” and “full” democracy and characterizing the United States as a “restricted” democracy prior to the implementation of the 1965 Voting Rights Act).

²⁹⁹ 2006 Reauthorization § 2(d)(7), Pub. L. No. 109-246, 120 Stat. 578.

³⁰⁰ *Shelby County*, 570 U.S. at 540.

³⁰¹ See Brief of State of Alabama, as Amicus Curiae in Support of Petitioner at 1, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (asserting that “[t]hings in the South have, indeed, changed” and “Alabama and other States [are] ready to be equal partners in the Union”).

³⁰² *Id.* at 1.

³⁰³ Brief of Alabama Legislative Black Caucus and Alabama Association of Black County Officials, as Amici Curiae in Support of Respondents at 6, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

black Alabamians will advance rapidly and far outstrip our resources to combat them.”³⁰⁴ The National Lawyers Guild noted that the Act posed only a “slight burden” on covered jurisdictions relative to “a history of hundreds of years of oppression and disenfranchisement.”³⁰⁵ It was “telling” that Shelby County was seeking to strike down the Act instead of meeting its modest obligations for ten years.³⁰⁶

The Roberts Court disagreed. In 2013, *Shelby County* struck down the coverage formula for preclearance on the basis that it was “a drastic departure from the basic principles of federalism,” justified only by the “exceptional conditions” of the past but not by “current needs.”³⁰⁷ While the Court did not strike down the preclearance requirement itself, it effectively nullified the law absent new Congressional coverage legislation.

Chief Justice Roberts’s majority opinion openly conceded that “voting discrimination still exists; no one doubts that.”³⁰⁸ Yet, he expressed frustration that “[n]early fifty years later, [Sections 4 and 5 of the Voting Rights Act] are still in effect . . . and are now scheduled to last until 2031.”³⁰⁹ Chief Justice Roberts argued that this timeframe was too long because “the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.”³¹⁰ While acknowledging the Act’s role in perceived Southern progress, he downplayed preclearance’s capacity to avert potential regression.³¹¹ Instead, he emphasized perceived imperfections in the coverage formula, which he felt no longer reflected reality in the South.³¹²

In her dissent, Justice Ginsburg recognized that the past could have complicated and enduring legacies, which the Voting

³⁰⁴ *Id.* at 7.

³⁰⁵ Brief of National Lawyers Guild, as Amicus Curiae in Support of Respondents at 17, *Shelby County v. Holder*, 570 U.S. 529 (2013) (No. 12-96).

³⁰⁶ *Id.* at 5.

³⁰⁷ *Shelby County*, 570 U.S. at 535–36 (citing *Katzenbach*, 383 U.S. at 334). *But see* Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 732–35 (2014) (arguing that *Shelby County* avoids discussing the Fifteenth Amendment’s express shift of power from states to the federal government, defends a principle of equal sovereignty not found in the Constitution, and ignores how bailout from preclearance addresses current conditions).

³⁰⁸ *Shelby County*, 570 U.S. at 536.

³⁰⁹ *Id.* at 535. “[I]ndeed, they have become more stringent,” Chief Justice Roberts added. *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at 547.

³¹² *Shelby County*, 570 U.S. at 547.

Rights Act guarded against.³¹³ Although the Act had facilitated progress, its mission of eliminating voting discrimination was incomplete. Striking down voter protections because of their success at combating discrimination was, she concluded, “like throwing away your umbrella in a rainstorm because you are not getting wet.”³¹⁴ Justice Ginsburg recognized what Chief Justice Roberts chose not to see: the storm of racist voter suppression continues.

Shelby County reinstated an unjust temporal regime by erasing past progress, enabling destructive uses of time, and exhausting the lived time of subordinated people. Within hours of the *Shelby County* decision, Texas restored a voter identification law previously blocked under Section 5 of the Voting Rights Act.³¹⁵ The decision also shifted the burdens of “time and inertia” back onto minority voters,³¹⁶ who would now need to bring laborious lawsuits under Section 2 of the Act to defend their fundamental right to vote.³¹⁷

However, Section 2 itself faces similar time-based legal challenges. In the June 2023 case of *Allen v. Milligan*,³¹⁸ where Section 2 was used to demonstrate that Alabama’s congressional voting map diluted the influence of Black voters, four justices openly entertained the possibility that Section 2 had endured for too long. In his dissenting opinion, Justice Thomas, joined by Justices Neil Gorsuch and Amy Coney Barrett, argued that even if Congress had the constitutional authority to enact Section 2 in 1982, there should be a time limit on that authority.³¹⁹ He suggested that Section 2 might be considered unconstitutional because it “has no expiration date” and “is unbounded in time.”³²⁰ In his concurrence, Justice Kavanaugh acknowledged this “temporal argument” but said he would not consider it at that time since Alabama did not raise this point.³²¹ Less than a month later, Louisiana cited these opinions in a lawsuit asserting that Section 2 is no longer constitutional.³²²

³¹³ *Id.* at 559–60 (Ginsburg, J., dissenting).

³¹⁴ *Id.* at 590.

³¹⁵ Hasen, *supra* note 13.

³¹⁶ *Katzenbach*, 383 U.S. at 328.

³¹⁷ *Shelby County*, 570 U.S. at 537 (describing Section 2 as “permanent”).

³¹⁸ 143 S. Ct. 1487.

³¹⁹ *Id.* at 1543–44 (Thomas, J., dissenting).

³²⁰ *Id.* at nn.21 & 45.

³²¹ *Id.* at 1519 (Kavanaugh, J., concurring in part).

³²² Rick Hasen, *Louisiana Argues that the District Court Considering Voting Rights Challenge to Louisiana Congressional Redistricting Should Consider if Section 2 of the*

Although Section 2 survived, for now, in *Milligan*, *Brnovich* had already significantly narrowed its scope two years prior.³²³ While this Article primarily focuses on the experiences of Black Americans, *Brnovich* underscores how racial time also shapes the lives of other subordinated groups, including Native Americans.

In *Brnovich*, two Arizona laws eliminated practices disproportionately used by minorities to exercise their right to vote.³²⁴ In January 2020, an en banc panel of the Ninth Circuit held that these laws violated Section 2 because they effectively imposed “burdens [that] fall disproportionately on Arizona’s minority voters,” including “voters who have trouble finding time to return mail because they work multiple jobs or lack childcare services.”³²⁵

Before the Supreme Court, the Arizona Republican Party argued that voting restrictions that are facially “neutral” do not violate Section 2, even if they impose differential burdens on minorities.³²⁶ “[O]rdinary rules that set the time, place, and manner of voting do not ‘deny’ or ‘abridge’ the right to vote,” the Party argued.³²⁷ “They simply define the process by which all voters must exercise that right.”³²⁸

The National Congress of American Indians responded that the time-related reasons that the Arizona Republican Party considers irrelevant “are in fact daunting obstacles that are unreasonably hard for Native American voters to navigate.”³²⁹ The organization’s brief detailed how election procedures force Native Americans to spend “significant time and money to travel to

Voting Rights Act is No Longer Constitutional, ELECTION L. BLOG (July 7, 2023), <https://perma.cc/X22K-B26U>.

³²³ *Brnovich*, 141 S. Ct. at 2343.

³²⁴ Amy Howe, *Justices Add Seven New Cases to Docket, Including Major Voting-Rights Dispute*, SCOTUSBLOG (Oct. 2, 2020), <https://perma.cc/F2W6-BPTG>.

³²⁵ *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1006 (9th Cir. 2020) (en banc); see *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016) (“[S]ocioeconomic disparities establish that no mere ‘preference’ led African American[] [voters in North Carolina] to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration.”); *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 663–64 (6th Cir. 2016) (noting that the elimination of straight-ticket voting in Michigan might increase wait times in Black communities, which have “historically faced some of the longest wait times in the state”).

³²⁶ Brief for Private Petitioners at 1, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (No. 19-1257).

³²⁷ *Id.* at 15.

³²⁸ *Id.* (emphasis omitted).

³²⁹ Brief of National Congress of American Indians at 3, as Amicus Curiae in Support of Respondents, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (No. 19-1257).

vote.”³³⁰ For example, when election commissioners in Pondera County, Montana initially allowed in-person voting only at the county seat, “impoverished Blackfeet members [had] to travel 120 miles round-trip, while the 95.1% of white voters in town had to travel 10-20 minutes.”³³¹ County officials changed their position and provided voting on the Blackfeet reservation after Section 2 litigation was filed, demonstrating the continuing necessity of voter protections.³³²

Several briefs in *Brnovich* documented similar temporal inequalities in voting. The Navajo Nation noted that Arizona’s time, place, and manner restrictions “may appear to be neutral and ordinary to non-Native Americans” but they “impose severe burdens on Navajo voters living on the Nation.”³³³ Mi Familia Vota, Arizona Center for Empowerment, Chispa Arizona, and League of Women Voters of Arizona explained that “minority voters are less likely to have time off work to vote when polls are open,” causing them to vote outside their assigned precinct “just to be sure they can fit voting into their schedule.”³³⁴ The A. Philip Randolph Institute told similar stories of Black voters in North Carolina who, despite their best efforts, were disenfranchised by time, place, and manner restrictions.³³⁵

These briefs illustrate how time is racialized in quotidian ways: minorities may have less available time to vote and seemingly neutral voting procedures may consume even more of their time.³³⁶ Meanwhile, litigation aimed at challenging voting barriers necessitates time and resources that minority communities

³³⁰ *Id.* at 14.

³³¹ *Id.* at 15.

³³² *Id.* This illustrates Justice Ginsburg’s argument in *Shelby County* about the continuing deterrent effect of the Voting Rights Act. *Shelby County*, 570 U.S. at 559–60 (Ginsburg, J., dissenting).

³³³ Brief of Navajo Nation at 4 as Amicus Curiae in Support of Respondents, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (No. 19-1257).

³³⁴ Brief of Mi Familia Vota, Arizona Center for Empowerment, Chispa Arizona, and League of Women Voters of Arizona at 23–24, as Amici Curiae in Support of Respondents, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (No.19-1257).

³³⁵ Brief of the North Carolina, Memphis, Central Virginia, and Miami-Dade Chapters of the A. Philip Randolph Institute at 24, as Amici Curiae in Support of Respondents, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (No.19-1257).

³³⁶ In so doing, these briefs evoked Mills’ insights into how white time controls work and leisure rhythms. Mills, *White Time*, *supra* note 15, at 31. See Orly Lobel, *Book Review: The Law of Social Time*, 76 TEMPLE L. REV. 357, 372 (2003) (arguing that “it should be an uncontested fact that free time is distributed unevenly among different social groups”).

may lack.³³⁷ Time then becomes a tool of disenfranchisement.³³⁸ The Voting Rights Act, the briefs argued, was designed to protect against such weaponizing of time to disenfranchise minorities.

The Roberts Court again disagreed. In July 2021, *Brnovich* concluded that the two Arizona laws did not violate Section 2 since time, place, and manner election regulations were deemed “neutral” rather than racially biased.³³⁹ By examining *Brnovich* from the perspective of racial time, it becomes apparent that the decision reinforces dominant perceptions and experiences of time, assuming their universal applicability, while simultaneously erasing subordinated people’s experiences of time.

Justice Samuel Alito’s majority opinion reasoned that because “[v]oting takes time” for everyone, a voting system that takes time from both whites and minorities is “equally open” and the “mere inconvenience” of minorities does not demonstrate a violation of Section 2.³⁴⁰ This reasoning imposed time constraints that may appear “ordinary” to privileged white citizens on everyone, treating privileged experiences of time as representative of the entire electorate.³⁴¹ Furthermore, Justice Alito asserted that Congress must have intended to exempt “facially neutral” time, place, and manner regulations from Section 2 scrutiny, citing their “long pedigree” in the United States.³⁴² This argument transformed legislation that was originally intended to shift the advantages of “time and inertia” to minority voters into one that sought to entrench exclusionary temporal regimes.³⁴³

Justice Elena Kagan’s dissent criticized Justice Alito’s opinion on both points. She argued that “equal ‘opportunity’” to vote is not achieved “when a law or practice makes it harder for members of one racial group [] to cast ballots,”³⁴⁴ even if the law appears “neutral.”³⁴⁵ To make this point, Justice Kagan resurrected

³³⁷ See *Oversight Hearing on Voting Matters in Native Communities: Hearing Before the S. Comm. on Indian Affs.*, 117th Cong. 1 (2021) (testimony of Janet Davis, Chairwoman, Pyramid Lake Paiute Tribe) (observing that voting rights litigation “takes time and money that tribes don’t have”).

³³⁸ See Joshi, *Racial Indirection*, *supra* note 37, at 2497–2509 (describing this form of “racial indirection”).

³³⁹ *Brnovich*, 141 S. Ct. at 2332.

³⁴⁰ *Id.* at 2338.

³⁴¹ See Mills, *White Time*, *supra* note 15, at 32 (noting how white time claims timelessness and racelessness).

³⁴² *Brnovich*, 141 S. Ct. at 2339.

³⁴³ *Katzenbach*, 383 U.S. at 328.

³⁴⁴ *Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting).

³⁴⁵ *Id.*

Justice Antonin Scalia's 1991 example of a law that limits voter registration to three hours on one day a week.³⁴⁶ Justice Scalia had argued that if such a law "makes it 'more difficult for blacks to register than whites,'" it would violate Section 2 because Black citizens would "have less opportunity 'to participate in the political process' than whites."³⁴⁷ Justice Kagan further pointed out that Congress, when enacting Section 2, had documented many similar facially "neutral" rules.³⁴⁸ Accordingly, Justice Alito was also mistaken about congressional intent, which was "to eradicate then-current discriminatory practices, not to set them in amber."³⁴⁹

Justice Kagan critiqued the majority's acceptance of the "usual burdens" of voting, including the factor of time, "even if those burdens fall highly unequally on members of different races."³⁵⁰ She specifically condemned the majority's disregard for the temporal burdens on Native Americans,³⁵¹ and its failure to realize that "[w]hat does not prevent one citizen from casting a vote might prevent another."³⁵²

While Justice Kagan highlighted unequal voting burdens on different groups, she did not explicitly criticize Arizona's voting regime for enforcing hegemonic notions of time.³⁵³ However, by employing the analytic framework of racial time, we can understand how Arizona's voting restrictions impose dominant temporalities on subordinated communities, depriving them of time and erasing their temporal experiences.³⁵⁴ This racial time analysis not only offers insights but also furnishes additional legal arguments. For example, considering that inequitable temporal regimes are the legacies of colonialism and segregation,³⁵⁵ it could be argued that Arizona's voting restrictions perpetuate "social and historical conditions" that abridge voting opportunities under

³⁴⁶ *Id.* (citing *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting)).

³⁴⁷ *Id.* Justice Kagan also cited Pettigrew, *supra* note 65 (finding that a voter in a predominantly minority precinct is six times more likely to wait more than an hour to vote). *Id.* at 2355.

³⁴⁸ *Brnovich*, 141 S. Ct. at 2363–64 (Kagan, J., dissenting).

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 2362.

³⁵¹ *Id.* at 2371–72 n.15.

³⁵² *Id.* at 2363.

³⁵³ *Brnovich*, 141 S. Ct. at 2362–64.

³⁵⁴ See Mills, *White Time*, *supra* note 15, at 32.

³⁵⁵ See Hanchard, *supra* note 27, at 255, 265; Mills, *White Time*, *supra* note 15, at 28.

Section 2 of the Voting Rights Act.³⁵⁶ Racial time provides a framework for challenging the imposition of dominant time on subordinated groups and for advocating structural reforms that respect and protect their time.

CONCLUSION: TOWARD A MORE JUST TIME

In a stratified society like the United States, perceptions of time can differ based on distinctive group experience. While the legal enactment of time is ostensibly neutral, it often enforces dominant perceptions and interests. It is an invidious form of racial indirection.³⁵⁷

Black Americans, in particular, have endured a cruel form of racial time characterized by violence, marginalization, and deprivation. In response, Black activists have actively resisted and challenged prevailing notions of time by presenting their own understandings. These activists highlight enduring injustices across generations, stress productive uses of the present, and articulate collective visions for a more democratic future. Other subordinated groups in the United States, including Native Americans, also face similar subjugation. Recognizing the temporalities of marginalized groups is crucial to addressing their historical and ongoing disenfranchisement.³⁵⁸

Supreme Court opinions have played a significant role in enacting and universalizing dominant perspectives of time. Court decisions have often deemed racial remedies untimely and outdated, using time as an excuse to avoid implementing necessary racial justice measures and to dismantle existing remedies. These decisions have also upheld a dominant group's experiences and expectations of time under the guise of race-neutral standards. Consequently, these rulings have erased past progress, enabled time to destructively block justice and accountability, and exhausted the lived time of subordinated people. This adoption of a dominant perspective on time serves to safeguard white political

³⁵⁶ See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (“[The] essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”); *Johnson v. DeGrandy*, 512 U.S. 997, 1006–08 (1994).

³⁵⁷ See *Joshi*, *Racial Indirection*, *supra* note 37, at 2501–09; *id.* at 2501 (“The concept of racial indirection describes practices with a covert *racial form* that have a disproportionate *racial impact*.” (emphasis in original)).

³⁵⁸ See Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 *YALE L.J.F.* 450, 455 (2020) (explaining how accounting for marginalized people's perspectives can be “part of repairing disenfranchisement's legacy”).

and economic power, effectively suppressing efforts to redistribute intergenerational power and perpetuating inequality by dismissing the persistent existence of racism and the intricate interplay between the past and present.

To truly uphold equal protection, the Supreme Court should actively engage with the arguments about time presented by Black, Indigenous, and other subordinated people. The Court should examine how an accumulation of structural advantages and disadvantages can shape experiences and expectations of time in specific contexts, revealing the illusory nature of time's ostensible "neutrality." Moreover, it should recognize the disproportionate temporal burdens borne by certain marginalized people that impede their ability to enjoy basic democratic rights, such as voting. However, recent rulings like *Brnovich*³⁵⁹ and *SFFA*³⁶⁰ indicate that the Roberts Court is unlikely consider the temporal experiences of those who face true subordination. As a result, the most promising paths for progress lie outside the purview of Supreme Court jurisprudence.

Democratic decision-makers have the opportunity to advance temporal justice through various interventions. These interventions may involve measures that make the law and society more responsive to subordinated people's experiences of time and those that limit the law's deleterious control over their time. Both infrastructural and policy solutions should be explored. For example, improving public transit accessibility and quality,³⁶¹ as well as reducing the need for travel through practices such as remote court hearings,³⁶² could alleviate the temporal burdens associated with commuting.

Representational inequities in the legal field fuel temporal inequities.³⁶³ Although laws such as the 1965 Voting Rights Act

³⁵⁹ See *supra* notes 323–56.

³⁶⁰ See *supra* notes 260–87.

³⁶¹ See Devin Michelle Bunten, Ellen Fu, Lyndsey Rolheiser, & Christopher Severen, *The Problem Has Existed over Endless Years: Racialized Difference in Commuting, 1980–2019*, 3 (Fed. Rsrv. Bank of Phila., Working Paper No. 22-13, 2022) (finding that Black workers in the United States spend more time commuting than white workers and that part of the reason is longer public transit commuting times).

³⁶² See generally David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions*, 120 PROCS. NAT'L ACAD. SCI. (2023) (finding that excess public transit commuting time increased default judgment rates in tenant eviction cases in Philadelphia and proposing increased use of remote court hearings).

³⁶³ See Deborah L. Rodhe, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (Mar 27, 2015), <https://perma.cc/9XNK-8VCN>.

and the 1968 Fair Housing Act³⁶⁴ were enacted to protect marginalized groups, their enforcement often relies on relatively privileged individuals who may lack a direct understanding of subordinated perceptions and experiences of time.³⁶⁵ Some judges, for instance, may consider a few years sufficient time to achieve racial equality because they perceive time differently as powerful members of the majority and empathize with other majority members who resent periods of racial progress.³⁶⁶ Appointing judges and civil officials who demonstrate sensitivity and empathy toward subordinated experiences could be a positive step,³⁶⁷ although more is needed to address the structural dimensions of racial time.³⁶⁸

A more substantive reform entails amending legal rules and procedures to incorporate and consider subordinated experiences of time. For example, the proposed John Lewis Voting Rights Advancement Act includes the Native American Voting Rights Act (NAVRA), which addresses distinct temporal burdens faced by Native American voters.³⁶⁹ Given that Native tribes often have to travel hours to vote, NAVRA requires states and courts to account for travel time and previous waiting times for voting in elections.³⁷⁰ Any changes to polling places on tribal land that increase travel time for voters must receive written consent by the tribe.³⁷¹

³⁶⁴ Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601–3619).

³⁶⁵ See *Diversity of the Federal Bench*, AM. CONST. SOC'Y, <https://perma.cc/2QK6-NXZ9> (noting that “judges who sit on the federal bench are overwhelmingly white and male”).

³⁶⁶ In this vein, Professor Russell Robinson argues that judges’ perspectives on discrimination are affected by whether they are “insiders” or “outsiders.” Judges tend to either completely ignore perceptual differences, assuming that we all agree what constitutes “discrimination,” or, when judges do recognize a difference in perception, they may casually dismiss the outsider’s perception as “objectively” unreasonable. Robinson, *supra* note 15, at 1101. Additionally, Professor Reva Siegel shows that the Court exercises “empathy” with white plaintiffs in affirmative action cases in ways that it does not with minorities subjected to racial profiling, leading to a “divided” equal protection law. Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 4 (2013).

³⁶⁷ See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 98 (1997) (noting the potential of racial diversity to enhance judicial decision making).

³⁶⁸ See, e.g., Yuvraj Joshi, *The Trouble with Inclusion*, 21 VA. J. SOC. POL'Y & L. 207, 244–60 (2014) (discussing the limits of social inclusion as a means to social justice).

³⁶⁹ H.R. 5008, 117th Cong. (2021).

³⁷⁰ H.R. 5008, 117th Cong. § 6(b)(1) (2021). NAVRA also requires early voting periods to be at least ten hours a day, including some time outside business hours. H.R. 5008, 117th Cong. § 6(g)(3), (2021).

³⁷¹ H.R. 5008, 117th Cong. § 7(a)(3) (2021).

Thus, NAVRA acknowledges Native experiences of time in ways that the Roberts Court refused to do in *Brnovich*.³⁷² Context-sensitive and evidence-based standards of this nature may avoid essentializing racialized experiences of time while increasing decision-makers' awareness of temporal inequalities and reducing the enforcement of harmful "neutral" time standards.³⁷³

Community engagement also provides an avenue for the law to address the effects of racial time. NAVRA itself emerged from field hearings in Indian Country and multistate surveys of voter discrimination, which revealed that time, place, and manner restrictions constituted obstacles to voting.³⁷⁴ Additionally, NAVRA establishes a Native American voting task force to address the unique voting challenges faced by Native Americans.³⁷⁵ Information grounded in the experiences of subordinated groups can challenge dominant assumptions about time and drive changes within and beyond the legal realm.³⁷⁶

Avoiding time-based sunset provisions for equality measures offers another means of curbing the law's perpetuation of dominant time.³⁷⁷ Such timelines often reflect a dominant group's poor

³⁷² *Brnovich*, 141 S. Ct. at 2371–72 n.15 (Kagan, J., dissenting). Even so, NAVRA may be understood as facilitating Native "temporal recognition" within "settler time," as opposed to Native "temporal sovereignty." See RIFKIN, *supra* note 35 (drawing this distinction).

³⁷³ On the different forms such standards could take, see Robinson, *Perceptual Segregation*, *supra* note 15, at 1156–63 (proposing identity-based standards for Title VII's anti-discriminatory framework); see also Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 142 (2017) (proposing race as one contextual factor in Fourth Amendment cases).

³⁷⁴ H.R. 5008, 117th Cong. § 2(a)(8) (2021).

³⁷⁵ H.R. 5008, 117th Cong. § 4 (2021).

³⁷⁶ *But cf.* Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1312–17 (2020) (describing the limits of information-centered responses to racial injustice).

³⁷⁷ Timelines may appeal to both racial justice advocates and opponents for different reasons. For those invested in remedying racial oppression, timelines may express a desire for swift attainment of justice and acknowledge the need to secure remedies within a limited timeframe, particularly if powerful segments of society are more inclined to support time-bound solutions for historical injustices. Conversely, those seeking to restore an "ordinary" status quo may view timelines as an indication that remedial laws must be terminated. They may argue that these laws are no longer necessary because the precise issues that prompted their enactment have been solved, or because too much time has lapsed since the occurrence of historical injustice, rendering continued remedies inappropriate. Additionally, timelines may appeal to some because time appears to be a more impartial and quantifiable criterion for concluding remedial measures, and setting a duration can potentially facilitate compromise between actors who otherwise disagree about such measures. See COHEN, *supra* note 27, at 97–119. Nevertheless, timelines that attempt to predict or declare the end of racism are undesirable for the reasons outlined here.

understanding of the time required to overcome a racist history, while disregarding subordinated groups' collective and intergenerational experiences of time.³⁷⁸ Unrealistically short timelines hinder necessary changes by encouraging narrow interpretations of wrongs and remedies and promoting reductive rather than transformative goals.³⁷⁹ They reinforce the belief that the brief implementation of isolated measures has resolved centuries of racial subordination, when in reality, achieving transitional justice is a complex, intergenerational process.³⁸⁰ The expiration of a timeline leads to premature and erroneous declarations that the democratic transition in the United States is complete.³⁸¹ Following the guidance of U.S. civil rights leaders³⁸² and international human rights laws,³⁸³ legal benchmarks for achieving racial equality

³⁷⁸ See *supra* note 1.

³⁷⁹ Timelines for equality measures often lead to relitigating the past and renegotiating the social and legal compacts made to deal with it. As Johnson rightly predicted after *Grutter*, Justice O'Connor's twenty-five-year timeline was likely to fuel future litigation and almost guaranteed the Court's reconsideration of affirmative action. Johnson, *supra* note 4, at 187.

³⁸⁰ Enduring measures may be necessary to manage what Professor Derrick Bell termed "the permanence of racism." DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993); see also Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79 (1991). Professor Robert Meister similarly describes "transitional time" as a time "of indefinite duration, potentially permanent." ROBERT MEISTER, *AFTER EVIL: A POLITICS OF HUMAN RIGHTS* 85 (2010). Professor Monica Bell proposes "a perpetual governance process" to address racialized policing given "the phoenix-like resilience of institutional racism." Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 744, 763 (2020) (emphasis omitted).

³⁸¹ Recall that, with the Freedmen's Bureau's impending expiration in 1866, President Johnson declared that remedial measures were no longer needed "in a time of peace, and after the abolition of slavery." Johnson, *supra* note 134. Such temporal claims recur today in the school integration, affirmative action, and voting rights cases discussed in this Article. See *supra* Part III.

³⁸² For example, King observed that "the [*Brown*] [C]ourt did not set a definite deadline for the termination of this process" and only expected Americans to work toward "a smooth and peaceful transition." Martin Luther King, Jr., Address at the Fourth Annual Institute on Nonviolence and Social Change at Bethel Baptist Church, (Dec. 3, 1959) (transcript available at <https://perma.cc/JX64-2BZ9>). Similarly, Justice Marshall's dissent in *Dowell* rejected the majority's preoccupation with "temporariness and permanence" because "the continued need for a [desegregation] decree will turn on whether the underlying purpose of the decree has been achieved." *Dowell*, 498 U.S. at 267 n.11 (Marshall, J., dissenting).

³⁸³ The International Convention on the Elimination of All Forms of Racial Discrimination, which the United States ratified in 1994, endorses "special and concrete measures" to guarantee members of all racial groups "the full and equal enjoyment of human rights and fundamental freedoms." G.A. Res. 2106 (XX), annex, art. 2(2) (Dec. 21, 1965). These special measures are to end "after the objectives for which they were taken have been achieved." *Id.* Similarly, the Convention on the Elimination of All Forms of Discrimination Against Women authorizes "temporary special measures aimed at accelerating de facto

should be oriented towards transformative goals instead of being restricted by arbitrary timeframes.

Structural reforms can also disempower institutions that deprive subordinated people of time and empower alternatives.³⁸⁴ For example, if Congress wishes to respect the time of minority voters without harmful interference from federal courts, its voting legislation could include provisions that strip the authority of federal courts to review measures protecting voting rights.³⁸⁵ Additionally, since racialized policing and mass incarceration disproportionately burden the lifetimes of Black Americans, transferring responsibilities associated with policing and jails to social service providers or community organizations that possess cultural and professional competencies, while lacking white supremacist and carceral logics, could help alleviate temporal deprivations and enable constructive uses of time.³⁸⁶ Structural reforms should strive to minimize the capacity of dominant institutions to devalue marginalized people's time and maximize the control that marginalized people have over their own time.

In conclusion, King's precept that time should be constructively used to promote democracy instead of destructively enabling stagnation holds particular significance in this pivotal moment for U.S. democracy.³⁸⁷ Congress and the Biden Administration must use time constructively by implementing structural reforms. Any antagonism or complacency on racial justice issues from these entities would itself constitute a destructive misuse of time.

equality" that "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved." G.A. Res. 34/180, annex, art. 4(1) (Dec. 18, 1979) (emphasis omitted).

³⁸⁴ See Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1721 (2021) (discussing "disempowering" reforms).

³⁸⁵ *Id.*

³⁸⁶ See generally Gomez, *supra* note 26 (discussing the temporal deprivations of racialized policing); GILMORE, *supra* note 24 (discussing the same for prisons); Brendese, *supra* note 24 (discussing the same for mass incarceration).

³⁸⁷ King, Letter From a Birmingham Jail, *supra* note 42.