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Racial Transitional Justice in the United States

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RACIAL TRANSITIONAL JUSTICE IN THE UNITED STATES

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Abstract

For years, the United States government has endorsed transitional justice approaches abroad while ignoring the need for transitional justice at home. Recently, racial justice uprisings have shifted U.S.-based discussions of transitional justice, from gazing outward toward the international community to attending to the legacies of slavery, segregation, and white supremacy at home. This chapter demonstrates that the centuries-long oppression of Black Americans is precisely the kind of massive human rights violation that necessitates a systematic transitional justice response. Using historical, legal, and comparative analyses, it reveals that the United States has employed its own versions of transitional justice mechanisms and debates without recognizing them as such. The author argues that Americans should not uncritically adopt transitional approaches from elsewhere, but that they should reckon with systemic racism, recognize that the United States is still 'developing' in this respect, and consider how transitional justice could be implemented in the American context.

Keywords: transitional justice, racial justice, democracy, truth commissions, reparations, reconciliation, constitutional law, comparative law, Supreme Court, American exceptionalism

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INTRODUCTION

Transitional justice is a field that aims to help societies overcome conflict and oppression.[1] Its goals include promoting accountability for wrongdoings, redressing and ensuring the non-repetition of injustices, opening political and social space to marginalized people, and facilitating societal reconciliation. Societies pursue these goals through a set of measures implemented to address the legacies of massive human rights abuses, including truth and reconciliation commissions, criminal prosecutions, reparations programs, and institutional reforms.[2]

For years, the United States government has endorsed transitional justice approaches abroad, such as in Colombia, Congo, and Sri Lanka,[3] while ignoring the need for transitional justice at home. Internationally, the United States has been exempted from the political and legal considerations applied to other transitional societies, despite this country's frayed democracy and centuries-long imposition of state-sponsored racial violence.

Certainly, there have been attempts to challenge this trend. From 1989 until his retirement in 2017, Rep. John Conyers, Jr., introduced a bill (H.R. 40) in every Congress to study reparations for slavery. Civil rights leader Sherrilyn Ifill's 2007 book "On the Courthouse Lawn" elaborated transitional justice principles for American struggles with racism.[4] Ta-Nehisi Coates' 2014 *Atlantic* article reminded Americans that broader reparations are still pending more than two centuries after freedwoman Belinda Royall successfully petitioned for a pension from her former enslaver's estate.[5] Religion professor Anthony Bradley's 2018 essay applied the "Chicago Principles of Post-conflict Justice" to individual American states.[6] Yet, despite these efforts, the United States government has proceeded as if transitional justice does not belong "here."

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[1] *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS 31 (2012); COLLEEN MURPHY, THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE (2017); Laurel E. Fletcher & Harvey M. Weinstein, *Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals*, 7 J. HUM. RTS. PRAC. 177 (2015).

[2] Not all processes labeled as "transitional justice" are designed to achieve these goals. Rodrigo Uprimny & Maria Paula Saffon, INT'L PEACE RES. INST., USES AND ABUSES OF TRANSITIONAL JUSTICE DISCOURSE IN COLOMBIA (June 2007) (distinguishing between "manipulative" and "democratic" transitional justice). Furthermore, critical scholars question whether transitional justice can advance all its goals simultaneously and to an equal extent. Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95 (2008).

[3] U.S. DEPT. STATE, 2015–16 ADVANCING FREEDOM AND DEMOCRACY REPORT, https://2017-2021.state.gov/2015-16-advancing-freedom-and-democracy-report/index.html#_edn60.

[4] SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY XV (REV. ED. 2018).

[5] Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631.

[6] Anthony Bradley, *Finally Healing the Wounds of Jim Crow*, FATHOM MAG. (July 11, 2018), https://www.fathommag.com/stories/finally-healing-the-wounds-of-jim-crow.

However, two recent and interrelated events, each emerging out of this country's struggles with white supremacy, have highlighted the relevance of transitional justice approaches in the United States.

In January 2021, Donald Trump's attempts to overturn the results of a democratic election culminated in a violent insurrection at the United States Capitol. Americans have been debating whether to hold Trump and his enablers accountable or whether to 'move on' from the four years of his presidency in the interest of social stability. This tension between the pursuit of stability and accountability can be understood as a transitional justice dilemma that arises as societies seek to surmount conflict, known internationally as the "peace versus justice dilemma."

In addition to a violent insurrection, the United States in mid-2020 saw the largest racial justice demonstrations in its history. These protests reissued demands to address policing and other state violence, implement truth and reconciliation processes to acknowledge historical and ongoing injustices, and obtain reparations for decades and centuries of racist oppression. Such demands fundamentally call for transitional justice processes that deal with the legacy and threat of white supremacy in the United States.

While Americans increasingly speak of truth commissions and reparations, they typically do so without engaging with the broader field of transitional justice. When transitional justice does enter American political discourse, it is seldom by name and most often by reference to the work of individual countries, particularly South Africa and Canada. Yet, the international field of transitional justice offers broader insights for the United States to consider.

For example, transitional justice has provided a useful vocabulary and normative framework for other societies to center the values of accountability, redress, non-repetition, and reconciliation in their recoveries from conflict and oppression. American legal and political decisionmaking could benefit from a transitional justice perspective, since the failure to prioritize these values may be an important reason why the United States has struggled to surmount its racist history.

Furthermore, transitional justice is a holistic notion that has been used to connect individual laws and policies as elements of an integrated transition process.[7] The United States struggles with racism in part because government agencies and institutions such as the Supreme Court believe that the brief implementation of discrete measures has resolved centuries of racial subordination, when transitional justice is a complex, intergenerational process.

[7] Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT'L AFF. 17, 19 (2006); de Greiff, *supra* note 1, at 34; Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *The Justice Balance: When Transitional Justice Improves Human Rights and Democracy*, 32 HUM. RTS. Q. 980, 982 (2010).

This chapter examines America's struggles with anti-Black racism through an international transitional justice lens.[8] Building on the author's earlier work,[9] it draws upon both transitional justice *practice*, which involves developing and implementing processes to overcome systematic human rights abuses, and transitional justice *theory*, which identifies the promises and limitations of transitional approaches and distinguishes between desirable and undesirable forms of transitional justice.

The chapter begins by discussing the phenomenon of American exceptionalism that has allowed the United States to evade transitional justice scrutiny. It then presents historical, legal, and comparative perspectives that situate the United States in a racial transitional justice context. In so doing, this chapter offers a vision for how the transitional justice experiences of other countries could inform the United States' struggles with anti-Black racism.

I. AMERICAN EXCEPTIONALISM IN TRANSITIONAL JUSTICE

The United States is a country like many others struggling to leave conflict and oppression behind. The United States has sought to move beyond a racial past marked by structures of racial domination. And it is experiencing an interim period of transition that is neither exactly the past, nor yet the desired racially just future.

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[8] This chapter focuses on anti-Black racism because of its historical and contemporary significance to the United States. NELL IRVIN PAINTER, THE HISTORY OF WHITE PEOPLE 396 (2010). At the same time, it is necessary to grapple with the treatment of Indigenous/Native Americans, as well as other racialized groups, including Latinx/Chicanx Americans, and Asian Americans, in order to redress the past, reimagine the future, and build cross-racial solidarity. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019). Future works may build upon this chapter's analysis by engaging additional histories and bodies of law such as the Cherokee Cases, the Chinese Exclusion Cases, and the Insular Cases. Blackhawk, *supra* at 1820–25 (discussing the Cherokee Cases); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13 (2003) (discussing the Chinese Exclusion Cases); Aziz Rana, *How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire*, YALE L.J.F. (Nov. 2, 2020) (discussing the Insular Cases).

[9] *See generally* Yuvraj Joshi, *Racial Equality Compromises*, 111 CALIF. L. REV. __ (2023) (using transitional justice theory to demonstrate that American racial equality decisions are compromises) [hereinafter Joshi, *Racial Equality Compromises*]; Yuvraj Joshi, *Racial Justice and Peace*, 110 GEO. L.J. __ (2022) (examining American racial equality decisions as versions of the peace versus justice dilemma); Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181 (2021) [hereinafter Joshi, *Racial Transition*] (evaluating American racial equality decisions in light of transitional justice values); Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1 (2020) [hereinafter, Joshi, *Affirmative Action as Transitional Justice*] (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 American affirmative action debate); Yuvraj Joshi, *Does Transitional Justice Belong in the United States?*, JUST SEC. (July 13, 2020), https://www.justsecurity.org/71372/does-transitional-justice-belong-in-the-united-states/ (proposing a transitional justice analysis of anti-Black racism in the United States); Yuvraj Joshi, *MLK Believed 'No Justice, No Peace'*, JUST SEC. (Jan. 18, 2021), https://www.justsecurity.org/74235/mlk-believed-no-justice-no-peace/ (linking chants of "no justice, no peace" to civil rights history and transitional justice norms).

Yet, although the United States government has sought a *transition* from slavery and Jim Crow, it has eschewed *transitional justice* in response to racist human rights violations. This chapter describes certain beliefs about American society that have prevented the widespread application of a transitional justice framework to the United States.

The United States as an 'Established' Democracy

Since its inception, the field of transitional justice has been more concerned with transitions to democracy—such as in Argentina and Chile as they emerged from dictatorships—than with transformations within 'established' democracies. According to a standard account, transitional justice is inapposite to the United States because the U.S. is assumed to be an 'established' democracy.

However, this posture rests on both an overestimation of American democracy and an underestimation of the transition process: democracy in the United States is not as 'established' as commonly assumed, democratization is a continual rather than one-time process, and transition requires more than achieving a formal democratic regime.

Claims that emphasize the United States' status as an 'established' democracy ignore the denial of basic political rights and representation from colonialism and slavery to the present day.[10] Generations of writers have shown how American democracy has been—and remains—incomplete, given the nation's lack of racial justice.[11]

In a 2004 article, political scientists Francisco González and Desmond King drew the distinction between a "restricted" democracy and "full" democracy and characterized the United States as a "restricted" democracy prior to the implementation of the 1964 Civil Rights Act and the 1965 Voting Rights Act.[12] This distinction rested on the fact that certain groups were denied civil rights protections and excluded from the voting process. However, these landmark civil rights laws have been progressively eroded by the courts, rendering the United States something still less than a full democracy today.[13]

An enduring feature of Black oppression in the United States has been a backsliding away from democracy.[14] For example, the "preclearance" requirement of the Voting Rights Act, which scrutinizes proposed voting laws in states with a history of

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[10] Dana Hedgpeth, *'Jim Crow, Indian style': How Native Americans were denied the right to vote for decades*, WASH. POST (Nov. 1, 2020), https://www.washingtonpost.com/history/2020/11/01/native-americans-right-to-vote-history/.

[11] W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860–1880 (1935); Nikole Hannah-Jones, *The 1619 Project*, N.Y. TIMES MAG. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html.

[12] Francisco E. González & Desmond King, *The State and Democratization: The United States in Comparative Perspective*, 34 BRIT. J. POL. SCI. 193, 194 (2004).

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

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

discriminatory voting practices, supports democratic transition by sustaining democratic inclusion. However, the Supreme Court's 2013 decision in *Shelby County v. Holder* struck down the coverage formula used to determine which states would be subject to this preclearance requirement, effectively nullifying the requirement pending new legislation.[15] In the wake of *Shelby County*, voter suppression laws have been enacted in several jurisdictions previously covered by the preclearance provision, as well as in other states.[16] Transition is thus better conceptualized as the maintenance of democratic rule rather than the mere attainment of a formal democratic regime.

Transition is not only a move toward democracy and the rule of law, but also charts a path toward peace and justice. In his letter from Birmingham Jail, Dr. Martin Luther King, Jr., made the distinction between a negative peace, characterized by an absence of violence, and a positive peace, characterized by the presence of justice. King expressly called for "transition from an obnoxious negative peace . . . to a substantive and positive peace, in which all men will respect the dignity and worth of human personality."[17] Recurring protests against police violence and structural racism in the United States indict the government's failures to secure such a substantive and positive peace. They remind us of the need to target our transitional efforts towards achieving a true multiracial democracy.

'Too Much' or 'Too Little' Change Since Racial Apartheid

Another set of beliefs about American society that has prevented transitional justice from being adopted in the United States is the notion that either 'too much' or 'too little' has changed since America's formal racial apartheid.

Those who claim 'too much has changed' claim that slavery, Jim Crow, and the present should not be understood as a single transition. For them, the racial challenges we face today are long removed from the past. This perspective risks overstating the changes and understating the continuities between the past and present. Undoubtedly, the United States of today is not exactly the same as the antebellum or Jim Crow United States. However, this does not preclude legacies of the wrongful past from being present in today's society. The passage of significant time and intervening events since slavery and Jim Crow have not rendered questions of racial transition obsolete.

For those believing 'too little has changed,' the language of transition or progress obscures continuities with the past and implies structural change where it does not truly exist. For them, calling the United States 'transitional' is a misnomer because it suggests that American society is overcoming, rather than reconfiguring and continuing, its racist past. This perspective reminds us that progress is not linear or guaranteed. Therefore, any

[15] Shelby Cty. v. Holder, 570 U.S. 529 (2013).

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

[17] Martin Luther King, Jr., *Letter from Birmingham Jail*, 26 U.C. DAVIS. L. REV. 835, 842 (1993).

transitional analysis of the United States must account for discontinuity and continuity, steps both forward and back, and not simply the former.

American Exceptionalist Ideology

American exceptionalist ideology depicts the United States as the leader in the global struggle for liberty. This ideology forms part of the reason why the United States has been willing to champion but not domesticate a transitional justice framework. In 1963, James Baldwin wrote about "the collection of myths to which white Americans cling: that their ancestors were all freedom-loving heroes, that they were born in the greatest country the world has ever seen."[18] Today, those same myths impede a collective recognition of the United States' violence at home and abroad.[19]

American exceptionalism presents the United States as a society founded on liberty and equality rather than settler colonialism and white supremacy. It treats the centuries of dispossession and oppression as an aberrational rather than foundational parts of American history. And it posits that any racial inequality problems were resolved with the Civil Rights era and its landmark cases and laws. The United Nations Special Rapporteur on racism, E. Tendayi Achiume, explains in *Just Security* that this exceptionalism "implicitly treats existing domestic law as a high watermark for achieving justice and equality, when this law falls short even of global human rights anti-racism standards."[20] While the United States has been exempted from transitional justice scrutiny based in part on this exceptionalism, the enduring—and increasingly international[21]—criticisms of the United States' failures to address racism should lead us to consider this country alongside others with oppressive histories.

II. Racial Transitional Justice in the American Context

A transitional perspective is necessary to make sense of racial justice and injustice in the United States. A polity committed to ridding itself of the vestiges of oppression *requires* an account of the past out of which it is emerging, the future it ought to pursue, the transition pathway between them, and the present stage of transition. Such a general theory is needed to make decisions about the legitimacy of various practices (what aspects of the past cannot be tolerated in the present?), to develop strategies (what is necessary to create a future distinct from the past?), and to determine progress (what of the past is safely behind and what is still present?).

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[18] James Baldwin, The Fire Next Time 115 (1963).

[19] Aziz Rana, *Race and the American Creed: Recovering Black Radicalism*, N+1 (Winter 2016), https://nplusonemag.com/issue-24/ politics/race-and-the-american-creed/.

[20] E. Tendayi Achiume, *The United States' Racial Justice Problem Is Also an International Human Rights Law Problem*, Just Sec. (June 5, 2020), https://www.justsecurity.org/70589/the-united-states-racial-justice-problem-is-also-an-international-human-rights-law-problem/.

[21] *UN Experts Condemn Modern-day Racial Terror Lynchings in US and Call for Systemic Reform and Justice*, UN News Ctr. (June 5, 2020),
https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25933.

Such transitional theories underpin American legal and political decisionmaking, yet the transitional bases of decisions are rarely acknowledged and sometimes even denied. Transitional justice can serve as a framework to explore and evaluate the existing approaches to democratic transition in the United States in light of a more global theory. The remainder of this chapter presents historical, legal, and comparative perspectives that situate the United States in a racial transitional justice context, thereby developing a U.S.-specific account of transitional justice.

A. Historical Transition

Colonialism and slavery were America's original sins that still haunt the nation. Slavery survived under the Constitution of 1789 and its underlying ideology of innate Black inferiority and difference permeated American life.

Following the Civil War, Reconstruction attempted to remedy slavery's wrongs. In addition to adopting three constitutional amendments, Congress enacted the nation's first federal civil rights law in 1866, and the Freedmen's Bureau Acts, which opened schools and provided funding, land, and other assistance to help create colleges and universities for the education of Black students. Because they aimed to redress harms and set the stage for reconciliation, such Reconstruction era policies would today be recognized as types of transitional justice reforms.[22]

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

With the end of Reconstruction came a new wave of white supremacist practices. Although Jim Crow laws and policies were concentrated in the South, racism and segregation were rooted nationwide. In its 1896 decision *Plessy v. Ferguson*, the Supreme Court ratified racial segregation under the "separate but equal" principle.[23] Throughout the Jim Crow era, a wide array of state laws and practices, including ostensibly "race-neutral" ones such as poll taxes, disenfranchised Black people and other racial minorities. Lynching, rape, and other forms of violence were inflicted with impunity to assert white supremacy.

The Second Reconstruction attempted to complete the unfinished work of Reconstruction. In 1954, *Brown v. Board of Education* declared racial segregation in public education unconstitutional. Although segregationists responded to *Brown* with

[22] Bernadette Atuahene, *Property and Transitional Justice*, 58 UCLA L. REV. DISCOURSE 65, 86 (2010).
[23] Plessy v. Ferguson, 163 U.S. 537 (1896).

"massive resistance," a decade later Congress enacted the 1964 Civil Rights Act (passed following racial justice protests throughout the South), which barred discrimination in federally supported programs; the 1965 Voting Rights Act (passed after the historic marches from Selma to Montgomery), which aimed to remove barriers to voting; and the 1968 Fair Housing Act (passed amid protests following Dr. King's assassination), which prohibited discrimination in the housing market.

In addition to landmark cases and laws, this Civil Rights era featured deliberative processes that might today be labeled as transitional justice. For example, the 1966 White House Conference on Civil Rights brought together over 2,400 participants and proposed reforms relating to economic security and welfare, education, housing, and administration of justice.[24] In 1968, the Kerner Commission similarly recommended reforms to employment, education, the welfare system, housing, and policing.[25] These reports proposed holistic approaches to societal transition that find support in contemporary transitional justice theory.[26] However, Lyndon B. Johnson shelved the Kerner Report's recommendations, avoiding a systematic racial reckoning and prolonging racial discontentment.

Ultimately, the Second Reconstruction yielded to a racial retrenchment, as courts and other actors abandoned previous efforts to secure racial justice. The "Southern strategy" used to attract Southern White Democrats to the Republican party helped elect Richard Nixon in 1968 and 1972 and Ronald Reagan in 1980. Their policies and appointments to the Supreme Court halted and reversed many of the gains made during the Civil Rights era. This backtrack on racial equity took various forms, from the resegregation of public schools to the development of punitive crime policies that "both responded to and moved the agenda on civil rights."[27]

In the face of a long period of racial retrenchment, the pursuit of racial justice continues. Following the mid-2020 protests, a number of U.S. cities and states have initiated truth, justice, and reconciliation processes, as well as reparations programs. Universities and theological seminaries have offered limited reparations to the descendants of enslaved people from whom they profited. However, attempts to secure broader reparations for slavery, Jim Crow practices, and ongoing discrimination have stalled. Furthermore, although transitional and racial justice frameworks acknowledge the necessity of compromise, democratic progress on issues such as policing and voting rights has been stymied by an uncompromising Republican Party as well as an unduly compromising Democratic Party.[28]

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[24] "TO FULFILL THESE RIGHTS," WHITE HOUSE CONFERENCE ON CIVIL RIGHTS (1966), https://eric.ed.gov/?id=ED032354.

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

[26] de Greiff, *supra* note 1, at 34 (transitional justice measures "are not elements of a random list" but "[r]ather, they are parts of a whole").

[27] Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 265 (2007).

[28] Joshi, *Racial Equality Compromises*, *supra* note 9.

The United States' centuries of racist violence and multiple attempts at transition do not lend themselves to easy analysis. Throughout American history, some groups sought and supported transition to a multiracial democracy, while others deliberately worked against it. Today, supporters of multiracial democracy highlight the ongoing legacies of racism while others contend that racial injustice has long disappeared and that any further attempt at transition constitutes a race-based injustice against white people. Recognizing America's racial history—including how the Reconstruction and Civil Rights periods of relative improvement employed transitional justice-type measures—is a vital step toward understanding the United States within a transitional context.

B. Legal Decisions

In the United States, no special courts were established to steer the nation away from slavery and segregation. Instead, the U.S. Supreme Court has been America's makeshift truth and reconciliation commission. Court opinions concerning racial equality are both illustrative and constitutive of transition: they offer a window into how transitional concerns shape the law and how the law shapes America's transition process. Studying these opinions can therefore help us to better understand and address the real-world dynamics of transition.

Transitional Discourses: Reckoning versus Distancing

For much of its history, the Supreme Court's decisions openly enshrined white supremacy. However, particularly since its 1954 decision in *Brown v. Board of Education*, transitional perspectives have shaped the Court's race jurisprudence. The Supreme Court's pursuit of racial transition can be characterized into two approaches—*reckoning with* and *distancing from* the past.[29]

In the Civil Rights era, the Supreme Court enforced and extended measures designed to reckon with the legacies of historical racism. For example, in 1968, a unanimous Court in *Green v. County School Board of New Kent County* said that a "freedom of choice plan," which allowed all students in a deeply segregated county to choose their school, was insufficient for "transition to a unitary, nonracial system of public education . . . ."[30] New Kent County had not satisfied its "affirmative duty" to eliminate racial discrimination "root and branch,"[31] and needed to propose "a plan that promises realistically to work, and promises realistically to work now."[32] In so holding, *Green* highlighted the need for transitional measures to be both effective and timely in order to meet judicial standards.[33]

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[29] Joshi, *Racial Transition*, *supra* note 9, at 1202–34 (developing this distinction).
[30] 391 U.S. 430, 436 (1968).
[31] *Id.* at 437–38.
[32] *Id.* at 439.
[33] *See also Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971) (recognizing that transitional measures did not have to be ideal in order to be valuable and worthwhile).

However, with the racial retrenchment and conservative appointments starting in the late 1960s, the Court's decisions shifted from reckoning with the past toward distancing from the past. The Court denied continuities between blatant racism from the antebellum and Jim Crow past, which it denounced, and racism in the present, which it discounted. It also became preoccupied with identifying a discrete end point of the transition process—the point at which America's links to its racist past would be deemed severed once and for all and "extraordinary" policies such as voter protections and affirmative action would no longer be required.

In 1991, for instance, *Board of Education of Oklahoma v. Dowell* held that desegregation decrees were not to operate "in perpetuity," regardless of whether they were needed.[34] Chief Justice Rehnquist interpreted references to "transition" in *Green* to suggest "a temporary measure to remedy past discrimination" rather than something more enduring.[35] Justice Marshall's dissent rejected *Dowell*'s preoccupation with "temporariness and permanence" because "the continued need for a [desegregation] decree will turn on whether the underlying purpose of the decree has been achieved."[36] For Marshall, that purpose was not achieved "so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist."[37]

Such insistence on end points for transition was mirrored in affirmative action and voting rights cases.[38] With a shift from reckoning to distancing, civil rights measures that were once deemed necessary and urgent were declared inappropriate and outdated—and even antithetical to the project of ensuring a racially just society. In striking down voter protections in the 2013 case of *Shelby County v. Holder*, for example, Chief Justice John Roberts declared that "[n]early 50 years later, things have changed dramatically."[39]

As protestors demand a reckoning with America's legacies of racism, the Roberts Court appears poised to leave the past behind. A distancing jurisprudence limits not just what the Court sees as constitutionally required, but what it sees as constitutionally permissible in the pursuit of transition. By painting slavery and segregation as exceptional periods that were successfully overcome, a distancing approach rejects that settler colonialism and white supremacy have been the nation's governing doctrines from the beginning and are still with us. By casting civil rights measures aside as obsolete and even detrimental, such a jurisprudence helps to maintain America's legacies of racism as well as Americans' misperceptions regarding racial equality, impeding possibilities for transition.

Transitional Dilemmas: Peace versus Justice

[34] 498 U.S. 237, 248 (1991).
[35] *Id*. at 247.
[36] *Id*. at 267 n.11 (Marshall, J., dissenting).
[37] *Id.* at 252.
[38] Grutter v. Bollinger, 539 U.S. 306, 342 (2003); Shelby Cty. v. Holder, 570 U.S. 529, 546 (2013).
[39] Shelby Cty. v. Holder, 570 U.S. 529, 547, 552 (2013).

One of the central discussions in transitional justice is the peace versus justice dilemma, characterized as the challenge to "reconcile legitimate claims for justice with equally legitimate claims for stability and social peace."[40] Transitional justice scholarship on this dilemma grapples with questions such as: What is "peace" and what is "justice"? Are peace and justice competing goals or are they compatible and even complementary? Are peace and justice of similar normative and practical importance or should one take priority over the other? Is the relationship between peace and justice inherent or is it contingent on particular circumstances?

Transitional justice scholars and practitioners have examined these questions with respect to countries other than the United States.[41] Yet, the peace versus justice dilemma also animates America's attempted transition from slavery, segregation, and white supremacy, as it seeks to balance pursuing racial equality with ensuring social stability and harmony. When Americans have disagreed about how that balance should be struck, some have called upon the courts to settle versions of the peace versus justice dilemma.

American courts have thus long faced versions of the peace versus justice dilemma without recognizing them as such. Courts have been asked to decide: Does the advancement of racial equality facilitate or impede the achievement of racial harmony? Is the potential for social unrest and disharmony a legitimate basis for limiting equality? If racial justice and peace come into tension, which should prevail?

The Supreme Court's 1958 decision in *Cooper v. Aaron* illustrates this point. *Cooper* held that Arkansas state officials, who had refused to abide by *Brown v. Board of Education*, must begin desegregating the state's public schools.[42] Rejecting a school board's proposal to delay integration by two-and-a-half years in order to maintain "public peace," the Court concluded that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."[43]

Although the field of transitional justice emerged decades after *Cooper v. Aaron*, its insights deepen our understanding of this landmark civil rights case. In *Cooper*, the Supreme Court heard arguments that can be viewed as competing transitional justice claims. For example, with respect to a peace-justice balance, the school board insisted that the justice-related interests of Black children had to be weighed against (and ultimately give way to) the justice-related interests of other students in having an operational education system as well as the peace-related interests of local communities.[44] Meanwhile, the National Association for the Advancement of Colored People (NAACP) emphasized the importance of a justice-based peace which protects the

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[40] Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 323 (2009).

[41] CHANDRA LEKHA SRIRAM & SUREN PILLAY EDS., PEACE VERSUS JUSTICE? THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA (2009).

[42] Cooper v. Aaron, 358 U.S. 1 (1958).

[43] *Id*. at 16.

[44] Brief for the Petitioners, *reprinted in reprinted in* 54 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (PHILIP B. KURLAND & GERHARD CASPER EDS., 1975) [hereinafter *Brief for the Petitioners*].

education rights of all children.[45] With respect to timing and sequencing, the school 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.[46] In contrast, the NAACP responded that further delays both denied justice to Black people and rendered enduring peace more difficult to achieve.[47] A transitional justice analysis invites us to consider the peace-justice logics that are operative in *Cooper* and other racial equality cases.

Transitional justice theory provides a basis not only for evaluating America's ongoing transition, but also for improving how courts and other segments of society pursue democratic values. At the same time, court decisions serve as valuable case studies for thinking about the racial transition project, including the different paths available to transition and the values at stake.

C. Comparative Experience

Comparative experience reveals that the centuries-long oppression of Black Americans is precisely the kind of massive human rights violation that necessitates a systematic transitional justice response. The United States is most clearly comparable with South Africa, one of the paradigmatic sites of transitional justice.[48] Both the United States and South Africa have deep histories of state-enforced and enabled racial subordination: the racist apartheid system in South Africa spanned from 1948 to 1994 (although racism in South Africa predates the apartheid system), and government-supported slavery and official segregation in the United States spanned four centuries.[49] The pre-Civil Rights United States was arguably no more an 'established' democracy than apartheid South Africa. Further understanding of the history and legacies of America's racial apartheid only bolsters such comparisons.

Countries spanning from Canada to the Philippines have taken centuries to grapple with the legacies of their past. For example, Canada's 2008 Truth and Reconciliation Commission reached back to the Residential Schools started in the 1860s, established to "aggressively assimilate" Indigenous children into Euro-Canadian culture; the mandate of Burundi's 2014 Truth and Reconciliation Commission extended to cover crimes since 1885; Mauritius' 2009 Truth and Justice Commission went back to the start of colonialism in 1638; the Commission on the Truth of Black Slavery in Brazil reached

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[45] Brief for Respondents, *reprinted in* 54 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (PHILIP B. KURLAND & GERHARD CASPER EDS., 1975) [hereinafter *Brief for Respondents*].

[46] *Brief for the Petitioners*, *supra* note 44.

[47] *Brief for Respondents*, *supra* note 45.

[48] Joshi, *Affirmative Action as Transitional Justice*, *supra* note 9 (comparing these countries as transitional contexts).

[49] This chapter compares these very different time horizons because the South African transition is widely conceptualized as a transition from the apartheid system, whereas the parameters of the American transition are not as well-theorized. To be clear, racism in South Africa predates the apartheid system, even if (as some have argued) the racist logic of colonial rule differed from that of apartheid. DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 185–96 (1993).

back to the Atlantic slave trade era in the 1500s; and the Philippines' Framework Agreement on the Bangsamoro and Transitional Justice and Reconciliation Commission reached back to pre-1521 colonization.[50]

The transitional justice canon demonstrates that historic injustices and their legacies need to be addressed, even within democracies and even without regime change. If Canada could be moved to establish a truth commission to begin grappling with racist wrongs,[51] nothing exempts the United States from doing the same. Given the denialism of American racism prevalent in the challenges to voting rights, affirmative action, and public education,[52] a national truth commission with widely disseminated findings may be necessary to establish an accurate and authoritative historical record. Such a historical record is important for countering denial about the extent and impact of systemic violence, addressing patterns of violence in reform efforts, and achieving societal reconciliation in the long-term. Until the United States takes such preliminary steps to address its "unmastered past,"[53] its transition to a multiracial democracy will be delayed as harms compound and past progress is erased.

While the United States has been involved in transitional justice responses elsewhere, insights gained from other contexts could also be applied to the United States today. For example, the implementation of truth commissions and reparations in the United States should learn from foreign examples such as South Africa and Sierra Leone, which are studied in depth in the transitional justice literature.[54] Additionally, countries such as Northern Ireland have considered demilitarization and reduction of the police force in light of sustained civil strife.[55] Their experiences may serve as case studies for the United States to engage with.

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[50] Truth & Reconciliation Comm'n of Can., *Our Mandate*, http://www.trc.ca/about-us/our-mandate.html (Canada); Beatrice Tesconi, *Burundi extends the mandate of the Truth and Reconciliation Commission to cover crimes since 1885*, ICL MEDIA REV. (Oct. 31, 2018), http://www.iclmediareview.com/31-october-2018-burundi-extends-the-mandate-of-the-truth-and reconciliation-commission-to-cover-crimes-since-1885 (Burundi); Rep. of Truth & Reconciliation Comm'n (2011), http://pmo.gov mu.org/English/Documents/TJC_Vol1.pdf (Mauritius); Márcia Leitão Pinheiro, *A Truth Commission in Brazil: Slavery, Multiculturalism, History and Memory*, 18 CIVITAS-REVISTA DE CIÊNCIAS SOCIAIS 683 (2018) (Brazil); Kristian Herbolzheimer, *The Peace Process in Mindanao, the Philippines: Evolution and Lessons Learned*, INT'L REL. SEC. NET. 17 (2015) (Philippines).

[51] The Canadian Truth and Reconciliation Commission emerged from the Indian Residential School Settlement Agreement between Residential School survivors, the Assembly of First Nations, Church bodies, and the Government of Canada. *Settlement Agreement*, https://www.residentialschoolsettlement.ca/settlement.html.

[52] The African American Policy Forum, *Welcome to the #TruthBeTold Campaign*, https://www.aapf.org/truthbetold.

[53] Joshi, *Racial Transition*, *supra* note 9, at 1247–48.

[54] Matiangai V.S. Sirleaf, *The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies*, 35 CARDOZO L. REV. 2263 (2013); Kelebogile Zvobgo, *Demanding Truth: The Global Transitional Justice Network and the Creation of Truth Commissions*, 64 INT'L STUD. Q. 609 (2020).

[55] Fionnuala Ní Aoláin, *Women, Security, and the Patriarchy of Internationalized Transitional Justice*, 31 HUM. RTS. Q. 1055 (2009).

Of course, the United States should not uncritically adopt transitional justice approaches from elsewhere. South Africa and Canada (among other countries) offer both positive and cautionary lessons for the United States to consider.[56] Transitional justice also has more fundamental limitations and needs to be considered with careful attention to specific contexts and local demands.[57] At the same time, beliefs about American democracy, progress, and exceptionalism must not place it beyond the reach of transitional justice. Americans should recognize that their nation is still 'developing' in ways that place it alongside or behind others it considers 'less developed.' If transitional justice belongs 'there,' it belongs 'here' too.

CONCLUSION

This chapter has advanced a racial transitional justice analysis of the United States for three main reasons.

First, a transitional justice lens reveals different American theories of transition and offers a way to compare these *internal* accounts of racial change in the United States. Whereas Supreme Court decisions since the 1970s have promoted a narrow transition from racial apartheid to "colorblindness," racial justice advocates such as Dr. King have offered far more expansive and emancipatory understandings of "transition from an obnoxious negative peace . . . to a substantive and positive peace."[58] Engagement with transitional justice opens new avenues for making these more critical perspectives throughout American history cognizable by law.

Second, transitional justice offers an independent *external* perspective to assess America's local theories of transition and a framework for aligning local approaches with international human rights norms. E. Tendayi Achiume counsels looking beyond the United States for guidance because "international human rights norms require and offer the foundation for a better system than the one currently in place in this country."[59] Seriously considering the external perspective of transitional justice help can reorient

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[56] Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)*, 32 DIACRITICS 33 (2002); Rosemary L. Nagy, *The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission*, 7 INT'L J. TRANS. JUST. 52 (2013).

[57] Zinaida Miller, *Transitional Justice, Race, and the United States*, JUST SEC. (June 30, 2020), https://www.justsecurity.org/71040/transitional-justice-race-and-the-united-states/.

[58] King, *supra* note 17. Enduring transitional justice measures may be necessary to manage what Derrick Bell termed "the permanence of racism." DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1993); Derrick Bell, *Racism is Here to Stay: Now What?*, 35 HOW. L.J. 79 (1991). Robert Meister similarly describes "transitional time" as a time "of indefinite duration, potentially permanent . . . ." ROBERT MEISTER, AFTER EVIL: A POLITICS OF HUMAN RIGHTS 85 (2010). 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).

[59] E. Tendayi Achiume, *The United States' Racial Justice Problem Is Also an International Human Rights Law Problem*, JUST SEC. (June 5, 2020), https://www.justsecurity.org/70589/the-united-states-racial-justice-problem-is-also-an-international-human-rights-law-problem/.

American law toward a better internal approach, one that learns from other countries' experiences of transition and supports transnational racial justice struggles.

Third, transitional justice not only recommends broader remedies than American civil rights law but may be necessary for the kinds of *structural* changes that the Black Lives Matter movement is demanding.[60] Protesters today are not demanding discrete remedies for discrete harms. Instead, they are calling for a comprehensive and coordinated transition process that deals with the legacy and threat of white supremacy in the United States. Using a transitional justice framework, redirecting resources from policing could be a way of funding reparations for slavery, Jim Crow, and ongoing racism. It could also be a way of redressing the harms of policing. Thus, 'defunding the police' may be both a means to reparations and a form of repair.

In short, the United States needs an integrated transitional justice strategy—one that pursues reparations and policing reform alongside affirmative action, voting rights, political and judicial reform, and other structural changes. None of these changes alone can overcome white supremacy, yet all of them working in tandem can place the United States on a more democratic path. Transitional justice can help guide this effort.

[60] Movement for Black Lives, *Vision for Black Lives*, https://m4bl.org/policy-platforms/.