

Fulfilling the Promises of Our Preamble: A Holistic Approach to Transitional Justice in the United States

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ABSTRACT

The murder of George Floyd sparked renewed advocacy around racial justice. However, many Americans responded defensively to the increasingly widespread recognition of systemic racism and police brutality against Black Americans. Backlash to increased calls for racial justice manifested in the passage of anti-critical race theory bills by multiple states, the enactment of the Patriotic Education Commission by President Trump, and other efforts to quell recognition of racial inequality in the United States. These emblematic events demonstrate the consequences of the United States failing to fully acknowledge and atone for its history of slavery and racial discrimination.

Drawing from case studies that have implemented transitional justice schemes, this Note argues for the adoption of a responsive, holistic transitional justice scheme by the federal government. Such an approach, this Note contends, will position the United States on a path to achieving lasting justice, reconciliation, and equality. To achieve this end, the Note recommends amending the Constitution, establishing a commission on truth and history, re-examining the way we teach history in schools, and providing reparations. Thus, the Note offers a novel contribution to the literature on reparations and racial justice by demonstrating the efficacy of pairing reparations and a truth and history commission with education policy and constitutional amendments. The path to achieve transitional justice goals in the United States will be a long one, but as this Note demonstrates, this approach presents a viable means of fully achieving these goals. Discussing holistic transitional justice in the United States and developing strategies within this framework lay the first bricks in the path to achieve lasting justice, reconciliation, and equality in the United States.

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INTRODUCTION

A prominent Argentine journalist said, “People always ask, ‘Why reopen wounds that have closed?’” He responds, “Because they were badly closed. First you have to cure the infection, or they will reopen themselves.”¹ The United States has sustained an infected wound that it has not yet atoned for: a history of slavery and racial discrimination against Black Americans.² A recent example demonstrates how far this infection has

¹ PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 145 (2010) (ebook) (quoting an interview with Horacio Verbitsky, an Argentine journalist, in Buenos Aires (Dec. 10, 1996)).

² Brandon E. Patterson, *America Has Never Truly Atoned For Slavery. John Conyers Has Pressed the Issue for Nearly 30 Years*, MOTHER JONES (Sept. 22, 2017), <https://www.motherjones.com/crime-justice/2017/09/in-some-parallel-universe-congress-is-debating-how-america-could-atone-for-slavery-1/> [<https://perma.cc/ZJH8-VXBW>]; Sheila Jackson Lee, *H.R. 40 Is Not a Symbolic Act. It's a Path to Restorative Justice*, ACLU (May 22, 2020), <https://www.aclu.org/news/racial-justice/h-r-40-is-not-a-symbolic-act-its-a-path-to-restorative-justice/> [<https://perma.cc/AX4F-AAAF>].

spread. Within the same week that President Joe Biden signed legislation to make Juneteenth a federal holiday,³ multiple states proposed or enacted anti-critical race theory⁴ bills applying to public schools,⁵ with some bills banning discussion of the *New York Times*'s Pulitzer Prize-winning 1619 Project by Nikole Hannah-Jones.⁶ Racial disparities have denied certain individuals liberty and justice. Despite the fact that these principles are ingrained in the bloodstream of our nation, the recognition of their blatant denial to certain groups is not so ingrained. Although current United States leaders, including President Biden and Assistant Attorney General Kristen Clarke, have recognized the realities of racial discrimination in the past and present, this recent wave of state laws demonstrates that many Americans do not. President Biden's time in office will soon come to an end, and the experiences of other countries show that the systems and cultures that deny these realities in the United States will likely remain unless the federal government, including President Biden, takes the proper steps to set itself on a path toward lasting reconciliation, justice, and equality.⁷

Recently, the movement for racial justice has gained renewed prominence. In 2020, the murder of George Floyd at the hands of the police

³ Kevin Freking, *Biden signs bill making Juneteenth a federal holiday*, THE ASSOCIATED PRESS (June 17, 2021), <https://apnews.com/article/apnews.com/article/biden-juneteenth-federal-holiday-9bb62a3448376e05d87ac79cf27970d2> [<https://perma.cc/J3EP-C642>] (“Juneteenth commemorates June 19, 1865, when Union soldiers brought the news of freedom to enslaved Black people in Galveston, Texas — two months after the Confederacy had surrendered.”).

⁴ Critical race theory is an “intellectual . . . movement and loosely organized framework of legal analysis based on the premise that race is not a natural, biologically grounded feature of physically distinct subgroups of human beings but a socially constructed . . . category that is used to oppress and exploit people of colour.” The Editors of Encyclopaedia Britannica, *Critical Race Theory*, BRITANNICA (Sept. 21, 2021) <https://www.britannica.com/topic/critical-race-theory> [<https://perma.cc/3FFT-V4G3>].

⁵ Some states have banned critical race theory in name, while others have banned topics similar to the drafters' conception of critical race theory, such as divisive topics. *See, e.g.*, 2021 Bill Tracking NC H.B. 324. *See* Char Adams, Allan Smith & Aadit Tambe, *Map: See which states have passed critical race theory bills*, NBC NEWS (June 17, 2021, 2:54 PM), <https://www.nbcnews.com/news/nbcblk/map-see-which-states-have-passed-critical-race-theory-bills-n1271215> [<https://perma.cc/5CWX-98UH>]; *see also* Ashley Harding & Zachery Lashway, *Florida Board of Education adopts rule banning 'critical race theory' in public schools*, NEWS4JAX, https://www.news4jax.com/news/local/2021/06/10/florida-board-of-education-set-to-vote-on-change-in-teaching-guidelines/?fbclid=IWAR2Ynr1tiOxib73EEASemVWEVU6xU0ZSgcmv_1n1RgVO2R_5ZLb2EPKC0pM [<https://perma.cc/UGT4-8VTM>]; Ibram X. Kendi, *There Is No Debate Over Critical Race Theory*, THE ATLANTIC (July 9, 2021), (June 11, 2021, 12:17 PM) [<https://perma.cc/HVM2-AFXW>]. Lawmakers behind recent bills may have had different definitions of critical race theory in mind, as critical race theory is not traditionally taught in grade school. Phil McCausland, *Teaching critical race theory isn't happening in classrooms, teachers say in survey*, NBC NEWS (July 1, 2021), <https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945> [<https://perma.cc/2A96-ZJ2A>].

⁶ *The New York Times*'s Pulitzer Prize-winning 1619 Project “aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.” *The 1619 Project*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/4VVJ-DRBZ>].

⁷ HAYNER, *supra* note 1, at 145.

caused many Americans to realize that the United States is in dire need of racial justice and healing.⁸ This realization has permeated popular culture and built momentum for social change. This recognition cannot be a passing trend; rather, it must be a driving force in addressing racial inequality in the United States and the history that brought the nation to this point to place the country on a path toward lasting change.⁹ The United States must no longer hide behind the ideals of its Constitution while ignoring its failure to afford individuals liberty and justice in practice. This nation must do more in order to truly stand for liberty and justice for *all* and work toward forming a more perfect union as its Preamble instructs.¹⁰

This Note argues that the United States must adopt a responsive, holistic transitional justice (“TJ”) scheme. In 2004, the Secretary General of the United Nations (“UN”) defined TJ as the “full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹¹ A holistic approach to TJ requires the components of the scheme to work in tandem.¹² Informed by the example of other countries,¹³ this Note recommends that the components of a TJ scheme

⁸ George Floyd’s murder, along with many other violent acts committed against Black Americans that were brought to the media’s attention around the same time, re-ignited the American public’s awareness of the realities of violence against Black people, systemic racism, and implicit bias in the United States. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/7D7G-DGFR>]; Michelle Garcia, *The Monumental Impact of George Floyd’s Death on Black America*, NBC NEWS (May 25, 2021), <https://www.nbcnews.com/news/nbcblk/monumental-impact-george-floyds-death-black-america-rcna1021> [<https://perma.cc/P2D9-RKBU>].

⁹ See HAYNER, *supra* note 1, at 145.

¹⁰ U.S. CONST., pmbl.

¹¹ Pablo De Greiff, *A Normative Conception of Transitional Justice*, POLITORBIS, NO. 50, 2010, 17 [hereinafter De Greiff, *Normative Conception*] (quoting U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004)); see also U.N., *What is Transitional Justice?: A Backgrounder*, U.N. 1 (Feb. 20, 2008), https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/26_02_2008_background_note.pdf [<https://perma.cc/B9ZK-5EBW>] [hereinafter U.N., *What is Transitional Justice?*].

¹² See, Alexander L. Boraine, *Transitional Justice: A Holistic Interpretation*, 60 J. INT’L AFFS., 17, 19, 27 (2006) (illustrating how TJ integrates various processes and mechanisms into a single approach); De Greiff, *Normative Conception*, *supra* note 11, at 17–19 (discussing how TJ involves a set of measures used together to deal with human rights abuses).

¹³ The implementation of TJ models in other countries instructs that it is important to include the voices of the country’s general populace in creating a TJ model specific to its issue(s). See, e.g., Boraine, *supra* note 12, at 17 (“Through truth-telling, the commission attempts to document and analyze the structures and methods used in carrying out illegal repression, taking into account the political, economic and social context in which these violations occurred. . . . One of the objectives of the TRC was to ‘restore the human and civil dignity of victims by granting them an opportunity to relate their own accounts of the violations of which they were the victims.’”); *Epilogue: Beyond ‘Memory Laws’: Toward a General Theory of Law and Historical Discourse*, in LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 418 (Eric Heinze, U. Belavusau & A. Gliszczyńska-Grabias eds., 2017) [hereinafter *Beyond Memory Laws*]; HAYNER, *supra* note 1, at 5–6.

implemented in the United States include amending the Constitution, enacting policies to create a commission on truth and history, re-examining the way history is taught in schools, and providing reparations. In addition to offering these policy recommendations, this Note analyzes the symbolic and practical efficacy of each proposed component.¹⁴ Thus, the Note presents a novel contribution to the voluminous literature on reparations and racial justice¹⁵ by proposing a holistic approach to TJ in the United States that not only includes reparations and a truth and history commission, but also recommends education policy changes and a constitutional amendment. As this Note demonstrates, such an approach would further lasting justice, reconciliation, and equality in the United States.

Part I provides a brief overview of TJ theory and South Africa's model for TJ as a baseline for the goals and methods of modern TJ. Part II discusses why TJ is well-suited to the United States, providing background about the appropriate timing of TJ, the significance of the expressive value of the law and history, and the importance of context and a nation's consultation of its people in creating a TJ model. By looking to TJ models in other countries, as well as an initiative begun independently in the United States, Part III makes policy recommendations about the components of the holistic TJ model that should be adopted in the United States. Part III. A discusses changes that should be made to the United States Constitution, while Part III. B explains the necessity of an official commission on truth and history. Part III. C examines how history should be taught in public schools in furtherance of the goals of TJ, and Part III. D explains the necessity of reparations in light of these goals.

I. WHAT IS TRANSITIONAL JUSTICE?

This Note defines TJ as the process a society uses to acknowledge a legacy of abuse, help prevent future abuse, and achieve justice and reconciliation.¹⁶ The main goals of TJ go hand-in-hand with its definition: truth recovery, the promotion of democracy, accountability, institutional reform,

¹⁴ See *infra* Section II.B.

¹⁵ See, e.g., PABLO DE GREIFF, REPARATIONS AS JUSTICE 452 (Oxford Handbook on Reparations 2006) [hereinafter DE GREIFF, REPARATIONS AS JUSTICE]; HAYNER, *supra* note 1; WILLIAM DARITY, THE BLACK REPARATIONS PROJECT: A HANDBOOK FOR RACIAL JUSTICE (2023) (ebook); Andrew Valls, *Racial Justice as Transitional Justice*, 36 POLITY 53 (2003).

¹⁶ Various definitions of TJ exist in current scholarship, and the term itself is subject to controversy. This Note uses the general definition articulated by the former UN Secretary-General. U.N. Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) (“The notion of ‘transitional justice’ . . . comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”); see also De Greiff, *Normative Conception*, *supra* note 11, at 17 (referring to the Secretary-General’s definition of TJ in the aforementioned report to define TJ); Boraine, *supra* note 12, at 17 (“Despite the fact that ‘transitional justice’ has become a widely accepted term, there nevertheless remains confusion about this concept.”).

and reparations.¹⁷ A TJ process may be necessary because simply burying the past forces a society to re-build itself on a shaky “foundation of blind, denied, or forgotten history.”¹⁸ Also, even if a holistic TJ process does not immediately fulfill TJ goals to the fullest extent, it is still worth the effort because it places a nation on a path to achieve TJ goals in the future.¹⁹

The field of TJ has expanded its scope and methods since its origin.²⁰ Today, countries like Australia, Guatemala, and South Africa have adapted TJ policies to fit social justice measures and redress legacies of systemic injustice, focusing on abuses tied to long-term exclusions created by racial, socio-economic, or gender inequality.²¹ A TJ model implemented in the United States would follow this modern conceptualization of TJ.

A. *The Demonstrable Effectiveness of a Holistic Approach to Transitional Justice*

TJ should take a holistic approach and involve civil rights, community participation, conflict resolution, and socioeconomic and redistributive justice in order to effectively address historical marginalization.²² Elements of a holistic approach to TJ often include criminal prosecutions,²³ truth commissions, reparations programs, memorialization efforts, and gender justice.²⁴ This list is not exhaustive, and the field has become more diverse because of creative solutions developed in response to different contexts.²⁵

¹⁷ Boraine, *supra* note 12, at 19–25; *see also* U.N., *What is Transitional Justice?*, *supra* note 11, at 1 (“Transitional justice is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses. A transitional justice approach thus recognizes that there are two goals in dealing with a legacy of systematic or massive abuse. The first is to gain some level of justice for victims. The second is to reinforce the possibilities for peace, democracy, and reconciliation. To achieve these two ends, transitional justice measures often combine elements of criminal, restorative, and social justice.”).

¹⁸ HAYNER, *supra* note 1, at 4.

¹⁹ *See* Boraine, *supra* note 12, at 17, 27 (illustrating that transition can bring into focus difficulties that need to be surmounted on the path towards democratic progress and stating that the past must be dealt with during the transition period).

²⁰ U.N., *What is Transitional Justice?*, *supra* note 11, at 1, 2 (stating that TJ has grown and transformed as transitional contexts have shifted from post-authoritarian to post-conflict societies).

²¹ *Id.* at 2.

²² Lisa Laplante, *Plural Justice: A Holistic Approach to Transitional Justice and Peacebuilding*, PEACELAB 1 (Oct. 31, 2018), <https://peacelab.blog/2018/10/plural-justice-a-holistic-approach-to-transitional-justice-and-peacebuilding> [<https://perma.cc/P67Q-7Z57>].

²³ The issues the U.S. faces are often systemic and many wrongs were committed too long ago to reconcile effectively through individual prosecutions; thus, it may not make sense to advocate for a judicial component in the U.S.

²⁴ U.N., *What is Transitional Justice?*, *supra* note 11, at 3–4; *What is Transitional Justice?*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 1 (2009), <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [<https://perma.cc/78MG-A6VH>] [hereinafter ICTJ, *What is Transitional Justice?*].

²⁵ *See* ICTJ, *What is Transitional Justice?*, *supra* note 24, at 2 (“New practical challenges have forced the field to innovate . . .”).

Based on the experiences of various countries, there is a general consensus in TJ scholarship that a holistic approach is more effective than a piecemeal one.²⁶ The UN also considers a successful approach to TJ to be holistic.²⁷ Northern Ireland's initial approach provides a concrete example of the flaws of a piecemeal approach. Northern Ireland suffered political violence involving armed groups and the United Kingdom's security forces from the late 1960s until the 1998 Peace Agreement.²⁸ Following the conflict, multiple separate bodies were established and existing entities were asked to investigate past abuses and violations.²⁹ At least initially, no single mechanism was established with the purpose of investigating its history comprehensively and systematically.³⁰ The resulting "'patchwork and piecemeal' nature of [Northern Ireland's TJ] architecture" contributed to "undermin[ing] the confidence and trust of victims and affected communities in the ability of . . . institutions to deliver truth, justice and reconciliation."³¹ Years of practice suggest that TJ should be holistic to be most effective, and that to be holistic means that the program should include several components that reinforce and complement each other.³²

A holistic approach to TJ is necessary not only because each element serves a certain function in advancing the goals of TJ, but also because each component may not be able to reach its full level of effectiveness without the others. Considering possible consequences of implementing one element without the others clarifies this logic and demonstrates the importance of the holistic model.³³ For example, despite the individual significance of truth and history commissions, one study found that truth commissions employed alone had a negative impact on democracy and human rights.³⁴ The UN has similarly cautioned that "in isolation from efforts to punish abusers, reform institutions, and repair victims, [truth-telling] can be viewed as nothing

²⁶ See De Greiff, *Normative Conception*, *supra* note 11, at 18; HAYNER, *supra* note 1, at 26.

²⁷ Rebekka Friedman & Andrew Jillions, *The pitfalls and politics of holistic justice*, 6 GLOBAL POL'Y 141, 141–150 (2015).

²⁸ AMNESTY INTERNATIONAL, NORTHERN IRELAND: TIME TO DEAL WITH THE PAST 9, 12 (2013), <http://www.amnesty.org/en/library/info/EUR45/004/2013/en> [<https://perma.cc/5JJN-ABUG>] [hereinafter AMNESTY].

²⁹ *Id.* at 6.

³⁰ The various mechanisms that were in use included "the Historical Enquiries Team (HET), which is part of the Police Service of Northern Ireland and reviews deaths arising from the violence; the Office of the Police Ombudsman for Northern Ireland (OPONI), an independent body that is able to investigate historical allegations of misconduct by the police; coroners' inquests, which have powers to establish who the deceased person was, when, where and how they died; public inquiries, which have been established in a small number of cases; and the Police Service of Northern Ireland (PSNI), which carries out criminal investigations into historical cases, often as a result of evidence having been uncovered by one of the preceding mechanisms." *Id.* at 6-7.

³¹ Friedman & Jillions, *supra* note 27, at 146 (quoting AMNESTY, *supra* note 28, at 6).

³² U.N., *What is Transitional Justice?*, *supra* note 11, at 3; see also ICTJ, *What is Transitional Justice?*, *supra* note 24, at 2.

³³ U.N., *What is Transitional Justice?*, *supra* note 11, at 4.

³⁴ *Id.*

more than words.”³⁵ On the flip side, instituting a reparations program in the absence of ties to other TJ elements like a truth commission could be perceived as “blood money,”³⁶ meaning an effort to buy the acquiescence or silence of victims.³⁷ For example, following the end of a repressive regime in Malawi, a National Compensation Tribunal, albeit one “shrouded in secrecy” and administrative hurdles, was instituted and then used as an excuse not to address the nation’s history further or to establish a truth commission, as the public had wished.³⁸ When a reparations commission was established in Brazil after the end of military rule, one of the most valuable incidental benefits of the commission to many was preserving “historical truths and collective memory[.]” and fifteen years later, rights activists and victims’ families were advocating for a national truth commission to uncover the full truth.³⁹ To avoid these gaps in efficacy, TJ components must complement each other. For example, truth commissions in Chile, Argentina, and Morocco directly instructed their respective reparations processes, which is a step towards a holistic TJ process. Many commissions have made increasingly specific recommendations regarding reparations, and some countries have implemented the commission’s recommendations fairly quickly and accurately.⁴⁰

In a similar vein, the experiences of various countries illustrate the importance of developing societal consciousness about the importance of TJ initiatives, including truth and reparations, to ensure their effectiveness and lasting impact. For instance, since populations in Morocco and Chile already desired TJ programs, their policymakers were amenable to the swift implementation of significant programs.⁴¹ However, in countries like South Africa, Sierra Leone, El Salvador, and Haiti, where the general populace did not have much political will for victim reparations, and policymakers did not prioritize victim reparations, the programs fell short despite weighty insistence from victim groups and organized civil society.⁴² In addition to this setback, in South Africa, the failure of the government to commit to a more rigorous reparations program implementing the recommendations of the Truth and Reconciliation Commission created anger and bitterness.⁴³ These sentiments negatively colored the perception of the success of the Truth and Reconciliation Commission.⁴⁴ To avoid these issues, countries need to apply

³⁵ *Id.*; HAYNER, *supra* note 1, at 166.

³⁶ U.N., *What is Transitional Justice?*, *supra* note 11, at 4.

³⁷ *Id.*; HAYNER, *supra* note 1, at 166, 178.

³⁸ HAYNER, *supra* note 1, at 178–79 (quoting Diana Cammack, *Reparations in Malawi*, in THE HANDBOOK OF REPARATIONS 242 (2006)).

³⁹ *Id.* (quoting Ignacio Cano and Patrícia Salvão Ferreira, *The Reparations Program in Brazil*, in THE HANDBOOK OF REPARATIONS 133 (2006)).

⁴⁰ *Id.* at 5, 22, 163, 166–68.

⁴¹ *Id.* at 163.

⁴² *Id.*

⁴³ *Id.* at 176–77.

⁴⁴ *Id.*

the elements of TJ in tandem, which includes prioritizing reparations as an essential part of the strategy.

B. *South Africa: A Modern Paradigm for Transitional Justice*

Despite its flaws, South Africa's TJ model is considered a paradigmatic model of modern TJ and is a model from which the United States can learn.⁴⁵ The strengths of South Africa's model include having mechanisms to reckon with its past; a solid, though imperfect, education infrastructure; a democratic system; and refraining from dispersing a state-mandated historical narrative.⁴⁶ Overall, one of the greatest benefits of South Africa's process of which the United States should take note is its vision for the future and belief in the possibility for reform and improvement.⁴⁷ South Africa's Truth and Reconciliation Commission and Constitution work toward these goals, with its Constitution acknowledging the past and creating the opportunity for progress to both rectify past wrongdoings and work toward a new vision for the future.⁴⁸ Scholars in the field point to South Africa's Truth and Reconciliation Commission as one of the strongest, most sophisticated, and most comprehensive truth and history commissions.⁴⁹ Section I.B.1 discusses South Africa's Truth and Reconciliation Commission and Section I.B.2 addresses how other truth commissions have built on South Africa's Commission.

1. *South Africa's Truth and Reconciliation Commission*

South Africa's Truth and Reconciliation Commission⁵⁰ was established in 1995⁵¹ with the objective of "promot[ing] national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions

⁴⁵ Lindsay Harroff, *Lessons from Truth and Reconciliation Commissions in South Africa, Kenya, and the United States for Transitional and Restorative Justice*, 28 KAN. J.L. & PUB. POL'Y 527, 538 (2019) (quoting CLAIRE MOON, NARRATING POLITICAL RECONCILIATION: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2008)).

⁴⁶ Elizabeth A. Cole & Karen Murphy, *History Education Reform, Transitional Justice, and the Transformation of Identities*, in IDENTITIES IN TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 353 (Paige Arthur ed., 2010).

⁴⁷ See David Marchese, *What Can America Learn from South Africa About National Healing?*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/interactive/2020/12/14/magazine/pumla-gobodo-madikizela-interview.html> [<https://perma.cc/ZYN3-Q228>].

⁴⁸ See *infra* Section IV.A.

⁴⁹ HAYNER, *supra* note 1, at 4, 27–28; Harroff, *supra* note 45, at 538.

⁵⁰ For more on the establishment of South Africa's Truth and Reconciliation Commission, see Promotion of National Unity and Reconciliation Act 34 of 1995, <https://www.justice.gov.za/legislation/acts/1995-034.pdf> [<https://perma.cc/YDA9-2CQN>]; S. AFR. (INTERIM) CONST., 1993, ch. 15; see also *Legal Background to the Truth and Reconciliation Commission*, TRUTH AND RECONCILIATION COMM'N, <https://www.justice.gov.za/trc/legal/index.htm> [<https://perma.cc/E6A4-9PUL>].

⁵¹ *Official Truth and Reconciliation Commission Website*, TRUTH AND RECONCILIATION COMM'N, [justice.gov.za/trc](https://www.justice.gov.za/trc) [<https://perma.cc/E6A4-9PUL>]; Promotion of National Unity and Reconciliation Act 34 of 1995, *supra* note 50.

of the past.”⁵² These objectives were to be achieved by investigating and holding hearings for the human rights violations that occurred during apartheid, including giving voice to victims, learning their fates, and taking measures to rehabilitate, grant reparations to, and restore human dignity to victims.⁵³

One success of the Truth and Reconciliation Commission was instigating “contentious debate[,] . . . thus contribut[ing] to the creation of an agonistic deliberative public sphere.”⁵⁴ Anti-apartheid activists in South Africa “suggest that the [Truth and Reconciliation Commission]’s most important contribution was simply to remove the possibility of continued denial” of the atrocities committed during apartheid.⁵⁵ It is also important to note that although scholars consider the Truth and Reconciliation Commission to be a very important component of South Africa’s TJ process, it is only one aspect.⁵⁶

Despite its overall success and international recognition, South Africa’s TJ process was far from perfect.⁵⁷ For example, although political violence is mostly absent, South Africa still endures high crime rates,⁵⁸ socioeconomic inequities, and unequal opportunities for education, particularly in higher education.⁵⁹ The South African government “failed to implement the full recommendations from the [Truth and Reconciliation Commission], and only with great delay instituted a much smaller program.”⁶⁰

⁵² Promotion of National Unity and Reconciliation Act 34 of 1995, *supra* note 50, at § 3.

⁵³ *Id.* at § 3(1); *Official Truth and Reconciliation Commission Website*, *supra* note 51.

⁵⁴ Harroff, *supra* note 45, at 531 (quoting KATHERINE ELIZABETH MACK, FROM APARTHEID TO DEMOCRACY: DELIBERATING TRUTH AND RECONCILIATION IN SOUTH AFRICA 9 (2015)); *see also* Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making after Apartheid*, in LAUREL E. MILLER & LOUIS AUCOIN, FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 144 (2010).

⁵⁵ HAYNER, *supra* note 1, at 20–21.

⁵⁶ Harroff, *supra* note 45, at 544.

⁵⁷ *See* Ron Daniels, *The “Truth” About South Africa’s Truth and Reconciliation Commission*, INST. OF THE BLACK WORLD 21ST CENTURY (Feb 25, 2021), <https://ibw21.org/commentary/vantage-point-articles/the-truth-about-south-africas-truth-and-reconciliation-commission/> [<https://perma.cc/FN8A-VN6X>]; *see also* Cyril Ramaphosa, *Negotiating a New Nation: Reflections on the Development of South Africa’s Constitution*, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW 75 (Penelope Andrews & Stephen Ellmann eds., 2001) (“For all our emphasis on the importance of mass participation, the negotiations process was often too far removed from the everyday experiences of the majority of South Africans. . . . It became difficult under these conditions to maintain full accountability and transparency.”).

⁵⁸ Ebrahim & Miller, *supra* note 54, at 144.

⁵⁹ Cole & Murphy, *supra* note 46, at 353; *see* Saarah Surve, *Language a Barrier to Exam Success*, INDEPENDENT ONLINE (Jan. 10, 2017), <https://www.iol.co.za/news/south-africa/western-cape/language-a-barrier-to-exam-success-7370423> [<https://perma.cc/L6MY-7E3M>] (explaining that matriculation exams must be taken in English, which creates inequitable barriers for all South Africans to receive higher education).

⁶⁰ HAYNER, *supra* note 1, at 177; Marchese, *supra* note 47.

2. *Subsequent Truth Commissions Built Upon the South African Model*

Truth commissions have evolved since South Africa's Truth and Reconciliation Commission, building on its example. Two such commissions were formed in Peru and Guatemala, each building upon South Africa's example while setting new standards for conducting deeper analyses of societal and historical factors including economic discrimination and racism.⁶¹

The Peruvian Truth and Reconciliation Commission (2001-2003) was formed with the aims of improving judicial investigations, determining the conditions that had given rise to violence,⁶² drafting reparations proposals, and recommending reforms. In furtherance of these goals, the Commission collected a remarkable 17,000 statements; created an advanced database that allowed for the collection of statistics and qualitative characteristics of past violence; conducted seven in-depth regional studies and nineteen in-depth thematic studies; documented 4,600 clandestine burial sites throughout Peru—of which it exhumed three and conducted a preliminary investigation of 2,200—and helped create a long-term plan with other organizations to continue exhumations; created a reparations plan over the course of a year that included extensive consultations; produced summaries of the report in a shorter bilingual form and a book-length form; and archived its findings with the human rights ombudsman's office, which opened a historical documentation center based on the materials.⁶³ Peru's commission explicitly found that racism and economic discrimination both played a role in the nature of the violence, as evidenced by the finding that seventy-five percent of victims of violence were of indigenous identity (indicated by speaking Quechua or a different indigenous language as a mother tongue) and the fact that the majority of the victims were from the poorest areas of the country.⁶⁴

Guatemala experienced war and violence that provided the impetus for its Commission for Historical Clarification (1997-1999). In addition to traveling throughout the country to gather testimony, Guatemala's commission worked with other organizations to achieve its ends. It successfully requested declassification of thousands of documents from the US government with the help of the non-governmental National Security Archive and incorporated information from two other truth projects that had previously been initiated, the Recovery of Historical Memory Project of the Catholic Church's Human Rights Office and the Centro Internacional para Investigaciones en Derechos Humanos. Guatemala's commission also explicitly addressed racism in its report, concluding that acts of genocide were committed against groups of Mayan people and that racism was a factor

⁶¹ HAYNER, *supra* note 1, at 35–36.

⁶² Peru experienced a corrupt government, armed conflict between the government and other groups, and various serious human rights abuses. *Id.* at 36.

⁶³ *Id.* at 36–39.

⁶⁴ *Id.* at 37.

motivating armed confrontation.⁶⁵ The Commission presented its report at a public ceremony in the National Theater in Guatemala City in 1999 that was attended by thousands of people.

Three further examples of truth and reconciliation commissions in Kenya, Mauritius, and Canada further illustrate the influence of the South African model. Kenya's Truth, Justice, and Reconciliation Commission began in 2009 and covered a period of time marked with violence, from independence in 1983 until 2008. The Kenyan commission expanded its scope to include investigations of economic crimes, which it defined as violations of general socioeconomic rights.⁶⁶

Truth commissions in Mauritius and Canada reached even further into the past and across multiple generations to "tackle fundamental historical issues that help define community relationships of today."⁶⁷ Canada's Truth and Reconciliation Commission, established in 2009, addressed state abuses of the indigenous population since 1874 through forced assimilation and various forms of abuse in "residential schools." Canada began to address this legacy in 1991, issuing apologies and ultimately reaching a settlement agreement that provided reparations and established the Commission.⁶⁸ From 2009 to 2015, Canada's commission interviewed over 6,500 witnesses throughout the country; hosted seven educational events for the Canadian public about the history and legacy of the residential school system that also shared and honored the experiences of former students of residential schools and their families; and created a historical record of the residential school system.⁶⁹ The Commission ended its work in 2015 with an event at which it presented the executive summary of its findings and recommendations to further promote reconciliation between Indigenous peoples and Canadians. It released its final report later that year.

The Mauritius Truth and Justice Commission was established in 2009 to examine its colonial and post-colonial history—particularly focusing on slavery and its next incarnation in Mauritius, indentured labor—to develop a better understanding of this history's present impact and to recommend reparations for descendants.⁷⁰ The Commission issued its report in 2011.⁷¹ One of

⁶⁵ *Id.* at 33–35.

⁶⁶ *Id.* at 34, 73–74, 235–36. Unfortunately, although Kenya issued its 2,210-page report in 2013, the government has not yet acted on it or made it available through government means. Tom Maliti, *How Kenya's Truth Commission Report Became a Political Ghost*, JusticeInfo.net (May 29, 2020), <https://www.justiceinfo.net/en/44424-how-kenya-s-truth-commission-report-became-a-political-ghost.html> [<https://perma.cc/567E-68QM>].

⁶⁷ HAYNER, *supra* note 1, at 235–36; Harroff, *supra* note 45, at 552.

⁶⁸ HAYNER, *supra* note 1, at 72–73.

⁶⁹ *Truth and Reconciliation Commission of Canada*, GOV'T OF CAN., <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525> [<https://perma.cc/65VG-YMSY>] (Sep. 29, 2022).

⁷⁰ HAYNER, *supra* note 1, at 70.

⁷¹ *Report of the Truth and Justice Commission*, TRUTH & JUST. COMM'N, ii (Nov. 2011), https://www.usip.org/sites/default/files/ROL/TJC_Vol1.pdf [<https://perma.cc/2AJA-RUE6>].

its recommendations, the creation of a museum on slavery, recently came to fruition when Mauritius launched the Intercontinental Slavery Museum.⁷²

II. TRANSITIONAL JUSTICE: A FITTING SOLUTION FOR THE UNITED STATES

Based on the goals of TJ and the realities of racial inequality in the United States, TJ is a fitting solution for the United States at this moment. The United States could benefit from the important symbolic and practical advantages to implementing a TJ process, and no dramatic transition would be necessary. The United States should create its own tailored transitional justice model, based on the examples set by other countries, to achieve the TJ goals of reconciliation, justice, and equality.

A. *The Appropriateness of Timing for Transitional Justice in the United States*

Contrary to common parlance of the word “transitional,”⁷³ a drastic transition, such as a political transition or a nation coming out of violent conflict, is not necessary for TJ to take place.⁷⁴ TJ is relevant in the United States centuries after the abolition of slavery because the impact of past oppression “is still being felt by the current generation of descendants of those originally oppressed.”⁷⁵ Additionally, victims of segregation and present forms of racial discrimination are still alive and systemic marginalization continues today.⁷⁶ Confining the relevance and focus of TJ to a discrete period of time in the United States would defeat the purpose of creating lasting equality and justice because this approach would ignore continuities of discrimination and “questions of ‘historical justice[.]’”⁷⁷

Other countries not currently in a formal “transition” have implemented forms of TJ.⁷⁸ For example, in response to the State’s historical forced removal of aboriginal children from their parents that lasted until the 1970s, Australia enacted a commission in 1995 that, two years later, recommended monetary reparations and the issuance of a formal apology.⁷⁹ Ca-

⁷² Allegra Chen-Carrel, *How the Intercontinental Slavery Museum in Mauritius Promotes Peace and Justice*, STATE OF THE PLANET, COLUMBIA CLIMATE SCHOOL (Feb. 2, 2021), <https://news.climate.columbia.edu/2021/02/02/intercontinental-slavery-museum/> [<https://perma.cc/P97V-MCH5>].

⁷³ *Transitional*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/transitional> [<https://perma.cc/HC86-8ZF7>] (last visited Oct. 2, 2022).

⁷⁴ See Thomas Obel Hansen, *Transitional Justice: Toward a Differentiated Theory*, 13 OR. REV. INT’L L. 1, 2 n.5 (2011); Harroff, *supra* note 45, at 537.

⁷⁵ Hansen, *supra* note 74, at 52.

⁷⁶ Harroff, *supra* note 45, at 537 (quoting Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 361–62 (2009)).

⁷⁷ Harroff, *supra* note 45, at 537.

⁷⁸ Hansen, *supra* note 74, at 25.

⁷⁹ *Id.* at 43–44 (citing *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, THE AUSTRALIAN

nada similarly issued formal apologies and instituted a Truth and Reconciliation Commission in response to the state's forced assimilation of indigenous children and abuses against them through "residential schools" that began in 1874.⁸⁰ The delay did not detract from the necessity of taking these TJ actions and, based on these examples and the scholarship, it would not take away from TJ efforts in the United States.

B. *The Expressive Value of Law and History in the United States*

Law and history have significant expressive value in the societies they govern and in TJ policies. The United States is no exception. Justice Oliver Wendell Holmes described law as "embod[ying] the story of a nation's development through many centuries" of experience.⁸¹ Elucidating the connection between law and history, scholars have explained the nature of the law as "reflect[ing] official positions taken on past events" and "shap[ing] historical memory[.]"⁸² Law has a powerful opportunity as a "vehicle of memory"⁸³ to spotlight certain perspectives of history and to sideline alternative views according to the discretion of a person or entity with political power. Institutions like the Supreme Court, Congress, and the Executive have significant influence and authority, not only doctrinally but also culturally.⁸⁴ These entities have a great responsibility to make decisions, and to choose their rhetoric with reason and humanity, to best benefit the nation while including marginalized groups.

One clear example of the power these institutions in the United States is the Dred Scott case. In *Scott v. Sandford*, the Supreme Court affirmed and perpetuated the dehumanization of Black Americans in the United States.⁸⁵

HUM. RTS. COMM'N (1997), https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (In Australia "[i]n 1995, the Attorney General mandated the Australian Human Rights Commission . . . inquire into the state's practices until the early 1970s concerning the forcible removal of aboriginal children from their parents. In 1997, the Commission's report . . . was handed over to Parliament and made public. The report includes . . . recommendations, such as monetary compensation to the victims of forcible removal and for the Australian government officially to apologize for endorsing these practices." The Prime Minister expressed his regret for the atrocities, and a formal apology from the federal level was issued a few years later.).

⁸⁰ Hansen, *supra* note 74, at 44; HAYNER, *supra* note 1, at 72–73; *Truth and Reconciliation Commission of Canada*, *supra* note 69.

⁸¹ *The Common Law*, BRITANNICA, <https://www.britannica.com/biography/Oliver-Wendell-Holmes-Jr/The-Common-Law> [<https://perma.cc/3JDW-PXGV>].

⁸² *Beyond Memory Laws*, *supra* note 13, at 433, 416.

⁸³ *Id.* at 415.

⁸⁴ *See, e.g.*, Michael Dimock & John Gramlich, *How America Changed During Donald Trump's Presidency*, PEW RESEARCH CENTER (Jan. 29, 2021), <https://www.pewresearch.org/2021/01/29/how-america-changed-during-donald-trumps-presidency/> [<https://perma.cc/L78T-FFGZ>] (Executive); *see generally* Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. Rev. 53, 60–61 (2004) and Maxwell Bloomfield, *The Supreme Court in American Popular Culture*, 4 J. Am. Culture 1 (1981) (Supreme Court); Naomi Mezey, *Law as Culture*, 13 Yale J.L. & HUMAN. 35–67 (2001) (Congress).

⁸⁵ *See* 60 U.S. (19 How.) 393 (1857).

The Court tellingly referenced the Declaration of Independence,⁸⁶ which has much symbolic significance but little to no legal authority, demonstrating the importance that the Court placed on cultural values. The Supreme Court used the Declaration, along with legislation and beliefs from the time period in which the Declaration and Constitution were drafted, to support the proposition that African-Americans were not “citizens” under the Constitution.⁸⁷ Almost 100 years later, in *Brown v. Board of Education*, the Court overturned another racist case, *Plessy v. Ferguson*, by condemning the “separate but equal” doctrine.⁸⁸ *Brown v. Board* had an important, emotional impact on American culture in addition to tremendous doctrinal significance.⁸⁹ Similarly, TJ policies have the potential to have tremendous symbolic and practical significance in the United States.

The United States Constitution is a piece of law with significant expressive value. Constitutions often narrate a nation’s history, function as a precommitment device, and include a mission statement.⁹⁰ The United States Constitution is no exception.⁹¹

III. A HOLISTIC TRANSITIONAL JUSTICE SCHEME IN THE UNITED STATES: A PROPOSAL

To achieve lasting justice, equality, and reconciliation in the United States, this Note proposes that the United States focus on four components in its holistic TJ scheme: the Constitution, a truth and history commission, history education, and reparations. Amending the Constitution, establishing a commission on truth and history through legislation, and changing education policies are the avenues for the United States to establish cultural changes to make American society more receptive to reparations and would have their own concrete benefits. Establishing a policy for reparations would have both symbolic and practical significance in achieving TJ goals for the United States.

⁸⁶ *Id.* at 407.

⁸⁷ *Id.* at 405–08.

⁸⁸ See 347 U.S. 483, 494–95 (1954); see 163 U.S. 537, 551–52 (1896).

⁸⁹ Michael W. Combs & Gwendolyn M. Combs, *Revisiting Brown v. Board of Education: A Cultural, Historical-Legal, and Political Perspective*, 47 *How. L. J.* 627 (2004); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 *VA. L. REV.* 173 (1994).

⁹⁰ See Jeff King, *Constitutions as Mission-Statements*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 73, 73, 75, 81, 82, 85, 87–88, 98 (Denis Galligan & Mila Versteeg eds., 2013); Russell Hardin, *Why a Constitution?*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 51, 59–60 (Denis J. Galligan & Mila Versteeg eds., 2013) [hereinafter Hardin, *Why a Constitution?*]; RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM AND DEMOCRACY* 103 (2003) [hereinafter Hardin, *Liberalism*]; Lourens du Plessis, *The South African Constitution as Memory and Promise*, 11 *STELLENBOSCH L. REV.* 385, 385 (2000); GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 7 (2010); Michel Rosenfeld, *Constitutional Identity*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 756–57 (2011); *Expressing Identity*, in *COMPARATIVE CONSTITUTIONAL LAW: A GLOBAL AND INTERDISCIPLINARY APPROACH* (Mila Versteeg, David Landau & Tom Ginsburg eds., 2022).

⁹¹ For further discussion, see Section III.A.

Context, consultation, and a country-specific scheme are important in creating a transitional justice model for the United States. Despite the successes of other countries' TJ models, it is important for the United States to consider context instead of replicating existing models, as this has proven unsuccessful.⁹² The UN and International Center for Transitional Justice (ICTJ) both advocate against this approach, explaining that "there is no single formula for dealing with a past marked by massive and systematic abuse; [rather], [e]ach society . . . must . . . choose its own path."⁹³

Actively consulting and allowing the participation of the public and victims of the country in instituting TJ measures is also crucial in increasing the likelihood of success and effectiveness of the measures.⁹⁴ For example, "[p]articipation by victims during the approval of [Colombia's reparations law] influenced its content."⁹⁵ Consequently, victims' expectations about the law rose significantly and they are prepared to challenge the state if it fails to apply the law in their favor.⁹⁶

Nevertheless, scholarship demonstrates that the United States can still learn much from countries that have already taken steps to investigate their past to help determine the best course of action for the United States.⁹⁷ We have learned through practice that TJ policies are more likely to be effective "when they are based on a serious examination of prior national and international experiences."⁹⁸

A. *Amending the Constitution to Meet the Goals of Transitional Justice*

Because of the expressive value of the United States Constitution, amending it to reflect a new national identity is an important part of the TJ process. The United States Constitution is a well-known, sacred document in American culture and has symbolic significance on top of its doctrinal significance. From entertainment involving or referencing documents from

⁹² Harroff, *supra* note 45, at 542, 551, 559.

⁹³ U.N., *What is Transitional Justice?*, *supra* note 11, at 4; *see also* HAYNER, *supra* note 1, at 5, 164; Harroff, *supra* note 45, at 542, 551, 559 ("Senator Patrick Leahy's proposal for a truth commission [was] to be modeled after South Africa's Truth and Reconciliation Commission, to investigate the Bush administration's post-9/11 counter-terrorism and surveillance policies. While Leahy cited many of the terms and sentiments that are common among truth commissions, a closer analysis of his rhetoric demonstrates his truth commission, had it come to fruition, would function very differently.")

⁹⁴ U.N., *What is Transitional Justice?*, *supra* note 11, at 4; *see also* Laplante, *supra* note 22, at 1.

⁹⁵ Nelson Camilo Sánchez & Clara Sandoval-Villalba, *Go Big or Go Home? Lessons Learned from the Colombian Victims' Reparation System*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 565 (Carla Ferstman & Mariana Goetz eds., 2d ed. 2020).

⁹⁶ *Id.*

⁹⁷ *Id.* at 6.

⁹⁸ *Id.* at 4.

America's Founding period⁹⁹ to rhetoric inside and outside of politics, there is something about the document and text itself that Americans hold onto dearly.¹⁰⁰ The authority with which the document speaks, doctrinally and symbolically, could help to perpetuate the vision that TJ seeks to promote in the general populace. In addition to this authority, as seen in recent attempts to amend the United States Constitution, such as the Equal Rights Amendment, the amendment process generally involves much public discourse,¹⁰¹ which would be beneficial to the aims of the TJ process.¹⁰²

To understand the authority with which the US Constitution speaks, it is helpful to understand the typical functions of constitutions.¹⁰³ Foundational to the role and importance of a constitution is the idea that "[a] constitution both narrates and authors a nation's history [and] the manner in which we deal with the Constitution as a memory predetermines the fulfilment of the Constitution as a pledge."¹⁰⁴ A constitution can also function as a precommitment device.¹⁰⁵ This function can entrench certain values in the constitution and prevent a state from devolving into practices contrary to these

⁹⁹ See, e.g., LIN-MANUEL MIRANDA, *HAMILTON* (2015); NATIONAL TREASURE (Walt Disney Pictures 2004); A MORE PERFECT UNION: AMERICA BECOMES A NATION (Brigham Young University 1989); IRON JAWED ANGELS (HBO 2004); LINCOLN (Dreamworks Pictures 2012); PETER STONE, 1776 (1969); *The West Wing* (NBC television broadcast 1999-2006); *John Adams* (HBO 2008); *Liberty's Kids: Est. 1776* (PBS television broadcast 2002-2003).

¹⁰⁰ See Aziz Rana, *Why Americans Worship the Constitution*, PUBLIC SEMINAR (Oct. 11, 2021), <https://publicseminar.org/essays/why-americans-worship-the-constitution/> [https://perma.cc/6XKD-AEP9] ("The constitution itself inspires [a cultural veneration], almost religious devotion. Politicians of every party routinely praise its genius. This eighteenth-century document, so the argument goes, highlights how the U.S. from the founding has been engaged in what Barack Obama called 'an improbable experiment in democracy' grounded on principles of equality, self-government, and personal liberty. It is the key to what makes America 'exceptional,' the foundation of our 'shining city on a hill' and the reason the country offers a universal model of what Abraham Lincoln called 'government of the people, by the people, for the people.'"); Danielle Allen, *The Flawed Genius of the Constitution*, THE ATLANTIC (Oct. 5, 2020) <https://www.theatlantic.com/magazine/archive/2020/10/danielle-allen-constitution/615481/> [https://perma.cc/7L22-ATBT].

¹⁰¹ See, e.g., Alice Paul Institute, *Frequently Asked Questions*, ERA, <https://www.equalrightsamendment.org/faq#:~:text=the%20original%20Equal%20Rights%20Amendment,place%20subject%20to%20its%20jurisdiction> [https://perma.cc/M6B6-GSPS].

¹⁰² See *infra* Section III.A.

¹⁰³ These functions include structuring the state, expressing identity to the international community and the nation, and serving as a precommitment device. A related function of a constitution is coordination of the basic tasks of the government. Coordination theories can explain the acquiescence to the US Constitution, while, historically, South Africa has not fit this model as well since it re-coordinated its system. See King, *supra* note 90, at 75 ("The design of such codified constitutions is an affirmative political act, guided by a set of individual or collective purposes. Designers of constitutions ordinarily intend for the written document to help serve particular ends, *to do something*."); Hardin, *Why a Constitution?*, *supra* note 90, at 59–60; Hardin, *Liberalism*, *supra* note 90, at 103.

¹⁰⁴ du Plessis, *supra* note 90, at 385.

¹⁰⁵ *Constraining the State*, in COMPARATIVE CONSTITUTIONAL LAW: A GLOBAL AND INTERDISCIPLINARY APPROACH (Mila Versteeg, David Landau & Tom Ginsburg eds., 2022); see JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 94 (1979).

values.¹⁰⁶ Constitutions can also express a mission statement¹⁰⁷ for the nation and define the constitutional identity of the nation.¹⁰⁸ A constitution as a mission statement can be useful, such as through its expressive function¹⁰⁹ and legitimation of the legal order,¹¹⁰ even if this purpose has not yet been carried out in practice.¹¹¹ A minimalist constitution expresses a mission statement with little to no specificity. This constitutional silence tends to make it more difficult for marginalized groups to assert their rights under their constitution. The United States Constitution is an example of a minimalist constitution because it defines substantive rights briefly.¹¹²

1. *Defining a Nation's Identity and Purpose: The Preamble*

A statement of national identity¹¹³ can often be found in a constitution's preamble, as well as in other provisions such as a bill of rights.¹¹⁴ Tellingly, the United States Constitution's Preamble has not changed since it was first

¹⁰⁶ See Stephen Holmes, *Constitutions and Constitutionalism*, in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 188, 198, 200–01 (Andras Sajó & Michael Rosenfeld eds., 2011) (“[E]very constitution is, in part, an emergency constitution.”).

¹⁰⁷ King, *supra* note 90, at 73, 81, 98 (defining mission statement as “a statement of core [political] values and commitments that constitute or form part of the purpose of the state, [which the people of the nation accept as such,] and are meant to guide its decision making” and plans for action).

¹⁰⁸ Constitutional identity can be determined by having a constitution, the content of the constitution, and the context in which the document operates. Constitutional identity can also change over time and represent “a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past.” GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 7 (2010); Michel Rosenfeld, *Constitutional Identity*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 756–57 (2011).

¹⁰⁹ King, *supra* note 90, at 85 (“[T]hese principles help to manifest what the state and the political community stands for. Although expressive, such statements can . . . become reference points in public debate[;] give recognition to important groups and constituencies[;] inform judicial interpretation of . . . the constitution, . . . statutes and the civil law. . . . [M]ission statement provisions may reinforce political rhetoric in a subtle and sometimes not so subtle way.”).

¹¹⁰ *Id.* at 87–88.

¹¹¹ See *id.* at 82 (“[I]t is important also to distinguish between mission-statement provisions as observable features, characteristics of constitutions, or normative statements, on the one hand and the social functions that such constitutional statements *actually* perform on the other. Many constitutions are loaded with what could analytically be described as mission-statement provisions, but which are routinely ignored in practice. If so, then the mission-statements are present, but the functions . . . are not served.”).

¹¹² See *id.* at 81, 94 (“[T]here is evidence that constitutional silence serves elites rather well. A minimal constitution can deprive marginalised groups of a textual root for their advocacy claims, and it can forego the possibility of nudging institutions in the directions provided in the constitution. . . . [T]he U.S. constitution’s silence on social questions outside the bill of rights fits well with its manifest non-commitment to regulation and economic equality, and also with the agenda of libertarian groups who fetishise the constitution and call for a retrenchment of the state to fit with a narrow reading of the constitution.”).

¹¹³ See *infra* Section III.B.

¹¹⁴ *Expressing Identity*, *supra* note 90; King, *supra* note 90, at 82–84 (“Sometimes a country will wish to break clearly with a past event and make such a break part of its constitutive identity[; S.A.] renounced apartheid in this way[.]”).

ratified, and it does not include any mention of slavery or racial discrimination.¹¹⁵

Aside from the Preamble's doctrinal and policy implications, with which lawyers are often more familiar, it also has cultural implications. Requiring students to memorize the Preamble in grade school is one example of how the meaning of the Preamble is perpetuated in American culture. There is even a teaching song used to help schoolchildren remember these sacred words.¹¹⁶ Requiring memorization of this passage imputes a strong importance to the words and their meaning. Even if a second-grade student does not quite understand the meaning of "posterity", there are certain words or phrases that may jump out to a student or layperson: "We the people"; "union"; "justice"; "liberty".¹¹⁷ These themes that we instill in our youth, and therefore our society at large, through the act of memorization help develop our society's conception of national identity.¹¹⁸ The Preamble lays out in a few words the values of our nation and what "[w]e the people" should strive to embody.

The Preamble of the United States Constitution¹¹⁹ makes no acknowledgement of slavery or racial injustice. The Constitution was adopted before the United States confronted slavery as it did during the Civil War era, and it continued to govern a divided nation in need of healing and racial equality after it confronted slavery and endured a civil war. In contrast to the South African case, a new constitution was not adopted coming out of this conflict. Additionally, though the Reconstruction Amendments were added, its general, overarching purpose was not changed to acknowledge the trauma the United States and its people had faced and to set out a new vision for the nation.

Are these the values we want to ascribe to ourselves as a nation? Are they underinclusive? Too broad? The minimalist United States Constitution tends to serve privileged factions of society well and "can deprive marginalized groups of a textual root for their advocacy claims" as well as "forego the possibility of nudging institutions in the directions provided in the constitution."¹²⁰ The more general provisions may be enforced in a way that

¹¹⁵ U.S. CONST., pmbi.

¹¹⁶ School House Rock, *The Preamble*, SCHOOLTUBE (Aug. 25, 2019), https://www.schooltube.com/media/School-House-Rock-The-Preamble/1_mx06ca2x (a video of the song). See School House Rock, *Lyrics: Preamble*, SCHOOL HOUSE ROCK LYRICS (2017), <https://www.schoolhouserock.tv/Preamble.html> [<https://perma.cc/GFP7-QVNP>] for the lyrics.

¹¹⁷ U.S. CONST., pmbi.

¹¹⁸ See CAROL K. SIGELMAN & ELIZABETH A. RIDER, *LIFE-SPAN: HUMAN DEVELOPMENT* 221, 224 (9th ed. 2018).

¹¹⁹ U.S. CONST., pmbi. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.")

¹²⁰ King, *supra* note 90, at 94.

protects the rights of the privileged, but by ignoring factors like historical discrimination, they may not serve marginalized groups sufficiently.¹²¹

Based on these principles and the experiences of other countries, recent attempts by academics to envision amendments to the Constitution do not quite reach far enough to satisfy TJ goals, as demonstrated by the National Constitution Center's Constitution Drafting Project. In this initiative, three groups of academics (Conservatives, Progressives, and Libertarians) were tasked with drafting a new Constitution.¹²² The Progressive and Conservative constitutions seemed to understand the importance of stating these values in the Preamble. The Progressive constitution inserted the word "Equality" into the Preamble to read: "secure the Blessings of Liberty and Equality to ourselves and our Posterity",¹²³ enshrining equality as a value to guide our nation and define national identity. Nevertheless, this amendment still falls prey to the dangers of a minimalist constitution. The Conservatives inserted a passage from the Declaration of Independence as a "preamble to the Preamble"¹²⁴ to enshrine the values expressed in the Declaration of Independence in a document with legal force.¹²⁵ On its face, this passage could serve a similar purpose to the inclusion of the word "Equality," but taking the original meaning at the time of its writing, equality did not apply to various marginalized groups such as women and Black Americans.

Characteristic of the United States Constitution's minimalist nature,¹²⁶ though both proposed preambles stated desirable forward-looking principles, neither addressed past wrongdoing. Of the three drafts, only the Conservative Constitution explicitly mentioned race.¹²⁷

¹²¹ *Id.*

¹²² Each group elected to amend our current Constitution for the project rather than replace it. Caroline Frederickson, Jamal Greene & Melissa Murray, *The Progressive Constitution*, THE CONSTITUTION DRAFTING PROJECT.

¹²³ *Id.*

¹²⁴ We the People Podcast, *The Constitution Drafting Project*, NATIONAL CONSTITUTION CENTER, at 46:24 (Nov. 26, 2020), <https://constitutioncenter.org/interactive-constitution/podcast/the-constitution-drafting-project-wtp> [<https://perma.cc/SES7-NZGS>]; Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, *The Conservative Constitution*, THE CONSTITUTION DRAFTING PROJECT.

¹²⁵ Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, *The Conservative Constitution*, THE CONSTITUTION DRAFTING PROJECT (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)) ("We the People of the United States reaffirm that 'all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed,—that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness[.]").

¹²⁶ See King, *supra* note 90, at 94.

¹²⁷ Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, *The Conservative Constitution*, Art. I, § 12, cl. 8, THE CONSTITUTION DRAFTING PROJECT ("Neither the States nor the United States shall make or enforce any law which shall discriminate on the basis of race or other irrelevant characteristic.").

With similar TJ objectives to the one espoused in this Note, the South African Constitution's Preamble serves as a helpful contrasting example, at least regarding its expressive value, from which the United States can draw. In contrast to the United States Constitution, the South African Constitution's Preamble includes an explicit acknowledgement of its history of racial discrimination under apartheid.¹²⁸ The 1993 Interim Constitution, known as the birth certificate of the nation, defined the new South African state in the Preamble as one in which "there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms."¹²⁹ The Preamble to the South African Constitution explicitly states that "the people of South Africa, [r]ecognise the injustices of [their] past . . . and [b]elieve that South Africa belongs to all who live in it, united in [their] diversity."¹³⁰ One of the stated purposes in the South African Constitution is to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights[.]"¹³¹ Another is to seek to grow a democratic, united, open society that is legitimized by the will of the people and ensures that "every citizen is equally protected by law."¹³² The South African Constitution's Preamble sets out a vision for the future that is responsive to its history of apartheid.¹³³

2. *Additional Constitutional Provisions: Constructing Identity and Purpose*

The differences extend beyond the preambles of the two constitutions. The remaining provisions of the United States and South African Constitutions also reflect a dichotomy between choosing to build a national identity that acknowledges historical wrongdoing or choosing to build one that does not. The South African Constitution has recognized the injustices of the past with a focus on the contemporary conditions that apartheid caused.¹³⁴ For example, the South African Constitution does not extend the right to freedom of expression to the "advocacy of hatred . . . based on race, ethnicity, gender or religion" as long as it also "constitutes [an] incitement to cause harm"¹³⁵ or "imminent violence."¹³⁶ This choice was significant and com-

¹²⁸ S. AFR. CONST., 1996, pmbi.

¹²⁹ S. AFR. (INTERIM) CONST., 1993, pmbi.

¹³⁰ S. AFR. CONST., Dec. 18, 1996, pmbi.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See S. AFR. (INTERIM) CONST., Jan. 25, 1994, pmbi.; *Azania Peoples' Org. v. President of the Republic of S. Afr.*, 4 S.A. 672, (1996). Although the South African Constitution explicitly alludes to the discriminatory conditions and effects of the apartheid regime, it never uses the word "apartheid." See generally S. AFR. CONST., Dec. 18, 1996.

¹³⁴ See generally S. AFR. CONST., Dec. 18, 1996.

¹³⁵ *Id.* Ch. 1, § 16(2)(b).

¹³⁶ *Id.* Ch. 1, § 16(2)(c).

bats discriminatory structures and acts that took place and flourished under apartheid.

Most of the founding values of the South African Constitution are also responsive to South Africa's racially discriminatory past and are reflected in the Bill of Rights.¹³⁷ The first founding value of the South African Constitution is human dignity,¹³⁸ followed by "the achievement of equality[,] the advancement of human rights and freedoms[,]""¹³⁹ non-racialism,¹⁴⁰ universal suffrage, and ensuring that the democratic government is held to be accountable, responsive and open.¹⁴¹ The drafters "saw the declarations of rights as being a direct response to the abuses suffered under apartheid."¹⁴²

In addition to emphasizing human dignity, the South African Bill of Rights also instructs courts to promote equality when interpreting the Bill of Rights.¹⁴³ The prioritization of equality is evident not only in the Bill of Rights but also throughout the document. The Equality provision of the Bill of Rights states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."¹⁴⁴ The provision goes on to define equality to include "the full and equal enjoyment of all rights and freedoms[.]"¹⁴⁵ a right not afforded to all South Africans during apartheid. The provision then directs the state to use legislative measures, among others, to "promote the achievement of equality[.]"¹⁴⁶ "Equality" and related words are found a total of thirty-five times in the Constitution.¹⁴⁷ Similarly, "equity" and related words are found twenty times.¹⁴⁸ The Constitution also prohibits the state and any person from unfairly discriminating directly or indirectly against anyone on the grounds of race, ethnic or social origin, color, culture, language, and birth.¹⁴⁹

The South African Constitution explicitly incorporates responsiveness to past discrimination into several of its provisions, including the provision on public administration. The "public administration must be broadly representative of the South African people"¹⁵⁰ and have "employment and personnel management practices based [in part] on . . . the need to redress the imbalances of the past to achieve broad representation."¹⁵¹ Additionally,

¹³⁷ See generally *id.* Ch. 2, §§ 7-39.

¹³⁸ *Id.* § 1(a).

¹³⁹ *Id.* Ch. 1, § 1(a).

¹⁴⁰ *Id.* Ch. 1, § 1(b).

¹⁴¹ S. AFR. CONST. Ch. 1, § 1(d).

¹⁴² See A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 19 (2009).

¹⁴³ S. AFR. CONST., Dec. 18, 1996, Ch. 2, § 39(1)(a).

¹⁴⁴ *Id.* Ch. 2, § 9(1).

¹⁴⁵ *Id.* Ch. 2, § 9(2).

¹⁴⁶ *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ S. AFR. CONST. Dec. 18, 1996, Ch. 2, § 9(3) – (4).

¹⁵⁰ *Id.* Ch. 10, § 195(1)(i).

¹⁵¹ *Id.*

when appointing judicial officers and members of the Electoral Commission, the necessity for the judiciary and the Commission to “reflect broadly the racial . . . composition of South Africa must be considered.”¹⁵²

In contrast to the South African Constitution, the United States Constitution as it was ratified in 1787 made little mention of race. The Constitution implicates slavery in a few instances but does not link race to “service or labour” and does not explicitly say “slave” or “slavery.” The document alludes to slavery through preventing Congress from banning the importation of slaves until 1808 (and preventing the amendment of this provision); the three-fifths compromise, which determined that slaves would be counted for purposes of congressional representation as three-fifths of the white residents of the state; and the fugitive slave clause, which required that a slave who had escaped be returned to his owner.¹⁵³ The only explicit mentions of the words race or color in the Constitution to this day are in the Fifteenth Amendment. This absence demonstrates the United States Constitution’s failure to fully acknowledge the nation’s history of slavery and the racial injustices that resulted from slavery.

The Reconstruction Amendments similarly set out guidelines and prohibitions for the future without explicitly acknowledging past harm. The Thirteenth Amendment abolished slavery.¹⁵⁴ The Fourteenth Amendment gave citizenship to all those born in the United States and guaranteed due process and equal protection of the laws to all citizens.¹⁵⁵ The Fifteenth Amendment prohibited denying the vote on the basis of race, color, or previous condition of servitude.¹⁵⁶ The context of the ratification of these amendments shows that the drafters sought to rectify past wrongdoings and combat racial discrimination.¹⁵⁷ The text of the Amendments made this possible. However, the Constitution does not explicitly make reference to past wrongdoing. The terms “Slavery” and “involuntary servitude” are used in the Thirteenth Amendment, “previous condition of servitude” is used in the Fifteenth Amendment, and “slave” is mentioned once in the Fourteenth Amendment.¹⁵⁸ While the South African Constitution uses phrases like “recognize the injustices of our past”¹⁵⁹ or “redress the results of past racial discrimination[.]”¹⁶⁰ the United States Constitution fails to fully acknowledge past wrongdoings, contemporary inequality, or mention slavery and

¹⁵² *Id.* §§ 174(2), 193(2).

¹⁵³ U.S. CONST., art. I, §§ 2, 9; *id.* art. IV, § 2; *id.* art. V; see also Andrew Cohen, *Constitution’s biggest flaw? Protecting slavery*, BERKELEY NEWS (Sept. 17, 2019), <https://news.berkeley.edu/2019/09/17/constitutions-biggest-flaw-protecting-slavery>, [https://perma.cc/5GMD-YA3D].

¹⁵⁴ U.S. CONST., amend. XIII.

¹⁵⁵ U.S. CONST., amend. XIV.

¹⁵⁶ U.S. CONST., amend. XV.

¹⁵⁷ See RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS 17–18* (2007).

¹⁵⁸ U.S. CONST., amends. XIII, XIV, XV.

¹⁵⁹ S. AFR. CONST., 1996, Dec. 18, 1996, pmbl.

¹⁶⁰ *Id.* Ch. 2, § 25(8).

historical discrimination as reasons for the Amendments. In addition to sparse text, judicial interpretations of the Civil Rights Amendments made them less effective than they could have been.¹⁶¹

Typical of a minimalist constitution, the United States Constitution is “[silent] on social questions outside the [B]ill of [R]ights” and this silence “fits well with its manifest non-commitment to regulation and economic equality, and . . . with . . . libertarian groups who fetishise the constitution and call for a retrenchment of the state to fit with a narrow”¹⁶² interpretation. The Bill of Rights of the United States Constitution, addressing some social questions, differs significantly from the South African Bill of Rights. One difference is that the United States Bill of Rights makes no mention of slavery, race, or discrimination. The Bill of Rights was ratified in 1791, in an earlier era than the one in which the Reconstruction Amendments were considered and ratified.¹⁶³ Slavery was legal on a national level at the time the Bill of Rights was ratified, and slaves were not protected by the Bill of Rights.

The Constitution is a prime location to include an acknowledgement of history because of its high expressive value and prevalence in American culture. Given this significant expressive value,¹⁶⁴ acknowledging the United States’ history in the Constitution would reinforce the principles that the truth and history commission and history education seek to pursue and there-

¹⁶¹ See, e.g., *Civil Rights Cases*, 109 U.S. 3, 20-21, 55 (1883) (holding that Congress may use the Thirteenth Amendment to abolish “all badges and incidents of slavery,” but cannot “adjust . . . social rights of men and races” and that the Fourteenth Amendment “does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the actions of State officers”); *Plessy v. Ferguson*, 163 U.S. 537, 543-49, 551-52 (1896) (holding that a statute requiring separate but equal facilities did not violate the Equal Protection Clause of the Fourteenth Amendment); *Shelby County v. Holder*, 570 U.S. 529, 530, 536 (2013) (limiting the scope of the Fifteenth Amendment by holding that the pre-clearance coverage formula of the Voting Rights Act was unconstitutional because it was no longer justified by current needs); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Mobile v. Bolden*, 446 U.S. 55 (1980); *Palmer v. Thompson*, 403 U.S. 217 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237 (1991); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003). *But see* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *U.S. v. Guest*, 383 U.S. 745 (1966); *Loving v. Virginia*, 388 U.S. 1 (1967); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Shelby County*, 570 U.S. at 559 (Ginsburg, J., dissenting); *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016).

¹⁶² See *King*, *supra* note 90, at 94.

¹⁶³ *Bill of Rights (1791)*, NATIONAL ARCHIVES, <https://www.archives.gov/milestone-documents/bill-of-rights#:~:text=articles%203%20to%2012%2C%20ratified,as%20the%20Bill%20of%20Rights> [https://perma.cc/XCP6-G9RE]; *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, HISTORY, ART & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> [https://perma.cc/QBX8-L248].

¹⁶⁴ See *supra* Section II.B.

fore would help to lay the foundation for reparations. Amending the Constitution is a key aspect of the holistic approach to TJ in the United States.

B. *Establishing A Commission on Truth and History*

As with law, history has an important symbolic value in American culture.¹⁶⁵ In both contexts, there exists no such thing as a neutral stance, as a facially neutral position inherently makes a statement. As such, states – given their inherent influence and authority – cannot help but take a stance on history.¹⁶⁶

A formal truth and history commission, alongside changes in the way history is taught in grade school, can guide the state’s narrative regarding its own history. Both policies play an important role in a holistic TJ scheme and in shaping national identity.¹⁶⁷ For example, even though South Africa’s Truth and Reconciliation Commission was an imperfect process that left some gaps, the fact that the country had listened to, read, and watched the stories from the Truth and Reconciliation Commission opened the door to discussions about the nation’s history in its classrooms.¹⁶⁸

Although the influence of history needs to be felt at the grassroots level throughout the general populace, having a formal process for a truth and history commission helps make this process most effective as a tool for changing the national historical narrative because it forces the public and visible acknowledgement of history and past wrongdoing.¹⁶⁹ The Chicago Principles on Post-Conflict Justice indicate the importance of having a formal commission.¹⁷⁰ Two principles that are particularly relevant in the context of the United States are that “[s]tates shall respect the right to truth and encourage formal investigations of past violations by truth commissions or other bodies”¹⁷¹ and that “[s]tates should support official programs and popular initiatives to memorialize victims, educate society regarding past political violence, and preserve historical memory.”¹⁷² Even if the informa-

¹⁶⁵ See *supra* Section II.B.

¹⁶⁶ *Beyond Memory Laws*, *supra* note 13, at 419 (A state cannot “retreat to neutrality [in] historical interpretation. . . . Every authorised grade-school history curriculum stamps an official imprimatur upon particular readings of history. Few modern democracies are prepared to abandon historical education on the grounds that it cannot be done with perfect ethical or political neutrality.”).

¹⁶⁷ Dylan Wray, *Facing the Past—Transforming Our Future: A Professional Development Program for History Teachers in South Africa*, in *TRANSITIONAL JUST. & EDUC.: LEARNING PEACE* 336–37 (Clara Ramirez-Barat & Roger Duthie eds., 2017); see Cole & Murphy, *supra* note 46, at 335; *supra* Section II.A.

¹⁶⁸ Wray, *supra* note 167, at 352.

¹⁶⁹ Marchese, *supra* note 47.

¹⁷⁰ See generally M. CHERIF BASSIOUNI, ETELLE HIGONNET, MICHAEL HANNA & DANIEL ROTHENBERG, *THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE* (2007).

¹⁷¹ Anthony Bradley, *Finally Healing the Wounds of Jim Crow*, *FATHOM* (July 11, 2018) <https://www.fathommag.com/stories/finally-healing-the-wounds-of-jim-crow> [<https://pmap.cc/CB5A-8VW3>] (describing Principle 2).

¹⁷² *Id.* (describing Principle 5).

tion distributed is widely known, the acknowledgement of these facts by the federal government, given its authority and influence, is significant.¹⁷³ Additionally, even though the truth-telling process is led by the state, this process is also valuable in creating “relational attachments among a community’s members, rather than an attachment to political institutions and their defined practices and beliefs.”¹⁷⁴

In the United States, the lack of a broadly internalized historical narrative based in fact has led to negative consequences. For example, a recent President’s proposal to create a “patriotic education” that would omit many of the country’s foundational flaws such as by diminishing criticism of the Founding Fathers,¹⁷⁵ banning certain discussions of race in schools,¹⁷⁶ and striking parts of history from textbooks, particularly regarding slavery, evidences how our current historical narrative is prone to restriction.¹⁷⁷ In contrast, following South Africa’s Truth and Reconciliation Commission, “very few people . . . defend or try to justify the system of apartheid, or question the fact that egregious practices such as widespread torture were used to sustain apartheid.”¹⁷⁸ A truth and history commission would help to create a broadly recognized, fact-based historical narrative in the United States.

There has been some progress made in instituting a truth and history commission in the United States. H.C.R. 19, introduced in the House of Representatives in February 2021, proposes a “[c]ommission on Truth, Racial Healing, and Transformation to properly acknowledge, memorialize, and be a catalyst for progress toward jettisoning the belief in a hierarchy of human value, embracing our common humanity, and permanently eliminat-

¹⁷³ De Greiff, *Normative Conception*, *supra* note 11, at 22.

¹⁷⁴ Harroff, *supra* note 45, at 533, 555.

¹⁷⁵ Trump’s 1776 Commission claimed that its recommended curriculum would promote “patriotic education” in part by diminishing criticism of the U.S. and its Founding Fathers. Critics said it would “ignore[] most social movements” and give the “silent treatment to the long struggle for black freedom.” Olivia B. Waxman, *Echoing Decades of Fighting Over U.S. History Classrooms, President Trump Announces a Push for ‘Patriotic Education’*, TIME (Sept. 17, 2020), <https://time.com/5889907/trump-patriotic-education/> [https://perma.cc/XK32-QFR6]. One historian countered, “[t]he highest form of patriotism is critical analysis.” Cory Turner, *Trump Announces ‘Patriotic Education’ Commission*, NAT’L PUB. RADIO (Sept. 18, 2020), <https://www.npr.org/2020/09/18/914281543/trump-announces-patriotic-education-commission> [https://perma.cc/H896-4X4M].

¹⁷⁶ #TruthBeTold: *Legislative Attacks on Racial and Gender Justice Education*, AFR. AM. POL’Y F., <https://www.aapf.org/truthbetold> (last visited Oct. 2, 2022), [https://perma.cc/82PD-343L] (last visited Oct. 2, 2022).

¹⁷⁷ Emma Brown, *Texas officials: Schools Should Teach that Slavery was ‘Side Issue’ to Civil War*, WASH. POST (July 5, 2015), https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html [https://perma.cc/9YCD-QHQF]; see also Camille Phillips, *Texas Students Will Soon Learn Slavery Played a Central Role in the Civil War*, NAT’L PUB. RADIO (Nov. 16, 2018), <https://www.npr.org/2018/11/16/668557179/texas-students-will-soon-learn-slavery-played-a-central-role-in-the-civil-war#:~:text=Texas%20Board%20of%20Education%20voted.central%20role%22%20in%20the%20war> [https://perma.cc/B38N-N5AZ].

¹⁷⁸ HAYNER, *supra* note 1, at 5, 20–21 (Michael Ignatieff described an aim of truth commissions as “narrow[ing] the range of permissible lies.”); see Bradley, *supra* note 171.

ing persistent racial inequities.”¹⁷⁹ The bill also includes an acknowledgement of the inequalities imposed by the government and people of the United States against various marginalized groups.¹⁸⁰ On the same day that H.C.R. 19 was introduced, the Senate introduced its own bill, S.C.R. 6, an almost identical proposal to H.C.R. 19.¹⁸¹ So far, H.C.R. 19 has at least 168 co-sponsors¹⁸² and has been referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties by the House Committee on the Judiciary.¹⁸³ S.C.R. 6 has at least fifteen co-sponsors.¹⁸⁴ These bills have significant symbolic and practical value in furthering the aims of TJ.

The commission’s work should not end with a final report; rather, it should “continue to reverberate and shape . . . society.”¹⁸⁵ The process of truth-finding and acknowledging past wrongdoing is not confined to the commission itself, but is an ongoing process that must continue after the commission has formally completed its work.¹⁸⁶ No matter what, the process will be somewhat underinclusive, and the consequences of this will need to be dealt with through continuous examination and scrutiny.¹⁸⁷

More directly, the distribution of the information revealed through the commission is crucial for this work to take hold in the nation at large,¹⁸⁸ not just the world of academia.¹⁸⁹ For example, South Africa’s Truth and Reconciliation Commission compiled comprehensive reports of its findings and activities,¹⁹⁰ which were directed to contain “recommendations of measures to prevent the future violations of human rights.”¹⁹¹ In the interest of transparency and openness, important values in the South African Constitution,¹⁹² The Promotion of National Unity and Reconciliation Act required that the findings be made known to the nation.¹⁹³ Certain Truth and Reconciliation Commission decisions were required to be published in the government

¹⁷⁹ Urging the Establishment of a U.S. Commission on Truth, Racial Healing, and Transformation, H.R. CON. RES. 19, 117th Cong. (2021).

¹⁸⁰ *Id.*

¹⁸¹ A concurrent resolution urging the establishment of a United States Commission on Truth, Racial Healing, and Transformation, S. CON. RES. 6, 117th Cong. (2021).

¹⁸² *Cosponsors: H.Con.Res.19 — 117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/bills/117th-congress/house-concurrent-resolution/19/cosponsors?searchResultViewType=expanded> [<https://perma.cc/5ZM8-BR8W>] (accurate as of Oct. 2, 2022).

¹⁸³ H.R. CON. RES. 19, 117th Cong. (2021).

¹⁸⁴ S.R. CON. RES. 6, 117th Cong. (2021).

¹⁸⁵ Harroff, *supra* note 45, at 540, 552.

¹⁸⁶ See HAYNER, *supra* note 1, at 32.

¹⁸⁷ See Marchese, *supra* note 47.

¹⁸⁸ See Harroff, *supra* note 45, at 552.

¹⁸⁹ Alexander Karn, *Historical Commissions and Education Outreach: Challenges and Lessons for Transitional Justice*, in TRANSITIONAL J. & EDUC.: LEARNING PEACE 325 (Clara Ramirez-Barat & Roger Duthie, eds., 2016).

¹⁹⁰ *See The Truth and Reconciliation Commission Report*, TRUTH AND RECONCILIATION COMMISSION, <https://www.justice.gov.za/trc/report> [<https://perma.cc/UU4B-83G9>].

¹⁹¹ Promotion of National Unity and Reconciliation Act 34 of 1995, *supra* note 50, at § 3 cl. 1(d).

¹⁹² See, e.g., S. AFR. CONST., 1996; S. AFR. (INTERIM) CONST., 1993.

¹⁹³ Promotion of National Unity and Reconciliation Act 34 of 1995, *supra* note 50.

newspaper.¹⁹⁴ Additionally, “most newspapers ran . . . stories on the commission every day[;] radio and television news often led with a story on . . . the commission’s hearings[;] four hours of hearings were broadcast live over national radio [daily;] and the *Truth Commission Special Report* television show on Sunday evenings [was] the most-watched news show in the country.”¹⁹⁵

Sierra Leone’s Truth and Reconciliation Commission presents a contrasting example. The Commission, assisted by UNICEF, crafted an engaging graphic novel as its Final Report, created a guide to help teachers teach these materials in the classroom, and made various recommendations about the education system in line with the Commission’s findings.¹⁹⁶ However, in 2008, one researcher found that no school possessed these education materials and, of the high-ranking education officials she came across in the Ministry of Education, none of them had seen a copy.¹⁹⁷ Thoughtful teaching materials do little good if they are simply sitting on a shelf collecting dust, if no one is aware of their existence, if they are not accessible, or if politics act contrary to their distribution.¹⁹⁸

C. *Re-Examining How History is Taught in Schools*

History education provides an avenue for furthering the impact of truth commissions outside of the intellectual elite and beyond the scope of the commission itself. History education also offers a pathway for TJ to work from the bottom up, in contrast to structurally top-down approaches like truth commissions.¹⁹⁹ Additionally, like a government initiative, a school curriculum can speak with a level of authority and influence, which can be useful in changing narratives.²⁰⁰ It is important to address history education at the grade-school level specifically because most Americans do not take a history class past the grade-school level²⁰¹ and because younger minds are more impressionable.²⁰² Elementary school may be the venue through which students develop their conceptions of national identity, which may be more difficult to change once their belief systems become entrenched.²⁰³

¹⁹⁴ *Id.*

¹⁹⁵ HAYNER, *supra* note 1, at 28.

¹⁹⁶ Cole & Murphy, *supra* note 46, at 366.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 335.

²⁰⁰ *Id.* at 334.

²⁰¹ *Id.* at 363 (“By the time students are in university, they are seen as adults, and studying history is elective. But . . . middle or high school history education can be the place to insist on and showcase the few unvarnished ‘truths’ about the past[.]”).

²⁰² CAROL K. SIGELMAN & ELIZABETH A. RIDER, *LIFE-SPAN: HUMAN DEVELOPMENT* 230 (9th ed. 2018).

²⁰³ *Id.* at 221, 224; *see* Cole & Murphy, *supra* note 46, at 363.

Additionally, history is an appropriate subject to address TJ goals because, aside from the symbolic value of history itself,²⁰⁴ history is the subject through which patriotism and group cohesion have been commonly perpetuated,²⁰⁵ and history generally has a strong link to civic education.²⁰⁶ History education has also been a guilty perpetrator of nationalistic, and sometimes false, narratives that have helped give rise to the widespread denial of America's present and past wrongdoing, particularly in the contexts of slavery and racial inequality.²⁰⁷

1. *Educational Strategies and Curricula of Other Countries*

To further the goals of TJ, history education must be reformed in a way that goes beyond the inclusion of substantive content recognizing a state's past wrongs.²⁰⁸ In South Africa, the minister of education recognized that it would not be beneficial to simply try to perpetuate a new, dominant narrative to replace the old one.²⁰⁹ Rather, as Peru's Truth and Justice Commission recommended, changes to the process of education such as "making schools better able to teach democracy and human rights, strengthening the humanities with the goal of achieving acceptance and knowledge of diversity, and strengthening the sciences in order to reduce prejudice"²¹⁰ would be beneficial.

Similarly, Northern Ireland's progressive, inquiry-based history curricula has sought since the 1980s to help students develop tools to view historical narratives as open questions and examine varying perspectives through primary and secondary sources.²¹¹ Inquiry-based learning focuses on student questions, group work, the selection and evaluation of primary and secondary sources, and the interpretation and analysis of their findings to reach conclusions responsive to these open questions.²¹² A goal of teaching this way of thinking through history education was to distance young students from "narrow or partisan perspectives on the past[.]"²¹³ Remembering dates

²⁰⁴ See *supra* Section III.B.

²⁰⁵ After World War II and throughout the Cold War era, U.S. history education shifted to instill a sense of unity and patriotism in students, principles that were important to the country in these times of war and uncertainty. Jon Sensbach, *Whose Revolution?*, UNIVERSITY OF FLORIDA (Aug. 24, 2016) (lecture).

²⁰⁶ Cole & Murphy, *supra* note 46, at 335.

²⁰⁷ See *id.* at 336, 353.

²⁰⁸ *Id.* at 351 ("[I]n history at its best, process is the key rather than content[.]").

²⁰⁹ *Id.* at 355.

²¹⁰ *Id.* at 364.

²¹¹ *Id.* at 361-62.

²¹² Richard Greenwood, Sandra Austin, Karin Bacon & Susan Pike, *Enquiry-based learning in the primary classroom: student teachers' perceptions*, 50 *EDUC.* 3-13, 404, 406 (2020); Cole & Murphy, *supra* note 46, at 362.

²¹³ Cole & Murphy, *supra* note 46, at 362.

and names does not teach these skills and should not be the priority of a history curriculum.²¹⁴

Similar to Peru and Northern Ireland, the goal in South Africa was “to provide history education with a strong ethical bias within a values framework.”²¹⁵ Such a history education curriculum seeks to prevent atrocities from happening again by teaching students to evaluate information and bias independently, which helps to prevent despotic powers and a singular narrative from taking root.²¹⁶ In pursuit of these goals, South Africa’s curriculum sought to provide teachers and students with “a process of enquiry, of interpretation and effective communication” as well as “knowledge and skills to enable them to interrogate the past, to understand historical interpretation and to recognize bias, propaganda and racism, hopefully ensuring that no historical narrative could again dominate to the exclusion of another and that distortions and manipulation in history texts could be identified.”²¹⁷

Studies in Northern Ireland have found that its inquiry-based curriculum has helped students understand how to “question the authoritative stories of their communities and to base their own conclusions on evidence.”²¹⁸ Importantly, however, as students in Northern Ireland aged, although they may have continued to independently evaluate evidence to form their views, students largely limited their sources of information to those that supported the narratives of the political and religious communities with which they identified.²¹⁹ To prevent the curriculum from hindering the goals of TJ and to keep history from repeating itself, then, it is important to create and continuously distribute a “memory base” through a truth and history commission.²²⁰

Curricula like the ones described in South Africa and Northern Ireland empower students to understand their power as individuals to be agents of change rather than spectators.²²¹ It is critical that these ideas be instilled in students to help prevent atrocities from reoccurring.²²² One of the most important outcomes of the South African TJ process was simply the belief in the possibility for a system that could be more equal and more just.²²³ Likewise, the Peruvian Truth and Justice Commission advocated making history

²¹⁴ See Wray, *supra* note 167, at 358 (“It is very difficult to become an active and democratic citizen if all one can do is remember names, places, and dates.”).

²¹⁵ Cole & Murphy, *supra* note 46, at 355.

²¹⁶ See Peter A. Facione, *Critical Thinking: What It Is and Why It Counts, Measured Reasons*, INSIGHT ASSESSMENT (2011), https://www.student.uwa.edu.au/_data/assets/pdf_file/0003/1922502/Critical-Thinking-What-it-is-and-why-it-counts.pdf [https://perma.cc/WX6L-GQYB].

²¹⁷ Cole & Murphy, *supra* note 46, at 351 (quoting Claire Moon, *Narrating Political Reconciliation: Truth and Reconciliation in South Africa*, 15 SOC. & LEGAL STUD. 257, 258 (2006)).

²¹⁸ *Id.* at 361–62.

²¹⁹ *Id.*

²²⁰ Wray, *supra* note 156, at 337–38.

²²¹ Harroff, *supra* note 45, at 553.

²²² Wray, *supra* note 167, at 338–39 (quoting Mack, *supra* note 54, at 8, 9); Karn, *supra* note 189, at 326.

²²³ See Marchese, *supra* note 47.

education more hopeful and future-looking by creating better connections between recent history and the present.²²⁴ The belief in individual agency and the possibility for a better future is the first step to actually making the changes that TJ purports to make. As South Africa's minister of education recognized, history education is a crucial foundation for any nation, particularly one undergoing a TJ process.²²⁵ The United States is no exception.

2. *Private Organizations Facilitating Transitional Justice Goals*

One United States-based organization,²²⁶ Facing History and Ourselves, works towards the goals of TJ by working with educators to reform the way that history is taught in the country. Facing History utilizes “lessons of history to challenge teachers and their students to stand up to bigotry and hate.”²²⁷ Facing History fuses the study of history, literature, and human behavior with moral decision making. The program encourages students to develop critical thinking, historical understanding, and social-emotional learning skills. Facing History's pedagogy pushes students to examine the choices made by individuals throughout history, particularly in instances in which significant moral harm has occurred to particular groups, and to search for instances where moral agency was used to work against this harm and to help others.²²⁸ Students learn about the past and connect the history they learn to current events, impacting their opinions and decision making.²²⁹ The organization is unique in that it has a particular commitment to focusing on topics related to human rights violations and past violence and the way in which they are judged, remembered, and studied in history curricula.²³⁰

Established in part by Facing History, a South African program called Facing the Past—Transforming Our Future seeks to achieve the goals stated above to further TJ in the crucial area of history education.²³¹ Facing the Past's co-founder and Facing History's international director have emphasized the inevitable intertwining between head and heart in the teaching of history, particularly in TJ contexts in which healing is needed, and thus the importance of teaching history with empathy.²³² Indeed, it would be disingenuous and ineffective to study this difficult history in a “sanitized, academic environment.”²³³

²²⁴ Cole & Murphy, *supra* note 46, at 364.

²²⁵ *Id.* at 355.

²²⁶ Wray, *supra* note 167, at 344.

²²⁷ *About Us*, FACING HISTORY & OURSELVES, <https://www.facinghistory.org/about-us> [<https://perma.cc/NU4N-KRL7>].

²²⁸ Cole & Murphy, *supra* note 46, at 357-58.

²²⁹ *Why Facing History*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/why-facing-history> [<https://perma.cc/PWX3-7G6R>].

²³⁰ Cole & Murphy, *supra* note 46, at 352-53.

²³¹ See Wray, *supra* note 167, at 344, 345, 348.

²³² *Id.* at 348-49, 352.

²³³ *Id.* at 348-49.

Connecting history to students' personal narratives about, and experiences of, their nation is another important piece of history education in a TJ society. Surveys in Bosnia, Herzegovina and Rwanda showed that students had a desire to learn about war and genocide in their own countries despite these narratives being prohibited in their academic environments. They wanted "proof of the stories they [we]re confronted with in their families and in the media".²³⁴

The emotional impact and development of empathy in students must be considered when constructing a history curriculum in a TJ scheme. An important first step is to edit textbooks to remove offensive narratives about particular groups, not only for the sake of removing this harmful material, but also to begin to create a belief in the possibility of a different future. This change can help shift the way marginalized groups view themselves in a positive direction and influence the formation of new identity relations and national identity.²³⁵ Teaching history with these principles in mind can allow students to learn how to view things from a different perspective from their own.²³⁶ Crafting a history curriculum that creates open, empathetic, and critical minds would be an important piece of a successful TJ process in the United States.

By laying a foundation through a truth and history commission, history education, and a constitution reflective of our nation's realities, a transitional justice program could help create a society receptive to and in favor of reparations, which not only could make reparations possible, but could make their implementation more effective.

D. *Implementing Reparations*

Reforms in history education, changes to the Constitution, and a truth and reconciliation commission would help to reform the American consciousness regarding the value of reparations. Changing the national narrative surrounding our history of racial inequality is a crucial step in the transitional justice process largely for this reason. Scholarship cautions that a stand-alone reparations program without other TJ components is less likely to be successful, and "can be interpreted as insincere, or worse, the payment of blood money."²³⁷ After laying a foundation through the implementation of the aforementioned initiatives, however, the United States would be ripe for a reparations policy. Because the audience for such a policy would be more

²³⁴ Cole & Murphy, *supra* note 46, at 362.

²³⁵ *Id.* at 334–35; *see also* Teboho Moja, *Education as Redress in South Africa: Opening the Doors of Learning to All*, in TRANSITIONAL JUSTICE AND EDUCATION: LEARNING PEACE (discussing efforts to redress racial inequity in South African higher education, 1990–2005, through a historical lens of institutional discrimination).

²³⁶ Cole & Murphy, *supra* note 46, at 352.

²³⁷ Boraine, *supra* note 12, at 25; *see supra* Section II.A.; *see also* HAYNER, *supra* note 1, at 171, 178 (discussing examples of reparations in Argentina, Chile, and Germany).

receptive following these initiatives, reparations – as part of a larger TJ scheme – would allow for concrete, lasting changes to societal inequities created by the United States’ past wrongs.

The legacy of slavery and segregation in America is deeply intertwined with modern-day socioeconomic inequalities on racial lines.²³⁸ This is evidenced by red-lining,²³⁹ the resegregation of schools,²⁴⁰ and a lack of diverse representation in various positions of power and high earning potential.²⁴¹ In order to repair the inequities that stem from a history of racist institutions and laws in the United States, reparations are necessary to create equitable opportunities for Black Americans in particular.²⁴² As such, reparations are a necessary piece of a holistic TJ process in the United States.

i. What are Reparations?

In the juridical context, reparations are defined as “measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes.”²⁴³ The purpose of reparations is defined by ICTJ as acknowledging:

the legal obligation of a state, or individual(s) or group, to repair the consequences of violations — either because it directly committed them or it failed to prevent them [and] express[es] to victims and society more generally that the state is committed to addressing the root causes of past violations and ensuring they do not happen again.²⁴⁴

Scholars have explained the goals of reparations as follows: restitution; compensation; rehabilitation; and satisfaction and guarantees of nonrecurrence.²⁴⁵ Some forms of reparations can serve several of these goals. For example, monetary reparations can serve as compensation as well as satisfaction and

²³⁸ See Darrell J. Gaskin, Alvin E. Headen, Jr. & Shelley I. White-Means, *Racial Disparities in Health & Wealth: The Effects of Slavery & Past Discrimination*, 32 REV. BLACK POL. ECON. (2004) (discussing how historic governmental policies have created and perpetuated health and wealth disparities across racial groups).

²³⁹ *Redlining*, ENCYCLOPAEDIA BRITANNICA (15th ed. 2010), <https://www.britannica.com/topic/redlining> [<https://perma.cc/49UX-TUB4>].

²⁴⁰ GARY ORFIELD & DANIELLE JARVIE, BLACK SEGREGATION MATTERS: SCH. RESEGREGATION & BLACK EDUC. OPPORTUNITY (The Civ. Rts. Project 2020), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/black-segregation-matters-school-resegregation-and-black-educational-opportunity> [<https://perma.cc/3B3T-JUB8>].

²⁴¹ See Laura Morgan Roberts & Anthony J. Mayo, *Toward a Racially Just Workplace*, HARV. BUS. REV. (Nov. 14, 2019), <https://hbr.org/2019/11/toward-a-racially-just-workplace> [<https://perma.cc/HU24-AFUW>].

²⁴² Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemp. Racism: Why Reparations Are in Ord. for Afr. Ams.*, 20 HARV. BLACKLETTER L. J. 49 (2004).

²⁴³ DE GREIFF, REPARATIONS AS JUSTICE, *supra* note 15, at 452.

²⁴⁴ See *Reparations*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/fr/node/26919> [<https://perma.cc/7BPL-WPDT>] [hereinafter ICTJ, *Reparations*].

²⁴⁵ DE GREIFF, REPARATIONS AS JUSTICE, *supra* note 15, at 452.

guarantees of nonrecurrence. In Chile, the daughter of one victim of crime expressed that “[e]very time a check arrives, it’s a recognition of the crime [and, a]fter so many years of denial, . . . it’s a recognition that [she and her family] were right.” For the sister of another victim who “lost her brother to the violence of the Chilean army[,] the monthly checks from the government represented a ‘recognition from the state of its own guilt’ in killing her brother.”²⁴⁶

Reparations may also serve a symbolic purpose. Symbolic reparations can include dedicating memorials and days of commemoration; renaming public spaces; providing endowments to museums on slavery; official apologies; granting access to land; restoring political or civil rights; addressing mental harms; and granting access to healthcare.²⁴⁷

A holistic reparations policy should be coupled with a strong development program.²⁴⁸ Monetary reparations, on their own, cannot conquer poverty.²⁴⁹ Coupled with development programs and general state aid, however, a reparations program can both serve to provide benefits directly to victims of oppression and improve the conditions under which harmed or oppressed communities live. A development program may include repair to systemic inequities through components like housing, education, and healthcare reform.²⁵⁰ Humanitarian development and assistance programs, however, traditionally lack the “acknowledgment of responsibility” that is central to reparations.²⁵¹ As such, a successful reparations program should include both direct reparation and development.²⁵²

To determine how to construct a reparations program, the United States should consider a few factors. First, it is important to “institutionalize the *recognition* of individuals as citizens with equal rights.”²⁵³ Second, it is necessary to promote civic trust and social solidarity in the general populace.²⁵⁴ Third, integrity and coherence should be structural considerations for the

²⁴⁶ HAYNER, *supra* note 1, at 167–68.

²⁴⁷ ICTJ, *Reparations*, *supra* note 244; HAYNER, *supra* note 1, at 163–64.

²⁴⁸ Cristián Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia*, 12 (Oct. 19, 2015), <https://www.ictj.org/publication/principles-practice-challenges-implementing-reparations-massive-violations-colombia> [<https://perma.cc/MSS3-3H7X>].

²⁴⁹ *Id.* at 11–12.

²⁵⁰ See DE GREIFF, REPARATIONS AS JUSTICE, *supra* note 15, at 453.

²⁵¹ *Id.*; see Laplante, *supra* note 22, at 1 (“Restorative and retributive justice alone may not lead to a stable peace, because it does not resolve underlying grievances that led to violent conflict.”).

²⁵² For example, reforming the education system can serve as a form of reparation by providing equal access to education, such as through affirmative action programs. Cole & Murphy, *supra* note 46, at 334–35. However, solely providing *access* to education is not enough; resources must be provided to address inequities and allow students to succeed regardless of their race and socioeconomic status. Moja, *supra* note 235, at 219. These resources must be easily accessible and widely known to those who need them most. *Id.* at 215, 218. These resources constitute elements of a development program.

²⁵³ DE GREIFF, REPARATIONS AS JUSTICE, *supra* note 15, at 460 (emphasis added).

²⁵⁴ *Id.* at 462, 464, 466.

decision-maker; specifically, a reparations program should be externally coherent in that it is tied closely with other elements of the TJ scheme, and internally coherent in that each form of reparations works in harmony with the others.²⁵⁵ In constructing a reparations program consistent with TJ principles, the United States may also look to international law for guidance.²⁵⁶

A holistic approach to a reparations program means coupling material and symbolic benefits, individual and community programs, financial payments, and clear statements of apology or recognition to mutually work together to achieve common goals.²⁵⁷

ii. *Colombia: A Modern Example of Reparations in Transitional Justice*

Colombia's reparations program serves as a recent, cutting-edge example of a holistic and ambitious approach to reparations and TJ.²⁵⁸ Although the circumstances in the United States and Colombia are different in many ways,²⁵⁹ Colombia's is a useful and relatively successful modern model for the United States to explore and use as guidance.

Colombia's program reflects a holistic, comprehensive reparations scheme. The aims of Colombia's program, created by Law 1448,²⁶⁰ include compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition.²⁶¹ The program has a high level of complexity and completeness, covers a distinctively broad scope, and sets forth a continuous eligibility process for victims to receive monetary benefits.²⁶² Law 1448 provides for collective, individual, symbolic, and material reparations. For example, individual forms of reparation provided in the law include compensation, rehabilitation for mental and physical health, satisfaction measures, a land restitution process, and additional types of restitution such as education, health, housing, and employment measures.²⁶³ Law 1448 also has the stated purpose to dignify victims, promote truth-telling, record memory, and pre-

²⁵⁵ *Id.* at 467.

²⁵⁶ *Id.* at 455.

²⁵⁷ HAYNER, *supra* note 1, at 166; *see* DE GREIFF, REPARATIONS AS JUSTICE, *supra* note 15, at 467.

²⁵⁸ *See* Carr Ctr. for Hum. Rts. Pol'y and the Harvard Humanitarian Initiative, Evaluation and Analysis for Learning, *Evaluation of Integral Reparations Measures in Colombia: Executive Summary* [hereinafter *Evaluation of Reparations*], 15 (Oct. 2015), https://pdf.usaid.gov/pdf_docs/PA00KSXQ.pdf [<https://perma.cc/Y7P4-C993>]; Sánchez & Sandoval-Villalba, *supra* note 95, at 565.

²⁵⁹ One notable difference is that Colombia came out of a period of violent conflict when it issued reparations, while the U.S. arguably has not experienced this level of widespread trauma in recent history. *See* Sánchez & Sandoval-Villalba, *supra* note 95, at 560, 562.

²⁶⁰ Sánchez & Sandoval-Villalba, *supra* note 95, at 549 (citing Constitutional Court, Decisions C- 580 of 2002, C- 228 of 2003 and C- 250 of 2011).

²⁶¹ *See generally* *Evaluation of Reparations*, *supra* note 258.

²⁶² *Id.* at 6.

²⁶³ Sánchez & Sandoval-Villalba, *supra* note 95, at 552, 553, 554–62.

vent re-occurrence of abuses.²⁶⁴ The Colombian program has been successful in many ways, compensating a large number of individuals over a short time period and leading to the creation of the nation's registry of victims.²⁶⁵

In addition to individual forms of reparation, another goal of Colombia's program is to provide collective reparations to help groups, communities, and political and social organizations.²⁶⁶ For example, it has implemented a program that concentrates on collective rehabilitation called the *Entrelazando* program.²⁶⁷ In an effort "to help communities move forward," the program has the position that "[w]ell implemented collective reparations . . . developed on the basis of consultations with victims have the potential to help not only communities but also individual members of the community." In particular, "[p]roviding reparation to Afro-descendants and indigenous peoples is one of the biggest pending debts in Colombia [and c]ollective reparation offers a meaningful form of redress for these groups."²⁶⁸

Colombia's reparations program also includes a type of symbolic reparations: an official apology in the form of a letter. The Victims' Unit, an institution established by Law 1448 to implement its policies,²⁶⁹ provided a "dignifying letter" to victims alongside their compensation payment.²⁷⁰ A dignifying letter is "a personalized letter from the state expressing remorse for the violation and offering to pay 'a long-owed debt.'"²⁷¹ While seemingly small, this gesture has the capacity to significantly influence the expression of a reparatory message to victims. The manner in which the letters "are handed to victims, during their interview to define their individual reparations plan, reinforces the personalized nature of the message and its potential as a form of satisfaction."²⁷² While these letters would be more effective with the inclusion of an explicit recognition of the state's responsibility for violations and the signature of the President of Colombia, the gesture remains meaningful.²⁷³

The commitment made by Colombia to its reparations program is commendable, even if the program has proven to be a bit over-ambitious given its initial timeline and available resources.²⁷⁴ To address these shortcomings,

²⁶⁴ *Id.* at 553.

²⁶⁵ *Evaluation of Reparations*, *supra* note 258, at 9–10.

²⁶⁶ *Id.* at 9–10.

²⁶⁷ *Id.* at 10.

²⁶⁸ Sánchez & Sandoval-Villalba, *supra* note 95, at 570.

²⁶⁹ Correa, *supra* note 248, at 2.

²⁷⁰ *Id.* at 21.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* The letters are not signed by the Colombian President, but are signed by the General Director of the Victims' Unit.

²⁷⁴ Law 1448 was set to expire in 2021. Eight years in, it was determined that "by 2021 when the Law would have been in place for a decade, Colombia would have not been able to provide reparation to victims according to its initial plans" and at least 85% of its victims "would still be waiting for reparation." The model has been criticized for being overly com-

one study has recommended prioritizing the delivery of reparations and creating a strategy to do so without exceeding the resources available.²⁷⁵ The study emphasized the importance of maintaining political support from the populace and financial support from the government, to continue the success of the program.²⁷⁶ It also recommended Colombia consider ways to integrate policies on reparations into the country's broader political economy and to create a "legitimate social pact to carry out the ambitious program that has been launched."²⁷⁷

Colombia's experience with its reparations program reflects that of other countries, such as Chile, that have failed to fulfill their promise to fully repair the damage caused by past atrocities within a window of years. While some individual measures have been fulfilled and the most visible political, financial, and international support was garnered during the first five years of the work, it would be impossible to fully repair the nation's wounds within such a short window.²⁷⁸ The work of the Chilean program is ongoing, and its impact should last for at least a generation. Scholars recommended that Colombia extend its law to do the same.²⁷⁹ Learning from these examples, the United States should also expect a long-term process to successfully fulfill its reparations goals.

iii. H.R. 40: An Opportunity for Reparations in the United States

In 2015, what began as a mere study bill became a remedy bill in the form of H.R. 40, largely thanks to the work of the National African American Reparations Commission and the National Coalition of Blacks for Reparations in America.²⁸⁰ The bill seeks to create a holistic reparations program in the United States, potentially accomplishing the reparations component of TJ in this country.

The stated purpose of H.R. 40 is to:

address the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to study and consider a national apology and proposal for reparations for the institution of slavery, its subsequent de jure and de facto racial and economic discrimination against African-Americans, and the impact of these forces on living African-Americans, to make rec-

plex, not practically operable, and having an implementation gap. Sánchez & Sandoval-Villalba, *supra* note 95, at 547–48, 565–66, 570.

²⁷⁵ *Evaluation of Reparations*, *supra* note 258, at 9, 17.

²⁷⁶ *Id.* at 18.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 566.

²⁷⁹ *Id.* at 566, 569.

²⁸⁰ H.R. 40, 116th Cong. (2019); Daniels, *supra* note 57.

ommendations to the Congress on appropriate remedies, and for other purposes.²⁸¹

H.R. 40 lays out its purpose by first acknowledging the “lingering negative effects” of the United States’ history of slavery and discrimination²⁸² and pointing out the fact that the American public has not been sufficiently educated on this history.²⁸³ In the Findings and Purpose section, H.R. 40 serves a symbolic role similar to a truth and history commission by formally acknowledging the nation’s past wrongs related to slavery, racial discrimination, and their consequences. In its entirety, the bill contains many components of a holistic reparations program, addressing the symbolic value of the government’s recognition of past wrongdoings and of perpetuating a truthful history and creating a plan for monetary reparations.

To help repair these injuries, the bill designs a commission that would “recommend appropriate ways to educate the American public of the Commission’s findings”, “recommend appropriate remedies in consideration of the Commission’s findings” regarding the United States’ past wrongdoings and present conditions of inequality, and “submit to the Congress the results of such examination, together with such recommendations.”²⁸⁴ The Commission would also “[i]dentify, compile and synthesize the relevant corpus of evidentiary documentation of the institution of slavery which existed within the United States and the colonies . . . from 1619 through 1865.” The study and documentation of the Commission would “include but not be limited to the facts related” to wrongs committed against slaves and Black Americans.²⁸⁵ Guiding questions for the Commission would include inquiring as to “[h]ow such recommendations comport with international standards of remedy for wrongs and injuries caused by the State, that include full reparations and special measures, as understood by various relevant international protocols, laws, and findings”²⁸⁶; “[h]ow Federal laws and policies that continue to disproportionately and negatively affect African-Americans as a group, and those that perpetuate the lingering effects, materially and psycho-social, can be eliminated”²⁸⁷; “[h]ow the injuries resulting from matters [listed] can be reversed and provide appropriate policies, programs, projects and recommendations for the purpose of reversing the injuries”;²⁸⁸ “[h]ow, in consideration of the Commission’s findings, any form of compensation to the descendants of enslaved African is calculated”²⁸⁹; “[w]hat form of compensation should be awarded, through what instrumentalities and who should be

²⁸¹ H.R. 40, 116th Cong. (2019).

²⁸² *Id.* § 2(b)(3) (2019).

²⁸³ *Id.* § 2(b)(4).

²⁸⁴ *Id.* § 2(b)(7)–(9).

²⁸⁵ *Id.* § 3(b)(1).

²⁸⁶ *Id.* § 3(b)(6)(A).

²⁸⁷ *Id.* § 3(b)(6)(C).

²⁸⁸ *Id.* § 3(b)(6)(D).

²⁸⁹ *Id.* § 3(b)(6)(E).

eligible for such compensation”²⁹⁰; and “[h]ow . . . any other forms of rehabilitation or restitution to African descendants is warranted and what the form and scope of those measures should take.”²⁹¹ The bill also would ask the Commission “[h]ow the Government of the United States will offer a formal apology on behalf of the people of the United States for the perpetration of gross human rights violations and crimes against humanity on African slaves and their descendants”²⁹², recognizing the importance of an official apology.²⁹³

Congressman John Conyers, Jr. introduced H.R. 40 continuously from 1989 until 2017, when he passed the torch to Congresswoman Sheila Jackson Lee, the current Lead Sponsor for the bill.²⁹⁴ The bill has at least 196 cosponsors,²⁹⁵ indicating the increasing recognition of its importance.²⁹⁶ Additionally, over three hundred organizations and various celebrities such as Danny Glover, John Legend, and Stevie Wonder have endorsed the “Why We Can’t Wait” Campaign, which supports H.R. 40.²⁹⁷ Most recently, the Committee on the Judiciary ordered the bill to be reported as amended after being reviewed by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties.²⁹⁸

Importantly, H.R. 40 contains provisions setting forth the creation of a robust monetary reparations program. Ongoing financial disparities are often the shortcoming in otherwise successful TJ schemes.²⁹⁹ A Truth and Recon-

²⁹⁰ *Id.* § 3(b)(6)(F).

²⁹¹ *Id.* § 3(b)(6)(G).

²⁹² *Id.* § 3(b)(6)(B).

²⁹³ Ruben Carranza, Cristián Correa & Elena Naughton, *Reparative Justice: More than Words: Apologies as a Form of Reparation*, 1 (Dec. 2015), <https://www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf> [<https://perma.cc/4VYT-9SET>].

²⁹⁴ Daniels, *supra* note 57.

²⁹⁵ *Cosponsors: H.R.40—117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/> [<https://perma.cc/FNZ6-DFXK>].

²⁹⁶ *See The Case for Reparations in Tulsa, Oklahoma: A Human Rights Argument*, HUM. RTS. WATCH, 2 (May 2020), https://www.hrw.org/sites/default/files/media_2020/11/tulsa-reparations0520_web.pdf [<https://perma.cc/E84Q-JULX>] (“H.R. 40 has been circulating in Congress for 30 years but recently gained renewed momentum given a growing public understanding about the harms of slavery and its continuing impact today”); *U.S.: Provide Reparations for 1921 ‘Tulsa Race Massacre’: State, City Should Compensate Survivors, Descendants; Adopt Broad Plan*, HUM. RTS. WATCH (MAY 29, 2020), <https://www.hrw.org/news/2020/05/29/us-provide-reparations-1921-tulsa-race-massacre> [<https://perma.cc/RQM5-3YMC>] (“[T]he US Congress should also pass H.R. 40, a bill that would begin to address the ongoing harm from slavery.”).

²⁹⁷ *An Open Letter to President Biden: Support Reparations and HR-40 “By Any Means Necessary”*, NAT’L AFR. AM. REPARATIONS COMM’N (Feb. 23, 2021), <https://reparation-comm.org/naarc-news/press-releases/open-letter-to-biden-support-reparations-bill-hr-40> [<https://perma.cc/D5J3-B7E4>] (supporting institutions include National Coalition of Blacks for Reparations in America, the Samuel DeWitt Proctor Conference, African American faith-based institutions, National African American Reparations Commission, ACLU, Human Rights Watch, Center for American Progress, Color of Change, and the National Council of Churches).

²⁹⁸ *All Actions: H.R.40—117th Congress (2021-2022)*, CONGRESS.GOV, <https://www.congress.gov/> [<https://perma.cc/FNZ6-DFXK>].

²⁹⁹ Hansen, *supra* note 74, at 50.

ciliation Commission itself is unlikely to directly eliminate financial disparities on racial lines without implementing reparations. This further demonstrates the importance of the holistic approach and the way in which reparations reinforce other components of a TJ scheme. To truly have a lasting impact, TJ in the United States must include monetary reparations working alongside other forms of reparations.

CONCLUSION

The United States has long needed to repair the injuries suffered by Black Americans at the hands of the state and society at large. Transitional justice offers a framework to successfully perform this repair. These changes will not happen overnight, but discussions about their necessity and the development of goals and strategies for their implementation must begin promptly. The United States should look to other countries for guidance on the TJ process, but ultimately must create a customized scheme based on its particular circumstances and the input of those who this process will affect.

In creating its own TJ program, the United States should amend the text of its Constitution to reflect the realities of our past and present, address its history of slavery and racial discrimination through a formal truth and history commission, change the way it teaches history in order to foster critical thinking and confront the true realities of the nation's past, and issue reparations in monetary as well as other forms.

Congress must commit to implementing each of the TJ components discussed above in order to both change hearts and minds and achieve healing, justice, and equality in the United States. Re-examining history education, instituting a truth and history commission, and amending the Constitution can create a new, more accurate conception of American national identity. This, in turn, can promote the public's receptiveness to reparations, which can clear a path for concrete, lasting change. By examining the past, we can work toward effective solutions for a just future, free of infection, such that America's enduring wounds inflicted by racial injustice might begin to heal.