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.” 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. A recent example demonstrates how far this infection has...
spread. Within the same week that President Joe Biden signed legislation to make Juneteenth a federal holiday, multiple states proposed or enacted antici
ritical race theory bills applying to public schools, with some bills banning discussion of the New York Times’s Pulitzer Prize-winning 1619 Project by Nikole Hannah-Jones. 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.

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


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/nbcblkw/map-see-which-states-have-passed-critical-race-theory-bills-n1271215 [https://perma.cc/SCWX-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=IWAR2YNr1fOxiB73EEAXeMvWEvU6xU0ZScvmy1n1RgVO2R5zLb2EPK0pM [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].


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. 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. 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.

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.” A holistic approach to TJ requires the components of the scheme to work in tandem. Informed by the example of other countries, this Note recommends that the components of a TJ scheme

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9 See HAYNER, supra note 1, at 145.

10 U.S. CONST., pmbl.


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. Gliszczynska-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. Thus, the Note presents a novel contribution to the voluminous literature on reparations and racial justice 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. The main goals of TJ go hand-in-hand with its definition: truth recovery, the promotion of democracy, accountability, institutional reform,
and reparations. 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.” 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.

The field of TJ has expanded its scope and methods since its origin. 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. 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. Elements of a holistic approach to TJ often include criminal prosecutions, truth commissions, reparations programs, memorialization efforts, and gender justice. This list is not exhaustive, and the field has become more diverse because of creative solutions developed in response to different contexts.

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.


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.


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. The UN also considers a successful approach to TJ to be holistic. 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. Following the conflict, multiple separate bodies were established and existing entities were asked to investigate past abuses and violations. At least initially, no single mechanism was established with the purpose of investigating its history comprehensively and systematically. 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.” 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.

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. 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. 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.
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.
34 Id.
more than words.  " 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,” meaning an effort to buy the acquiescence or silence of victims.  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.  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.  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.

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. 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. 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. These sentiments negatively colored the perception of the success of the Truth and Reconciliation Commission. To avoid these issues, countries need to apply

35 Id.; HAYNER, supra note 1, at 166.
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. 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. 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. 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. 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. 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 Commission was established in 1995 with the objective of “promoting national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions


48 See infra Section IV.A.

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


of the past.” 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.

One success of the Truth and Reconciliation Commission was instigating “contentious debate[,] . . . thus contribut[ing] to the creation of an agonistic deliberative public sphere.” 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. 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.

Despite its overall success and international recognition, South Africa’s TJ process was far from perfect. For example, although political violence is mostly absent, South Africa still endures high crime rates, socioeconomic inequities, and unequal opportunities for education, particularly in higher education. 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.”

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.
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.
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. 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.

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.” 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. 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. 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. The Commission issued its report in 2011. One of

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65 Id. at 33–35.
67 HAYNER, supra note 1, at 235–36; Harroff, supra note 45, at 552.
68 HAYNER, supra note 1, at 72–73.
70 HAYNER, supra note 1, at 70.
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-
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. 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[y]ing the story of a nation’s development through many centuries” of experience. 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.” Law has a powerful opportunity as a “vehicle of memory” 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. 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.
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The Court tellingly referenced the Declaration of Independence, 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. 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. Brown v. Board had an important, emotional impact on American culture in addition to tremendous doctrinal significance. 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. The United States Constitution is no exception.

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.

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86 Id. at 407.
87 Id. at 405–08.
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

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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 (“Senators 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.
96 Id.
97 Id. at 6.
98 Id. at 4.
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America’s Founding period to rhetoric inside and outside of politics, there is something about the document and text itself that Americans hold onto dearly. 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, which would be beneficial to the aims of the TJ process.

To understand the authority with which the US Constitution speaks, it is helpful to understand the typical functions of constitutions. 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.” A constitution can also function as a precommitment device. This function can entrench certain values in the constitution and prevent a state from devolving into practices contrary to these

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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).


101 See infra Section III.A.

102 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.

Constitutions can also express a mission statement for the nation and define the constitutional identity of the nation. A constitution as a mission statement can be useful, such as through its expressive function and legitimation of the legal order, even if this purpose has not yet been carried out in practice. 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.

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

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

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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 Jacobsen, 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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{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 Constitution\textsuperscript{119} 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.”\textsuperscript{120} The more general provisions may be enforced in a way that

\textsuperscript{115} U.S. Const., pmbl.
\textsuperscript{117} U.S. Const., pmbl.
\textsuperscript{118} See Carol K. Sigelman & Elizabeth A. Rider, Life-Span: Human Development 221, 224 (9th ed. 2018).
\textsuperscript{119} U.S. Const., pmbl. (“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.”).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”,\textsuperscript{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 Pre-
amble”\textsuperscript{124} to enshrine the values expressed in the Declaration of Independ-
dence in a document with legal force.\textsuperscript{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,\textsuperscript{126}
though both proposed preambles stated desirable forward-looking principles,
neither addressed past wrongdoing. Of the three drafts, only the Conserva-
tive Constitution explicitly mentioned race.\textsuperscript{127}

\textsuperscript{121} Id.
\textsuperscript{122} Each group elected to amend our current Constitution for the project rather than re-
place it. Caroline Frederickson, Jamal Greene & Melissa Murray, \textit{The Progressive Constitu-
tion}, \textit{THE CONSTITUTION DRAFTING PROJECT}.
\textsuperscript{123} Id.
\textsuperscript{124} We the People Podcast, \textit{The Constitution Drafting Project, NATIONAL CONSTITUTION
CENTER}, at 46:24 (Nov. 26, 2020), https://constitutioncenter.org/interactive-constitution/pod-
cast/the-constitution-drafting-project-wtp [https://perma.cc/SES7-NZGS]; Robert P. George,
Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, \textit{The Conservative Constitution,
THE CONSTITUTION DRAFTING PROJECT}.
\textsuperscript{125} Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, \textit{The
Conservative Constitution, THE CONSTITUTION DRAFTING PROJECT} (quoting \textit{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[,]”).
\textsuperscript{126} See King, \textit{supra} note 90, at 94.
\textsuperscript{127} Robert P. George, Michael W. McConnell, Colleen A. Sheehan & Ilan Wurman, \textit{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.").
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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. 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.” 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.” 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[.]” Another is to seek to grow a democratic, united, open society that is legitimised by the will of the people and ensures that “every citizen is equally protected by law.” The South African Constitution’s Preamble sets out a vision for the future that is responsive to its history of apartheid.

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. 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” or “imminent violence.” This choice was significant and com-

131 Id.
132 Id.
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,
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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{155} The Fifteenth Amendment prohibited denying the vote on the basis of race, color, or previous condition of servitude.\textsuperscript{156} The context of the ratification of these amendments shows that the drafters sought to rectify past wrongdoings and combat racial discrimination.\textsuperscript{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.\textsuperscript{158} While the South African Constitution uses phrases like “recognize the injustices of our past”\textsuperscript{159} or “redress the results of past racial discrimination[,]”\textsuperscript{160} the United States Constitution fails to fully acknowledge past wrongdoings, contemporary inequality, or mention slavery and

\textsuperscript{152} Id. §§ 174(2), 193(2).
\textsuperscript{154} U.S. Const., amend. XIII.
\textsuperscript{155} U.S. Const., amend. XIV.
\textsuperscript{156} U.S. Const., amend. XV.
\textsuperscript{158} U.S. Const., amends. XIII, XIV, XV.
\textsuperscript{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-


162 See supra note 90, at 94.


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. 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.

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. 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.

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. The Chicago Principles on Post-Conflict Justice indicate the importance of having a formal commission. 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” and that “[s]tates should support official programs and popular initiatives to memorialize victims, educate society regarding past political violence, and preserve historical memory.” Even if the informa-

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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 Ramírez-Barat & Roger Duhrie 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.
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. 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.”

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, banning certain discussions of race in schools, and striking parts of history from textbooks, particularly regarding slavery, evidences how our current historical narrative is prone to restriction. 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.” 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-

174 Harroff, *supra* note 45, at 533, 555.
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.
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ing persistent racial inequities.” The bill also includes an acknowledge-
ment of the inequalities imposed by the government and people of the
United States against various marginalized groups. 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. So far, H.C.R. 19 has at least 168
cosponsors and has been referred to the Subcommittee on the Constitu-
tion, Civil Rights, and Civil Liberties by the House Committee on the Judici-
ary. S.C.R. 6 has at least fifteen cosponsors. 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.” 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. 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.

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

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179 Urging the Establishment of a U.S. Commission on Truth, Racial Healing, and Trans-
180 Id.
181 A concurrent resolution urging the establishment of a United States Commission on
ResultViewType=expanded [https://perma.cc/5ZM8-BR8W] (accurate as of Oct. 2, 2022).
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
191 Promotion of National Unity and Reconciliation Act 34 of 1995, supra note 50, at § 3
c1. 1(d).
193 Promotion of National Unity and Reconciliation Act 34 of 1995, supra note 50.
382 Harvard Civil Rights-Civil Liberties Law Review [Vol. 58

newspaper. 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.”

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. 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. 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.

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. Additionally, like a government initiative, a school curriculum can speak with a level of authority and influence, which can be useful in changing narratives. 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 level and because younger minds are more impressionable. 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.

194 Id.
195 HAYNER, supra note 1, at 28.
196 Cole & Murphy, supra note 46, at 366.
197 Id.
198 Id. at 335.
199 Id. at 334.
200 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 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

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.
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 Haroff, 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.
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 Tebogo 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 ILA.; 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.\textsuperscript{238} This is evidenced by red-lining\textsuperscript{239} the resegregation of schools,\textsuperscript{240} and a lack of diverse representation in various positions of power and high earning potential.\textsuperscript{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.\textsuperscript{242} As such, reparations are a necessary piece of a holistic TJ process in the United States.

\textit{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.”\textsuperscript{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.\textsuperscript{244}

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


\textsuperscript{243} DE GREIFF, \textit{Reparations as Justice, supra note 15, at 452.}

\textsuperscript{244} See \textit{Reparations, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE}, https://www.ictj.org/fr/node/26919 [https://perma.cc/TPL-WPDT] [hereinafter ICTJ, \textit{Reparations}].

\textsuperscript{245} DE GREIFF, \textit{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.”

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. A holistic reparations policy should be coupled with a strong development program. Monetary reparations, on their own, cannot conquer poverty. 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. Humanitarian development and assistance programs, however, traditionally lack the “acknowledgment of responsibility” that is central to reparations. As such, a successful reparations program should include both direct reparation and development.

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.” Second, it is necessary to promote civic trust and social solidarity in the general populace. Third, integrity and coherence should be structural considerations for the

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246 Hayner, supra note 1, at 167–68.
247 ICTJ, Reparations, supra note 244; Hayner, supra note 1, at 163–64.
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. In constructing a reparations program consistent with TJ principles, the United States may also look to international law for guidance.

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.

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. Although the circumstances in the United States and Colombia are different in many ways, 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, include compensation, rehabilitation, restitution, satisfaction and guarantees of non-repetition. 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. 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. Law 1448 also has the stated purpose to dignify victims, promote truth-telling, record memory, and pre-
vent re-occurrence of abuses. 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.

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. For example, it has implemented a program that concentrates on collective rehabilitation called the Entrelazando program. 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.”

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, provided a “dignifying letter” to victims alongside their compensation payment. A dignifying letter is “a personalized letter from the state expressing remorse for the violation and offering to pay ‘a long-owed debt.’” 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.” 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.

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. To address these shortcomings,

264 Id. at 553.
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-
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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-

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.\textsuperscript{281}

H.R. 40 lays out its purpose by first acknowledging the “lingering negative effects” of the United States’ history of slavery and discrimination\textsuperscript{282} and pointing out the fact that the American public has not been sufficiently educated on this history.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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?”\textsuperscript{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”\textsuperscript{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”;\textsuperscript{288} “[h]ow, in consideration of the Commission’s findings, any form of compensation to the descendants of enslaved African is calculated”\textsuperscript{289}; “[w]hat form of compensation should be awarded, through what instrumentalities and who should be

\textsuperscript{281} H.R. 40, 116th Cong. (2019).
\textsuperscript{282} Id. § 2(b)(3) (2019).
\textsuperscript{283} Id. § 2(b)(4).
\textsuperscript{284} Id. § 2(b)(7)–(9).
\textsuperscript{285} Id. § 3(b)(1).
\textsuperscript{286} Id. § 3(b)(6)(A).
\textsuperscript{287} Id. § 3(b)(6)(B).
\textsuperscript{288} Id. § 3(b)(6)(C).
\textsuperscript{289} Id. § 3(b)(6)(E).
eligible for such compensation’’; 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.’’ 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’’, recognizing the importance of an official apology.

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. The bill has at least 196 cosponsors, indicating the increasing recognition of its importance. 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. 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.

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. A Truth and Reconciliations Commission is needed to ensure a comprehensive approach to reparations.

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290 Id. § 3(b)(6)(F).
291 Id. § 3(b)(6)(G).
292 Id. § 3(b)(6)(B).
294 Daniels, supra note 57.
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.