

THE INJUSTICES OF TIME: RIGHTS, RACE, REDISTRIBUTION, AND RESPONSIBILITY

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ABSTRACT

Resurgent debates in U.S. law and politics over reparations and racialized inequality reflect what this Article argues is a significant transnational legal phenomenon: courts, policymakers, and social justice advocates mobilizing pasts of racial and ethnic violence and dispossession to justify competing rules for the distribution of resources and power today. In the United States., South Africa, Canada, and Israel/Palestine, significant legal and political battles revolve around the relationships among past, present, and future. Judges and advocates identify progress from or rupture with the past; embrace or reject institutions intended to record and resolve past events; and attempt to silence or center past violence when interpreting rights in the present. In the U.S., arguments about whether and how slavery is relevant to contemporary racialized inequalities arise in litigation around affirmative action and reparations. These debates contest not the horror of that past but rather its linkage with the beneficiaries of racial privilege today given the passage of time and the formal legal end of slavery and segregation. In South Africa, a critical fault line has emerged between those who view the Truth and Reconciliation

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Commission, the post-1994 Constitution, and Constitutional Court judgments as representative of a flawed but foundational break with the atrocious past and those who assert that today's radical, racialized inequalities derive from legal and constitutional continuities with the colonial and apartheid pasts. In Canada, recent public debates over the legal definition of genocide revealed tensions over the distribution of resources and power between Indigenous and settler Canadians. The question of whether genocide ended or continues represents a fundamental contest over the material consequences of colonialism in the present. The final case study examines the evasion of the past in the Oslo Accords and its subsequent effects on the structure of Israeli-Palestinian relations. While the predominant argument held that engaging the past would only provoke further conflict, activists and advocates countered that the radically unequal distribution of territory, population, and power in the present can be understood only in relation to past violence and dispossession. Together, the case studies reveal the material stakes of legal and political assertions of the resolution, distance, reproduction, legacy, afterlives, or erasure of racialized violence and dispossession.

TABLE OF CONTENTS

Introduction: Producing the Past in the Present.....	650
I. The United States: The Inescapable, Unresolvable Past	659
A. Background: Aftermaths of Slavery	662
B. Argument: The Slave Past, Completed	665
C. Counter-Argument: The Slave Past, Reproduced.....	676
D. Summary	682
II. South Africa: Transformation and Continuity	684
A. Background: Democracy and Truth-Telling.....	685
B. Argument: The Apartheid Past, Transformed.....	690
C. Counter-Argument: Apartheid and Transition, Continuous.....	696
D. Summary	702
III. Canada: The Settler-Colonial Present	703
A. Background: Investigating Indigenous Genocide	706
B. Argument: Repairing the Brutal Past.....	711
C. Counter-Argument: Restructuring the Violent Present.....	716
D. Summary	720
IV. Israel/Palestine: The Present Past	721
A. Background: Negotiating the Oslo Accords.....	723
B. Argument: Avoiding the Warring Past	724
C. Counter-Argument: Preserving the Unequal Past.....	728
D. Summary	731
Conclusion: Complexities and Consequences	732

INTRODUCTION: PRODUCING THE PAST IN THE PRESENT

On June 4, 2020, Rep. Barbara Lee (D-CA) introduced a House resolution calling for the establishment of a U.S. Commission on Truth, Racial Healing, and Transformation to “properly acknowledge, memorialize, and be a catalyst for progress.”¹ The resolution was introduced during the transnational Black Lives Matter protests in the aftermath of George Floyd’s brutal murder by police and a year after the Judiciary Committee of the House of Representatives held a historic discussion about slavery reparations. In response to the latter, a House hearing on H.R. 40, the Commission to Study and Develop Reparations Proposals for African-Americans Act, Senator Mitch McConnell resisted the notion that the past required any present reckoning. He declared: “I don’t think reparations for something that happened 150 years ago, when none of us currently living are responsible, is a good idea.”² He followed up his declaration by citing the Civil War, civil rights legislation, and the election of President Barack Obama as proof of how the United States had already appropriately addressed the “original sin of slavery.”³

Taken on their own terms, bills calling for commissions of inquiry and reparations appear chiefly as efforts to memorialize or compensate specific past harms. Yet they equally concern the present. While Senator McConnell’s remarks can be understood as a rebuttal to the notion that the slave past requires any further resolution or repair, they are at the same time an argument about *current*

1. Urging the Establishment of a United States Commission on Truth, Racial Healing, and Transformation, H. R. Con. Res. 100, 116th Cong. (2020).

2. Eli Rosenberg, *Mitch McConnell’s Ancestors Owned Slaves, According to a New Report. He Opposes Reparations*, WASH. POST (July 8, 2019), <https://www.washingtonpost.com/politics/2019/07/09/mitch-mcconnells-ancestors-owned-slaves-according-new-report-he-opposes-reparations/> (on file with the *Columbia Human Rights Law Review*). McConnell’s remarks came in response to an “historic hearing” at the House of Representatives where the House Judiciary Committee discussed a reparations bill sponsored by Rep. Sheila Jackson Lee, decades after its initial, annual introduction by Rep. John Conyers, Jr. Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/politics/slavery-reparations-hearing.html> (on file with the *Columbia Human Rights Law Review*). The bill would establish a commission to examine the history and legacies of slavery and segregation as well as the possibility of a national apology and reparations. Commission to Study and Develop Reparations Proposals for African-Americans Act, H.R. 40, 116th Cong. (2019).

3. Rachel Franzin, *Ta-Nehisi Coates Goes After McConnell on Reparations*, THE HILL (June 19, 2019), <https://thehill.com/homenews/house/449314-ta-nehisi-coates-goes-after-mcconnell-on-reparations> [<https://perma.cc/2VV2-7PF4>].

responsibility, benefit, and harm. Neither McConnell's remarks, H.R. 40, nor Rep. Lee's 2020 bill are solely or even primarily about the preservation or memory of the past. Rather, they are assertions about how that past should inform the ways in which resources, power, and rights are distributed today. That debate yokes together the legal and political production of the past with the radical racialized inequality of the present.

McConnell's position—that U.S. law and policy has already solved the problem of slavery—directly opposes the argument of the Black Lives Matter movement and its allies that present-day inequalities reflect and reproduce the legacy of slavery. The Movement for Black Lives Vision Statement, for example, stresses the need for reparations not only for colonialism, slavery, and segregation but also for redlining, mass incarceration, and other present-day forms of racial violence.⁴ The final line of Senator Lee's resolution suggests that a Truth, Racial Healing, and Transformation Commission would contribute to “eliminating persistent racial inequities.”⁵ These formulations of the present as both continuous with, and an unresolved legacy of, the past appeared in a different form in the 1619 Project from *The New York Times*, which commemorates the legacy of slavery by deliberately linking past enslavement to present-day health inequities, educational segregation, and cultural theft.⁶ Along with many others, these

4. *Reparations*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/reparations/> [<https://perma.cc/5AS2-3SUD>]; see also KATHERINE FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* 55 (2019) (ebook) (arguing that the history of anti-Black violence and dispossession “makes a compelling case for the renewed call for reparations today, especially in the form of property redistribution”). McConnell's remarks were directly refuted by writer Ta-Nehisi Coates, who testified at the House Judiciary Committee hearing. Coates made three important arguments in response. First, the notion of ending responsibility based on the passage of time constituted a “strange theory of governance” that ignored the commitment of the state to treaties that long outlast those who signed them. Second, the economic benefits reaped from slavery have not only not ended but in fact constitute the basis of the American economy. Finally, slavery cannot be separated from its “heirs[:] Coup d'états and convict leasing. Vagrancy laws and debt peonage. Redlining and racist G.I. bills. Poll taxes and state-sponsored terrorism.” *Here's What Ta-Nehisi Coates Told Congress About Reparations*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/ta-nehisi-coates-reparations.html> (on file with the *Columbia Human Rights Law Review*).

5. Urging the Establishment of a United States Commission on Truth, Racial Healing, and Transformation, *supra* note 1.

6. *The 1619 Project*, N.Y. TIMES MAG., <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (on file with the

advocates call for the redistribution of resources and power based in part on the multiple failures of courts and policymakers to recognize the continuities of past racialized dispossession.⁷ Those defending the current dispensation do so by severing the past from the present. Each position reflects a series of decisions about the reproduction of racialized inequality, the role of law in correcting or addressing it, and the degree to which current beneficiaries of unequal systems should yield some of their intergenerational privilege. The fulcrum of debate is not whether to discuss the past or not but rather how to define it and what it means in and for the present.

These debates about the past and present are limited neither to the United States nor to transitional justice institutions.⁸ Instead, arguments like the debate over the relevance of slavery for inequality today reflect what this Article identifies as a transnational legal phenomenon: stakeholders mobilizing pasts of racial and ethnic dispossession and violence to argue for or against specific arrangements of both material and symbolic resources in the present. In doing so, legal and political arguments alternately assert the importance of the past, attempt to differentiate the past from the present, or foreground one past over another. Each approach brings with it a different story of how the current distribution of power and resources evolved and how it can be altered for the future. Moreover, since radically opposing positions on the redistribution of wealth or power today can be supported by invoking the past, that invocation comes with possible costs: for example, support for institutions that

Columbia Human Rights Law Review). In an exchange with several eminent historians who asked for corrections to the Project's presentation of U.S. history, the Editor-in-Chief responded, "Why is this the way it is? In the case of the persistent racism and inequality that plague this country, the answer to that question led us inexorably into the past . . ." Jake Silverstein, *We Respond to the Historians Who Critiqued the 1619 Project*, N.Y. TIMES MAG. (Dec. 29, 2019), <https://www.nytimes.com/2019/12/20/magazine/we-respond-to-the-historians-who-critiqued-the-1619-project.html> (on file with the *Columbia Human Rights Law Review*). In July 2020, Senator Tom Cotton introduced a bill prohibiting the use of the 1619 Project in public school curricula, demonstrating the political stakes of the narrative. Saving American History Act of 2020, S. 4292, 116th Cong. (2020).

7. Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), <https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html> (on file with the *Columbia Human Rights Law Review*).

8. Transitional justice institutions work generally to memorialize and repair the past, hold perpetrators of violence accountable, pay reparations to survivors, and prevent a repetition of violence. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

excavate the past with a progressive agenda may not undo an unequal status quo. To elucidate these points, this article examines four cases: the United States, South Africa, Canada, and Israel/Palestine.

These cases expose different versions of a parallel phenomenon: the significance of the past for addressing racialized and national inequalities today. Together, they reveal what is at stake in choosing to foreground or background the past in legal decision-making. The narration of the past justifies different and often competing positions on economic, political, and legal arrangements in the present. In the United States, the debate hinges on whether the wrongs of slavery were resolved by constitutional and political processes or if they are a continuing factor in racial inequality today.⁹ In South Africa, some advocates argue that the struggle to address the apartheid past during the constitutional process had the consequence of freezing and possibly exacerbating longstanding economic inequality.¹⁰ In Canada, the debate pivots on whether the genocide of Indigenous people ended or if it continues today.¹¹ Finally, in Israel/Palestine, the debate over how to resolve the conflict has largely hinged on whether the past is the necessary starting point for negotiations or too fraught to consider at all.¹² Each case addresses a central question: under which conditions will a reinvigorated focus on past injustice promote or obstruct the possibility of meaningful political, legal, and economic transformations?

The dissonances between claims to racial resolution and the lived reality of material and racial inequality have become an overarching feature of legal and political argument in each site. Fierce struggles take place over the question of whether systems of violence and dispossession—like slavery, apartheid, conquest, or genocide—are completed and closed or continue in an unbroken chain. Courts and policymakers offer competing accounts of the past and of its resolution to justify different rules for the distribution of resources and power. They do so by identifying progress, continuity, or regression; by embracing the success or failure of government inquiries designed to excavate the past; or by expressly separating equality claims in the present from dispossession or violence in the past. Advocates and activists similarly endorse or condemn particular

9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

interpretations of the past to support different arguments for (re)distribution. Inescapably, pasts of settler-colonialism, slavery, apartheid, and genocide inform the present. What remains unsettled is whether those pasts constitute completed events, ongoing legacies, or continuous presents.

In areas of race and ethnicity, the language of time is central to legal debates over fairness, equality, and the distribution of resources and power.¹³ It is no accident that legal scholar Michelle Wilde Anderson uses the phrase a “new Time Zero” to describe a fundamental disagreement in U.S. law and politics over whether the racialized nature of U.S. property rules was “reset” through changes such as the establishment of the Fair Housing Act.¹⁴ Debates over inequality and emancipatory agendas today do not take place only in terms of contests between democratic socialism and chastened liberalism or in terms of tax policy or economic rights.¹⁵ They take

13. This is evident in the renewed attention to studies of racial capitalism and race relations in historical and legal scholarship, including on real estate, criminal law, and international law. *See, e.g.*, WALTER JOHNSON, *THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES* (2020) (analyzing the long history of St. Louis as “as part of the history of ‘racial capitalism’: the intertwined history of white supremacist ideology and the practices of empire, extraction, and exploitation”); MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2019) (examining the legal, historical, and economic construction of the racialized wealth gap through the history of Black banks in the U.S.); KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019) (arguing that “predatory inclusion” practiced in the 1970s post-redlining real estate industry left Black communities in desperate conditions as they were both encouraged to buy homes and subjected to radically unequal, racialized real estate policies, regulations, and terms); Noah Zatz, *Is ‘the Market’ the Enemy?: Racial Exploitation in Bailey v. Alabama*, LPE PROJECT: LPE BLOG (Jan. 17, 2018), <https://lpeblog.org/2018/01/17/is-the-market-the-enemy-racial-exploitation-in-bailey-v-alabama/#more-497> [<https://perma.cc/9RHZ-Q9M8>] (examining the *Bailey* case through the lens of racial capitalism and “with one eye on the contemporary”); Christopher Gevers, *Prosecuting the Crime of Apartheid: Never, Again*, AFR. Y.B. ON INT’L HUMANITARIAN L. 25 (2018) (exposing the racial politics of international criminal law through the repeated historical failure to prosecute the crime of apartheid).

14. Michelle Wilde Anderson, *The Racial Wealth Gap and the Question of Time Zero*, L. & POL. ECON. (Feb. 7, 2019), <https://lpeblog.org/2019/02/07/the-racial-wealth-gap-and-the-question-of-time-zero/> [<https://perma.cc/R9HJ-AN2P>].

15. *See generally* PHILIP ALSTON & NIKKI REISCH, *TAX, INEQUALITY AND HUMAN RIGHTS* (2019) (exploring the linkages between tax law and human rights law in the context of radically worsening inequality); *see also* Dennis M. Davis, *Taxation and Equality: The Implications for Redressing Inequality and the Promotion of Human Rights*, 10 HUMAN. 465, 465 (2019) (arguing that taxation is

place in the temporal vocabularies of justice, redress, and the reproduction or continuation of violence and dispossession.¹⁶ As a result, they link evaluations of present inequality and future redistribution to past injustice.

This Article proceeds in four Parts, each of which identifies predominant arguments and counter-arguments about the relevance of a particular past for the current arrangement of resources and power in a specific site.¹⁷ Part I analyzes U.S. court judgments on affirmative action and reparations by examining the invocations of a

critical to addressing growing global inequality, including creating infrastructure and support for fulfilling social and economic rights).

16. See, e.g., Dennis M. Davis, *Social Justice and Economic Inclusion: Where to, South Africa?*, DAILY MAVERICK (Feb. 23, 2020), <https://www.dailymaverick.co.za/article/2020-02-23-social-justice-and-economic-inclusion-where-to-south-africa/> [<https://perma.cc/8SPY-VP5Q>] (“[T]he kind of structural challenge to deal with inequality and reboot South Africa from its deeply imbedded patterns inherited from some 300 years of colonial and apartheid rule have simply not taken place . . .”); *Canada’s Indigenous Peoples Are Claiming New Rights and Resources*, THE ECONOMIST (July 25, 2019), <https://www.economist.com/special-report/2019/07/25/canadas-indigenous-peoples-are-claiming-new-rights-and-resources> [<https://perma.cc/YR5P-VZZN>] (describing recent developments in the rights asserted by Indigenous groups in Canada); Andrew W. Kahrl, *Black People’s Land Was Stolen*, N.Y. TIMES (June 20, 2019), <https://www.nytimes.com/2019/06/20/opinion/sunday/reparations-hearing.html> (on file with the *Columbia Human Rights Law Review*) (“[S]lavery and Jim Crow not only excluded generations of [B]lack Americans from benefits and opportunities enjoyed by white Americans; it also . . . turned black people’s earnest attempts to build wealth the American way – through property ownership – into an opportunity for others to profit at their expense.”); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/J9DZ-DHRR>] (“One cannot escape the question [of why reparations are not considered] by hand-waving at the past, disavowing the acts of one’s ancestors, not by citing a recent date of ancestral immigration If Thomas Jefferson’s genius matters, then so does his taking of Sally Heming’s body.”); Lawrie Balfour, *Unthinking Racial Realism: A Future for Reparations?*, 11 DU BOIS REV. 43, 45 (2014) (“Taking the idea of reparations seriously demands a confrontation with this history. Dismissing it out of hand, by contrast, helps to sustain White habits of devaluation of Black claims for equality.”).

17. This Article pursues these case studies to different degrees of detail. It devotes less space to the Israeli-Palestinian case, in part because I have written at length about it elsewhere. See generally Zinaida Miller, *Perils of Parity: Palestine’s Permanent Transition*, 47 CORNELL INT’L. L.J. 331 (2014). It also represents the outlier in many respects since it is still in the midst of conflict. The United States takes up the most space in the article, not least because unraveling the exceptionalist claim that the United States need not address its racialized past requires a deeper inquiry into the ways in which that past is constantly produced in legal opinions.

racialized past and an unequal present in both majority and dissenting opinions. The dominant thread in these judicial opinions is that the history of slavery is increasingly irrelevant to decisions about resources today and should be, at best, left to memorials and statues.¹⁸ For this argument, the past serves as evidence for the progress narrative of American history. The counter-argument asserts that the question is not *whether* the past of chattel slavery should affect legal and political decision-making today but *how*: as an intergenerational transmission of wealth and deprivation, a longstanding singular trauma, or an unresolved set of interlocking harms, including theft, economic exploitation, physical and sexual violence, and erasure of identities.¹⁹ Each potentially yields a different legal response.

The South African case study, discussed in Part II, exposes a crucial fault line between those who view the new constitutional order as part of a successful break with the past and those who understand it as reinforcing continuous inequality. For those defending the potential for greater socio-economic equality achieved alongside or through the 1996 Constitution, South Africa's famous democratic transition in 1994 and the Constitution itself marked a transformative legal shift—even if a necessarily incomplete one.²⁰ For those arguing for greater, faster, or different modes of redistribution, the very notion of transformation represented a regressive politics based on ignoring the colonial past.²¹ This argument suggests that the transition failed to adequately redistribute resources, and the focus on closure might be a way to avoid the economic implications of the past.²² These critics use the Truth and Reconciliation Commission

18. See *infra* Section I.B.

19. See *infra* Section I.C.

20. See *infra* Section II.B.

21. Tshepo Madlingozi writes: “[T]he earliest clue that the [constitutional] drafters . . . do not pretend to pursue a decolonising agenda can be seen in the fact the word ‘Apartheid,’ let alone ‘colonialism,’ does not appear in the entire text It is thus not clear what past this constitution seeks to constitute a rupture from.” Tshepo Madlingozi, *The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonisation?*, CRITICAL LEGAL THINKING (Apr. 6, 2018), <http://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/> [https://perma.cc/GJ6W-2HR5].

22. *Id.*; see also Ben Turok, *Despite Democracy, South Africa Remains a Colonial Country*, DAILY MAVERICK (Aug. 13, 2018), <https://www.dailymaverick.co.za/opinionista/2018-08-13-despite-democracy-south-africa-remains-a-colonial-country/> [https://perma.cc/9PDY-CJDC] (arguing that

and the Constitutional Court's judgments to argue not merely that attention to the past did not go far enough, but also that the very recognition of the past in a partial manner facilitated an ongoing failure to adequately redistribute resources and end economic apartheid.²³

Part III turns to Canada, where the National Inquiry into Missing and Murdered Indigenous Women and Girls found the Canadian state responsible for Indigenous genocide.²⁴ That conclusion came in the aftermath of a Truth and Reconciliation Commission (TRC) finding that the Indian Residential School system not only inflicted brutal racialized physical abuse on Indigenous peoples but also constituted "cultural genocide."²⁵ The ensuing popular and legal battles over the "appropriate" usage of the term genocide revealed the material stakes of how the past is raised in the present—and how recognition and redistribution do not always coalesce.²⁶ For scholars and advocates who viewed the two inquiries as establishing a common story of continuous violence and dispossession, the remedy required is not only reparation or reconciliation but also decolonization.²⁷ For Indigenous activists, an express admission by the Prime Minister that the recent murders and disappearances of Indigenous women, girls, and two-spirit persons constituted acts of

South Africa "remains a colonial country despite appearances of modernity and advancement").

23. See, e.g., Joel Modiri, *The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa*, 28 S. AFR. J. HUM. RTS. 405, 431 (2012) ("Another troubling aspect in most of the Court's references to race is the emphasis on 'past' or 'previous' disadvantage, which . . . thus ignores the ways in which that 'past' discrimination and 'past' disadvantage currently manifests itself as a present condition and is constantly being reproduced.").

24. NAT'L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 54 (2019).

25. Virginia Arsenault, *Resistance to the Canadian Truth and Reconciliation Commission* 32 (Feb. 2015) (unpublished report) (on file with the *Columbia Human Rights Law Review*).

26. Evan Dyer, *What Does It Mean to Call Canada's Treatment of Indigenous Women a 'Genocide'?*, CBC NEWS (June 5, 2019), <https://www.cbc.ca/news/politics/indigenous-missing-murdered-women-genocide-trudeau-1.5162541> [<https://perma.cc/SF53-YDC4>].

27. Jeff Corntassel et al., *Indigenous Storytelling, Truth-Telling, and Community Approaches to Reconciliation*, 35 ENG. STUD. CAN. 137, 145 (2009) (pointing out that using the dominant scripts of "moving on from the past" means "[r]econciliation becomes a way for the dominant culture to reinscribe the status quo rather than to make amends for previous injustices").

genocide has had little material effect on conditions of poverty, violence, and resource exploitation.²⁸ A decolonial approach would have redistributed power relations and resources between the settler and Indigenous populations in any number of ways. By contrast, for those who viewed the TRC as correctly locating genocidal acts in the past, the direct remedy was fulfilled through a combination of closing the residential schools (prior to the TRC opening) and distributing reparations payments to individuals.

Part IV describes the ways in which negotiations between Israelis and Palestinians were structured from 1993 onwards by a decision to sever the past from conflict resolution on the grounds that discussing the past was itself too provocative. For those defending that decision, negotiations had to begin in the present in order to avoid getting mired in unresolvable historical arguments.²⁹ That theory was made concrete in the Oslo Accords, which were premised in part on the notion that only by excising the past from discussion of present distribution could any agreement be reached.³⁰ The most extreme version of this came in January 2020 when the Trump Administration announced a peace plan entirely structured around making permanent an unequal situation legally understood as temporary.³¹ Cutting off the past made it possible to use the current

28. Catharine Tunney, *Trudeau Says Deaths and Disappearances of Indigenous Women and Girls Amount to 'Genocide'*, CBC NEWS (June 4, 2019), <https://www.cbc.ca/news/politics/trudeau-mmiwg-genocide-1.5161681> [https://perma.cc/QM79-WK8M]; Amanda Coletta, *Why Protestors Are Shutting Down Canada's Rail Service*, WASH. POST (Feb. 18, 2020), https://www.washingtonpost.com/world/the_americas/why-protesters-are-shutting-down-canadas-rail-service/2020/02/18/a5bf534e-51f2-11ea-80ce-37a8d4266c09 (on file with the *Columbia Human Rights Law Review*) (describing the Canadian government's militarized response to Indigenous protests against a natural gas pipeline); Ryan Maloney, *Romeo Saganash: Trudeau 'Doesn't Give A F**k' About Indigenous Rights*, HUFFINGTON POST (Sept. 25, 2018), https://www.huffingtonpost.ca/2018/09/25/romeo-saganash-trudeau_a_23541694/ [https://perma.cc/82QT-WGRR] (discussing MP Saganash's comment that Prime Minister Trudeau "doesn't give a f**k about Indigenous rights.").

29. The idea that history itself is simply too loaded to be discussed as a factor is not unique to Israel and Palestine. See Sarah Warshauer Freedman et al., *Teaching History After Identity-Based Conflicts: The Rwanda Experience*, 52 COMPAR. EDUC. REV. 663, 663–64 (2008) (criticizing the Rwandan government's policy which permits only the "official historical narrative" of the Rwanda genocide to be taught in secondary schools).

30. INT'L CRISIS GRP., *THE EMPEROR HAS NO CLOTHES: PALESTINIANS AND THE END OF THE PEACE PROCESS* (2012).

31. EXEC. OFF. OF THE PRESIDENT, *PEACE TO PROSPERITY: A VISION TO IMPROVE THE LIVES OF THE PALESTINIAN AND ISRAELI PEOPLE 6* (2020) ("Reciting

distribution of land, resources, and power as a model for the future. As a result, opponents argued, it silenced claims for redistribution that were based on a history of dispossession.³²

The Article concludes by reflecting on some possible challenges of arguing for contemporary redistribution by invoking the past. This is not to dismiss calls for remediation, for tracing beneficiaries over time, for memorializing past violence, or for framing inequality as a legacy of past oppression. To the contrary, the cases analyzed here all demonstrate in different ways the critical need to reflect upon heinous histories, racialized violence and dispossession, and the reproduction of structural inequalities over time. The constraints discussed here are offered as prompts for further discussion by fully engaging with the potential benefits and limitations of contesting distribution in the present through the past, advocates can better assess their own strategies and arguments. The Article concludes in this spirit of productive exchange.

I. THE UNITED STATES: THE INESCAPABLE, UNRESOLVABLE PAST

Slavery is sometimes described as the “original sin” of the United States: everyone can agree that it was wrong, but its relationship to the present remains undetermined. The “disparate temporalities of unfreedom” described by Saidiya Hartman reflect not only the distance of the past but the ways in which encounters with that past become a “vehicle for articulating the disfigured promises of the present.”³³ According to legal historian Ariela Gross, contemporary debates reveal that “the time [of slavery] is now. Slavery is still the touchstone for all of our discussions about race in America—as it should be, because race was born out of slavery.”³⁴

past narratives about the conflict is unproductive. In order to resolve this conflict, the solution must be forward-looking and dedicated to the improvement of security and quality of life, while being respectful of the historic and religious significance of the region to its peoples.”).

32. See, e.g., Salam Fayyad, *Trump’s Middle East Peace Plan: What’s There To Be Upset About?*, BROOKINGS INST.: ORDER FROM CHAOS (Feb. 21, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/02/21/trumps-middle-east-peace-plan-whats-there-to-be-upset-about/> [https://perma.cc/WUL7-8YRF] (arguing that among other problems, the Trump plan is “replete with . . . examples and suggestions regarding whose narrative should prevail. These include the suggestion that Palestinians have no territorial rights whatsoever . . .”).

33. Saidiya Hartman, *The Time of Slavery*, 101 S. ATL. Q. 757, 763 (2002).

34. Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 321 (2008). The

Gross' incisive investigation of these questions makes clear that legal judgments on race not only rely upon but produce historical narratives.³⁵ This Part argues that those judgments mobilize the past in service of struggles over contemporary racialized inequality; positions on the latter depend upon competing accounts of continuity, interruption, legacy, or progress from the eras of slavery and segregation. Accounts of the past are equally arguments over the present, specifically about whether harm and benefit transmit intergenerationally, how collective or structural injury relates to individual experience, and how definitive the difference is between *de facto* and *de jure* racialized policies. Arguments over affirmative action and reparations have made these threads particularly explicit, although they are far from the only arenas in which the debates take place.

In a series of judgments over decades, Supreme Court majorities moved from a minimal recognition of the injustices wrought by slavery—and conceivably the need for some form of remediation—to an assertion of the past as a receding horizon demonstrating the victory of progress.³⁶ The shift reflected the well-

notion of a country's "original sin" of dispossession or enslavement is perennially present in the societies addressed in this article. For example, the South African government declares, "[t]he dispossession of land through the 1913 Natives Land Act was apartheid's original sin." *Land Reform*, SOUTH AFRICAN GOV'T, <https://www.gov.za/issues/land-reform> (on file with the *Columbia Human Rights Law Review*). The question of how and why specific forms of violence and dispossession are labeled as the "original sin" of a nation (the U.S. example obviously raising questions about Indigenous genocide) is critical but outside the scope of this Article.

35. Gross, *supra* note 34, at 285–86. Gross' account, which itself builds on important work by Robert Gordon cited in this article, is invaluable for this Article. Her framework is deeply instructive; this Article builds on her account by focusing more specifically on the ways in which including, omitting, or narrating the past become part of arguments over current inequality.

36. Yuvraj Joshi has offered an insightful comparative argument that affirmative action be viewed as transitional justice, using the United States and South Africa as case studies. While we both view affirmative action as a critically important site of negotiation over past racial injustice, Joshi's account focuses on affirmative action as itself a form of transitional justice while this Article is interested in affirmative action litigation as one case among several of a transnational phenomenon of arguing over rights and distribution in the present through continuities or breaks with the past. *See generally* Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1 (2020); *see also* Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 607 (1998) ("Affirmative action programs are a direct outgrowth of our nation's long and unhappy history of moving away from slavery and toward the goal of racial equality.").

documented move from redress (for the past) to colorblindness (in the present).³⁷ It redefined a collective experience into individual harm and remedy, converting the institutional racism and structural dispossession put in place by slavery into a present-day concern over eliminating race-conscious policies. By the early twenty-first century, that conversion led to explicit statements that affirmative action would soon be unnecessary because so much progress had been and would continue to be made.³⁸ Legal judgments against reparations for slavery found that without a clear and present causal relationship between perpetrator and injury, slavery's beneficiaries are no longer responsible for its harms.³⁹

In both areas, courts assert that past harms are non-continuous, both because they are complete (neither harm nor responsibility endures) and because they are long past (and thus legally irrelevant). Either the Reconstruction Amendments resolved the harms of slavery or the harms are now too far past for accounting. In other areas too, such as voting rights, a racialized progress narrative from past inequality justified particular distributions of rights in the present.⁴⁰ The counter-argument by reparations advocates, legal scholars, and dissenting justices reflects an understanding of both benefit and harm as reproductive and continuous.⁴¹ As a result, responsibility endures and contemporary inequality rests on the foundation of the slave trade.

37. Ian F. Haney López, "A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1004 (2007).

38. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 342 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *id.* at 351 (Thomas, J., concurring in part and dissenting in part) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years.").

39. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 380 (1987).

40. In *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013), the Roberts court majority opinion found the preclearance requirements of the Voting Rights Act unconstitutional on the basis that they were no longer necessary. The Court viewed the contemporary lack of necessity, bolstered importantly by data points, through the lens of progress in Black voter registration in the states subject to the preclearance requirements from 1965 to 2012. *Id.* at 549 ("Problems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides.").

41. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993).

A. Background: Aftermaths of Slavery

The period immediately following the Civil War set the stage for contemporary arguments over inequality, rights, and race in multiple ways, particularly in a series of decisions that shaped the ways slavery was and was not formally addressed by courts.⁴² Early decisions regarding amnesties, reparations, and constitutional rights had long-term impacts on the treatment of slavery as a historical tragedy or an ongoing horror.⁴³ The abolition of slavery through the Thirteenth Amendment, the passage of the Civil Rights Act of 1866 and the Reconstruction Acts in 1867, and the subsequent ratification of the Fourteenth and Fifteenth Amendments expanding citizenship and suffrage laid the ground for a set of radical political changes but left unchecked much of the racial inequality constructed through slavery. The federal government's choice at the end of the Civil War to focus on national reunion over racial redistribution prioritized a white reconciliation narrative. Reconstruction gradually devolved into legally-sanctioned Jim Crow segregation and racial terror campaigns. Whether or not fulfilling Reconstruction could have better equalized race relations in the U.S. is an impossible counter-factual, but historians argue convincingly that the federal government's choice to appease Southern states by softening and then eliminating the emancipatory aspects of Reconstruction led directly to segregation and widespread 'private' violence in the form of lynching sanctioned tacitly or explicitly by the state.⁴⁴

At the end of 1863, Lincoln issued the Proclamation of Amnesty and Reconstruction, offering pardons to any who would

42. See, e.g., Adjoa A. Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 NYU ANN. SURV. AM. L. 457, 458 (2003) (tracing Black reparations claims in the United States back to the failures of Field Order No. 15 in the aftermath of the Civil War).

43. Meister argues that this period might be best understood as an unfinished transition. Robert Meister, *Forgiving and Forgetting: Lincoln and the Politics of National Recovery*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 135, 145 (Carla Hesse & Robert Post eds., 1999).

44. Gordon suggests similarly that the "make-whole remedy" involving preferential treatment requires a "massive counterfactual thought experiment: imagine what positions in society and the economy living blacks would have attained had they not been subject to acts of racist injustice The argument is perfectly sensible" and all but impossible; "[t]he history of the United States, its entire economy, society, politics, and racial and ethnic composition would have been so different without slavery that one couldn't even begin to guess what American society would look like now." Robert W. Gordon, *Undoing Historical Injustice*, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 35, 56 (Austin Sarat & Thomas Kearns eds., 1998).

swear a loyalty oath to the Union and the Constitution.⁴⁵ The Proclamation was hotly debated in Congress over the next year. After Lincoln's assassination, President Johnson proclaimed similar amnesties. Citizens and soldiers who participated in the Confederate rebellion were pardoned (and their property returned) if they signed a loyalty oath to the Union.⁴⁶ Although several groups—including Confederate officials—were initially excluded, a broader amnesty accompanied the passage of the Fourteenth Amendment, essentially allowing almost all former Confederate officials to once again hold office.⁴⁷ These amnesties overrode the possibility of a full administrative purge of Confederates in the defeated South. Few prosecutions were pursued, and those that were pursued centered on particularly atrocious crimes.⁴⁸

The predominant post-War approach focused far more on a discourse of national reunion than on accountability for slavery, any form of racial reconciliation, or long-term redistribution of resources after slavery.⁴⁹ Despite attempts by some to redistribute land, the end result in the U.S. South was to maintain white property ownership, leaving the freedmen to live “once more [as] subordinate farm labor.”⁵⁰ The Reconstruction project floundered in part due to the power given to Southern states to enact Black Codes and other rules to ensure the continuing racial exclusion, the defeat of land reform,

45. JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 16 (1994).

46. *Id.* at 30.

47. Meister, *supra* note 43; see also FRANKLIN, *supra* note 45, at 82–84. (discussing President Johnson's amnesty proclamation, which pardoned almost all ex-Confederate soldiers).

48. CAROLINE JANNEY, *REMEMBERING THE CIVIL WAR: REUNION AND THE LIMITS OF RECONCILIATION* 78–80 (2013) (describing the arrest and execution of Henry Wirz, Henry Magruder, and Champ Ferguson for abuse of prisoners of war).

49. In his detailed study, W.E.B. Du Bois argued that “land hunger—this absolutely fundamental and essential thing to any real emancipation of the slaves—was continually pushed by all emancipated Negroes and their representatives in every Southern state. It was met by ridicule, by anger, and by dishonest and insincere efforts to satisfy it apparently.” W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 537 (Routledge 2013).

50. Gordon, *supra* note 44, at 45.

and “the campaign of violence that turned the electoral tide in many parts of the South.”⁵¹

Reconstruction centered on the creation of new political formations and allocations of power rather than formal accountability processes, undermined by both deliberate political sabotage and the failure to account nationally for the past of chattel slavery. For southern white planters, legal historian Robert Gordon argued, “the Civil War amendments had changed only the formal status of their black labor force; the task now was simply to work around the legal restrictions to reattach black laborers to their former masters and preserve stratification by caste.”⁵² Gross also pointed out that the post-Civil War era was defined by a choice of national unity over meaningful accountability for, or even recognition of, the atrocity, theft, exploitation, and destruction wrought by slavery.⁵³ She suggests that such “public amnesia—the collective forgetting of slavery after it came to an end—allowed reconciliation and unification of the nation through the forgetting of the victims of slavery and its aftermath.”⁵⁴ The Civil War amendments promised formal political equality for Black men but guaranteed no economic redistribution or reparations. The failures of Reconstruction to adequately redistribute power and resources—chiefly land—allowed white southern power brokers to implement radical segregation politics bolstered by privatized racial terror campaigns in the early twentieth century.⁵⁵

The focus in the aftermath of the Civil War on what historian David Blight described as “reconciliation and reunion” had long-term consequences for the legal and political place of slavery in the United

51. ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 603 (rev. ed. 2014) (explaining why “[r]econstruction can only be judged a failure”).

52. Gordon, *supra* note 44, at 45.

53. Ariela J. Gross, *All Born to Freedom? Comparing the Law and Politics of Race and the Memory of Slavery in the U.S. and France Today*, 21 *S. CAL. INTERDISC. L.J.* 523, 529 (2012).

54. *Id.*

55. See, e.g., HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 37 (2019) (contextualizing the legalization of segregation within “the ideology of white supremacy [which] evolved in order to maintain the country’s racial hierarchy in the face of emancipation and black citizenship” after the Civil War and which was “reinforced in this new era by the nation’s cultural, economic, educational, legal, and violently extralegal systems, including lynching”).

States.⁵⁶ Among those consequences were the failure to fully memorialize, account for, or engage with “the impact of slavery on [U.S.] history, and the long-term consequences of the overthrow of Reconstruction.”⁵⁷ Blight described the initial development of national memory in the first decades after the war, culminating in the anniversary of reunion, celebrated at Gettysburg in July 1913. Multiple descriptions of the event in news stories depicted a white reconciliation narrative that erased the role of race altogether: “[s]lavery (and the whole black experience) had no place in the formulas by which most Americans found meaning on the Civil War.”⁵⁸ That these formulas supported the development of a brutal segregationist society built on the ruins of Reconstruction was no accident; to the contrary, a “segregated society required a segregated historical memory” and an active myth-making project to obscure the racial conflicts at its roots.⁵⁹ The tension between memory and amnesia, or more specifically between one version of the past and another, would recur and reappear throughout legal judgments. The following Sections focus primarily on two sites of contemporary contestation over the relationship between the enslaved past and unequal present in the United States: reparations claims and affirmative action.⁶⁰

B. Argument: The Slave Past, Completed

In both the reparations and affirmative action arenas, many judicial opinions (and in some cases advocates, lawyers, and

56. DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 2* (2001).

57. ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION xxx* (2013).

58. *Id.* at 388.

59. *Id.* at 391; *see also* ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION xiii* (2015) (describing the decades of scholarship required to overcome the ingrained racist myths associated with reconstruction).

60. *See* Alfred Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 499 (2003) (noting the “strange relationship . . . between affirmative action and reparations talk, because many see affirmative action as a form of reparations” and the belief that “as courts restrict affirmative action and as it loses support in legislatures, reparations offers the hope of a different language for talking about many of the same issues”); *see also* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 432 (1998) (arguing that with the demise of affirmative action, “legal theorists concerned about racial subordination of Blacks reconsider and revitalize the discussion of reparations as a critical legalism”).

policymakers) promote a common narrative: slavery was horrific and heroically ended—albeit by paying a terrible national price—and its effects have been managed as well as possible through legislative, constitutional, and judicial interventions. As a result, this line of thinking implies, any arguments over the current distribution of wealth and power must be separated from the legacy of slavery. Reparations judgments explicitly invoke the passage of time; affirmative action cases have done so primarily by omission.⁶¹ Whereas early opinions reference slavery and segregation in affirming or denying affirmative action, later cases largely remove these references altogether, separating claims made in the present with regard to inequality from a historical context.

This is demonstrated by the outcomes of cases brought by plaintiffs making claims for reparations. In the decisions for these cases, courts de-link past from present individuals through procedural blocks to reparations such as statutes of limitations,⁶² lack of standing,⁶³ causation,⁶⁴ duty,⁶⁵ political question,⁶⁶ or sovereign immunity.⁶⁷ The judgments against reparations reject arguments

61. See, e.g., *Richmond v. Croson*, 488 U.S. 469, 470 (1989) (finding a program that awarded a percentage of city contracts to minority-owned businesses to remedy past discrimination in the construction business unconstitutional); *Re African-American Slave Descendants Litig.*, 471 F.3d 754, 763 (7th Cir. 2006) (dismissing a reparations claim brought by descendants of enslaved people). There are, of course, vast, important literatures on both of these topics, to which this Article cannot do justice. This Article's aim is not a broad analysis of either reparations claims in the courts or affirmative action; rather, it focuses on language in the judicial opinions that reveals particular assumptions or judgments about the relationship between racial and economic inequality in the present and the operations of slavery in the past.

62. *African-American Slave Descendants Litig.*, 471 F.3d 754, 762 (7th Cir. 2006).

63. See *Aiyetoro*, *supra* note 42, at 467 (“The question [of standing] is then, how can an individual be injured in the legal sense by institutions and practices abolished over a hundred years ago?”).

64. See, e.g., *Brophy*, *supra* note 60, at 504–05 (identifying difficulties in reparations claims, including identifying victims and perpetrators, accounting for the lack of direct involvement by descendants of perpetrators, and the difficulty in connecting “past wrong and present claim”).

65. See Calvin Massey, *Some Thoughts on the Law and Politics of Reparations for Slavery*, 24 B.C. THIRD WORLD L.J. 157, 162 (2004) (demonstrating the legal complexity of finding a duty owed today based on rights violated 150 years prior).

66. *African-American Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006).

67. See, e.g., *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (dismissing a \$100,000,000 claim to reparations on grounds of sovereign

based on unjust enrichment that would rely on the reproduction of wealth by the intergenerational beneficiaries of slavery.⁶⁸ The courts mobilize procedure to defend a failure of remedy.⁶⁹

In 2006, the Seventh Circuit heard a consolidated case bringing together nine separate suits for monetary relief in the form of disgorgement for harms related to slavery.⁷⁰ The cases were brought against companies that transacted with slaveowners or held slaves themselves in northern states where slavery was illegal even prior to the Thirteenth Amendment. The court expressed some skepticism about the success of any potential reparations litigation but offered an exhaustive list of conditions that, if met, would allow the case to move forward.⁷¹ Having offered up a narrow possibility for success, however, the court upheld the district court's dismissal of the case, citing:

immunity); *In Re African-American Slave Descendants Litig.*, 471 F.3d 754, 760 (7th Cir. 2006) (“[I]f there were a legal wrong it would not be a wrong to any living persons unless they were somehow the authorized representatives to bring suits on behalf of their enslaved ancestors.”) The procedural restrictions also shift the targets of litigation; Best and Hartman review the 1915 dismissal on sovereign immunity grounds of a case brought against the U.S. Treasury and the subsequent imprisonment of one of the plaintiffs in the case on the grounds that he had fraudulently promised the possibility of redress for slavery from the state. The result was not only the end of that particular suit but the “very conception of the government as culpable or obligated.” Stephen Best & Saidiya Hartman, *Fugitive Justice*, 92 REPRESENTATIONS 1, 7 (2005); see also Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 73–74 (2005) (pointing out the long-time questions about statutes of limitations, demonstrated by Justice Holmes’ nineteenth century question, “what is the justification for depriving a man of his rights . . . in consequence of the lapse of time?” (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897))).

68. See Aiyetoro, *supra* note 42, at 469 (“African descendants who disproportionately live in poverty yet whose ancestors provided the base for the creation of modern-day industry, are injured in fact when corporations who exploited the system of chattel slavery thereby amassed many millions of dollars.”)

69. Malveaux argues that it is precisely on these grounds that exceptions to statutes of limitations exist. Malveaux, *supra* note 67, at 83 (“[E]xemptions from statutes of limitations ensure that procedural mechanisms do not supercede the enforcement of substantive law.”)

70. *Slave Descendants*, 471 F.3d at 754.

71. *Id.* at 759 (suggesting that the plaintiffs could be granted relief if they could establish standing, establish that a defendant violated the law in 1850, establish that the law was intended to provide a remedy for this violation, identify their ancestors, quantify damages incurred, and persuade the court to toll the statute of limitations).

[A] fatal disconnect between the victims and the plaintiffs. When a person is wronged he can seek redress, and if he wins, his descendants may benefit, but the wrong to the ancestor is not a wrong to the descendants. For if it were, then . . . statutes of limitations would be toothless. A person whose ancestor had been wronged a thousand years ago could sue on the ground that it was a continuing wrong and he is one of the victims.⁷²

The court framed slavery as a long past harm outlawed by the Thirteenth Amendment, the financial and emotional implications of which are now part of an overly long causal chain with “too many weak links” to connect defendants and plaintiffs.⁷³ Moreover, the opinion highlighted the fear that permitting reparations for a harm committed against one’s ancestors rather than against the body of a living person will essentially overrule the necessity of statutes of limitations.⁷⁴

Despite contributing to continued inequality, these judgments suggest that legal and political responsibility can only be designated through a causal chain from perpetrator to victim, slave-holder to slave. In some versions, responsibility is reduced by simultaneously emphasizing the passage of time since slavery and individualizing the institution of slavery.⁷⁵ The past is horrific, mistaken, atrocious, and over. Materially, the argument is that the chain ends with the bodies of those involved in the harm.⁷⁶ As Senator McConnell argued in

72. *Id.*

73. *Id.*; see also Malveaux, *supra* note 67, at 75–81 (identifying issues of fairness to the defendant, efficiency, and institutional legitimacy as policy justifications for limitations law).

74. See *Slavery Descendants*, 471 F.3d at 760 (“There is no way to determine that a given black American today is worse off by a specific, calculable sum of money (or monetized emotional harm) as a result of the conduct of one or more of the defendants.”); see also Massey, *supra* note 65, at 164 (suggesting that “[c]alculation of the economic loss suffered by any given present day descendant of an American slave attributable to the wrongful confinement of slaves is so speculative as to be an exercise in imagination”).

75. At congressional hearings on the need for reparations in June 2019, Congressman Mike Johnson condemned “the injustice of monetary reparations from current taxpayers for the sins of a small subset of Americans from many generations ago.” *Slavery Reparations Hearing Ignites Fiery Debate in Congress*, BBC NEWS (June 19, 2019), <https://www.bbc.com/news/world-us-canada-48665802> [<https://perma.cc/E9VD-BR7S>].

76. For an argument that reparations should be limited to those with documented slave ancestry rather than determined based on racial classification,

2019, no reparation could or should be made for a harm against deceased individuals committed by the deceased.⁷⁷ Reparative responsibility dies with the individuals involved, regardless of the surviving structures of domination.⁷⁸ That individualist idea translates into antidiscrimination law, which legal scholar Alan Freeman argued rests on a “perpetrator perspective” which emphasizes specific, individualized, deliberately discriminatory harms that are removed from the evolution of historical violence.⁷⁹

Of the many areas of antidiscrimination in which the Supreme Court has produced specific racialized pasts, affirmative action stands out for its explicit engagement with, and eventual dismissal of, the importance of past racial inequality, dispossession, and violence for the distribution of rights and resources in the present.⁸⁰ Moreover, like reparations, affirmative action represents a place in which the courts are forced to debate the relationship between remediation for the past and redistribution in the present. The arguments made in the context of reparations that slavery can no longer be compensated, repaired, or redressed due to the passage of time parallel affirmative action litigation where multiple opinions portray the past as comprised of a specific set of harms subject to particular, temporary remedies.⁸¹ The trajectory from *Bakke*, where five separate opinions reference slavery and racial inequality, to *Grutter*, where slavery is largely absent, reveals an historical erasure mobilized to support a new theory of “colorblind” equal protection.⁸²

see *Roadmap to Reparations*, AM. DESCENDANTS OF SLAVERY, <https://ados101.com/roadmap-to-reparations> [<https://perma.cc/K6TX-3PHS>].

77. Rosenberg, *supra* note 2.

78. See Best & Hartman, *supra* note 67, at 8 (“Dismissals of African American claims for reparations oscillate between competing senses that one either has no ground for a legitimate claim or that the claim has come too late.”).

79. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053–54 (1978) (“The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity.”).

80. See Joshi, *supra* note 36, at 31–32 (arguing that “the implementation of affirmative action gives rise to debates about the relationship between socioeconomic status and racial inequality, as well as about how socioeconomic inequalities . . . should be addressed”).

81. See Gross, *supra* note 53, at 286 (“[T]he story of slavery is presented as almost a prelude to abolition and to the inevitable unfolding of freedom.”).

82. Aiyetoro, *supra* note 42, at 473 (“[T]he backlash of the affirmative action era, where programs designed to narrow the gap created by slavery and continuing racial discrimination in the United States have been held to violate the

In 1978, the Supreme Court confronted the question of the legality of affirmative action in higher education for the first time. Allen Bakke, a white applicant to the University of California-Davis School of Medicine, challenged the school's admissions program as racially discriminatory under the Equal Protection Clause.⁸³ The medical school at the time reserved sixteen of its hundred seats each year for members of particular minority groups; Bakke claimed that he was rejected on the basis of his race, establishing unlawful discrimination.⁸⁴ The decision divided the Justices, who issued six separate opinions. Justice Powell's judgment invalidated the special admissions program but overturned the lower court's ruling that race could never be taken into account in admissions.⁸⁵ Throughout their opinions, the Justices openly debated the relationships between a terrible past and unequal present; they agree on the significance of slavery in its own time but not its structural relationship to the present.

Each of the opinions in *Bakke* referenced a history of slavery and racial inequity, though they did so to support different points about the present. When Justice Powell, in his plurality opinion, reviewed the question of racial discrimination, he began with the "Nation's constitutional and demographic history"—that is, the purpose of the 14th Amendment in guaranteeing sustained freedom for those recently freed from slavery.⁸⁶ Powell began with the past in order to create a story in which the events of slavery and its immediate aftermath fade in relevance over time—not least because the specificity of relations between Blacks and whites or enslaved and free is complicated by the growth of the United States as a country of many minorities. His sense of continuity is not between past and present dispossession, but in terms of what he views as the fundamental truth of the U.S. constitution; he "retells a history in which colorblindness is the timeless principle of US constitutional history, punctuated by a series of unfortunate deviations."⁸⁷ The Equal Protection Clause solves the problem of the slave past.

14th Amendment's Equal Protection Clause, part of the trilogy of amendments passed to remedy the crimes of slavery.").

83. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

84. *Id.* at 277–78.

85. *Id.* at 314 (defending "diversity" as the sole criterion for considering race in admissions).

86. *Id.* at 292.

87. Gross, *supra* note 53, at 300.

Justice Powell's sharp distinction between past and present racial injustice opens the door to affirmative action jurisprudence that produces the past as a problem already solved. Interpreting equal protection as necessarily "universal" and as a result applicable to everyone regardless of background in racial origin or slave background, Justice Powell drew a sharp line between cases regarding "specific instances of racial discrimination" and an "amorphous concept of injury that may be ageless in its reach into the past."⁸⁸ As in other affirmative action and reparations decisions, he invoked a generalized concern about the consequences of construing responsibility and harm broadly (in temporal terms). Like in *In Re African-American Reparations*, Powell suggested that if the courts understand racial inequality in terms of continuing violence, they will open up contemporary arrangements of rights and resources to question.⁸⁹ Powell moved to establish a separation between the past in which the harm took place and the present of equal protection.

The contentious move to discipline the unresolved past and separate it procedurally or substantively from contemporary distributional realities dominated the Court's approach to affirmative action in higher education twenty-five years later. In *Grutter v. Bollinger*, the question of intergenerational beneficiaries surfaces only minimally, focusing attention on the presentist debate over equal protection. In part, the Court suggested the resolution of historical inequity simply by omission: while the past is foregrounded in *Bakke*, it is largely unmentioned in *Grutter*. Moreover, *Grutter* established and reaffirmed Justice Powell's singular legacy from *Bakke*: the invocation of "diversity" as a (presentist) rationale for affirmative action rather than remediation or distributional concerns, which would have forced a past-facing judgment.⁹⁰

88. *Bakke*, 438 U.S. at 307.

89. See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986) (arguing that the generalized nature of the remedial program in question would make it possible for courts to "uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future"); see also *Richmond v. Croson*, 488 U.S. 469, 506 (1989) (arguing that if past racial discrimination "can serve as the basis for rigid racial preferences [it] would be to open the door to competing claims . . . for every disadvantaged group. . . . The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost . . .").

90. Yamamoto et al. point out that defenders of the "colorblindness" rationale for affirmative action elided the radical difference between the mobilization of race in affirmative action and its deployment in Jim Crow segregation. The result was that such defenders could "channel our moral disgust for slavery and segregation and direct it against government efforts to ameliorate

After having been waitlisted and subsequently rejected by the University of Michigan Law School in 1996, Barbara Grutter sued the school and its officers under the Fourteenth Amendment and the Civil Rights Act.⁹¹ Grutter alleged that race was used as a “predominant” factor in admissions, unfairly punishing white applicants like herself, and that the University of Michigan had no compelling interest for using race in this manner to make admissions decisions.⁹² In accepting the case, the Supreme Court began where Justice Powell left off: not the consideration of remediation but rather the place of “diversity” as a compelling interest.⁹³ Whereas the first would have entailed a direct debate over the material terms of responsibility in the present for the past, the second invoked an almost exclusively presentist argument focused on non-material goals⁹⁴—all the more so given Justice O’Connor’s emphasis on the time-bound nature of race-conscious admissions policies themselves.⁹⁵

Justice O’Connor’s opinion made no explicit reference to slavery, Reconstruction, or Jim Crow—unlike Powell’s opinion in *Bakke*, it rejected the need to reference the past for remedy.⁹⁶ The silence speaks loudly: between 1978 and 2003, the racialized past became increasingly irrelevant to the question of present racial discrimination (to the contrary, Justice O’Connor preferred a diversity rationale to one premised on remediation). Powell’s diversity rationale played a central role in this transformation, as did the *Grutter* court’s decision to embrace a present of race relations that

the continuing effects of slavery and segregation.” Eric K. Yamamoto et al., *Contextual Strict Scrutiny*, 49 HOWARD L.J. 241, 302 (2005).

91. Grutter v. Bollinger, 539 U.S. 306, 316–17 (2003).

92. *Id.* at 317.

93. *Id.* at 322 (“[W]e granted certiorari . . . to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”).

94. In his “extensive” testimony before the District Court, the chair of the faculty committee that drafted the admissions policy expressly stated that the policy was intended not as remedy for the past but as an enhancement of the present. Even references in the policy to historical discrimination were explained in terms of perspectival diversity. *Id.* at 319.

95. *Id.* at 341–42 (stating that since the Fourteenth Amendment was intended to eliminate all race-based governmental discrimination, “race-conscious admissions policies must be limited in time”).

96. The only direct reference to slavery in *Grutter* is a singular mention in Justice Ginsburg’s concurrence, joined by Justice Breyer, which places *Grutter* and *Bakke* in a history of slavery and the “law-enforced racial caste system” of Jim Crow. *Id.* at 345.

has little history and a past of slavery that has no ongoing legacy.⁹⁷ The history that remains includes a new origin story of freedom, characterizing the post-Civil Rights Act United States as a racially neutral, “colorblind” society—legally, if not practically—where preferences based on race tend to violate equal protection guarantees.⁹⁸ This new origin point permits white people as well as people of color to claim discrimination.⁹⁹ A narrative about colorblindness and equality replaces any attempt to account for a

97. In a piece written shortly after the *Grutter* decision, legal scholar Kimberlé Crenshaw analyzed the “back story” of Supreme Court affirmative action cases as presenting:

[T]he racial past . . . as a distant reality disconnected from the present. From this perspective, antidiscrimination law appears as a portal through which contemporary Americans stepped through to a brand new present, a world free of the structural iniquities forged during the era of American apartheid. Indeed, the present is so attenuated from that past that we have to speculate whether the social realities in which we now live bear anything but the most coincidental relation to our nation’s recent past.

Kimberlé W. Crenshaw, “*Framing Affirmative Action*,” 105 MICH. L. REV. FIRST IMPRESSIONS 123, 128 (2006).

98. It is also, crucially, about a one-to-one correction process. In *Parents Involved*, Justice Thomas’ concurring opinion emphasized the precedent set by *Swann* that “remediation of past *de jure* segregation is a one-time process involving the redress of a discrete legal injury inflicted by an identified entity. At some point, the discrete injury will be remedied and the school district will be declared unitary.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 756–57 (2007) [hereinafter *Parents Involved*] (Thomas, J., concurring). He contrasted this notion of harm with the remedy of “racial balancing,” which he called a “continuous process with no identifiable culpable party and no discernable end point.” *Id.* Thus, Justice Thomas condemned any attempt at continuous remedy without acknowledging the continuous nature of racial inequality. Moreover, “democratic interest” cannot justify race-based remediation because it “has no durational limit.” As a result, the continuous interest in racial pluralism and cooperation will “justify race-conscious measures forever.” *Id.* at 767.

99. One of the themes of equal protection jurisprudence is the continuous characterization of race-based remediation programs as *more* threatening to the constitutional and social order of the United States than not remedying past discrimination at all. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring) (“[O]vercoming the effects of past discrimination is as nothing compared with the difficulty of eradicating . . . the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge [people] on the basis of their country of origin or the color of their skin.”).

racialized, brutally violent past—in fact, the past altogether has largely receded.¹⁰⁰

The colorblindness narrative played a central role in the 2007 *Parents Involved* case, where Chief Justice Roberts declared that the Fourteenth Amendment precludes differential treatment on the basis of race. Parents of children who had been denied enrollment in public schools in Seattle and Louisville under, in part, race-based decision-making sued under the Fourteenth Amendment. In Seattle, a “racial tiebreaker” was used to determine placements of high schoolers in public schools “in an attempt to address the effects of racially identifiable housing patterns on school assignments.”¹⁰¹ In Jefferson County, elementary school assignments were based in part on racial guidelines to maintain balance in the public schools. Justice Roberts’ opinion made clear that histories of differential treatment make little or no difference in the evaluation of such race-based classifications as unconstitutional.¹⁰² The plurality determines that radically unequal property and housing situations that naturally lend themselves to segregated school systems—and which are inseparable from the longer story of American race relations instituted by slavery—do not permit remediation through race-based school placement decisions.¹⁰³

It is worth noting that neither affirmative action nor reparations decisions are the sole arena for the production of specific historical narratives of past violence and past resolution. The reasoning of the affirmative action cases—that histories of racialized inequality and violence are horrific but have been resolved through the actions of the courts and government themselves—recurs in areas

100. In a series of cases, the Court debated whether race-based remedial measures could be used in situations other than those formerly subject to *de jure* segregation. See *Parents Involved*, 551 U.S. at 701; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995); *Swann v. Charlotte-Mecklenburg Bd. of Ed.* 402 U.S. 1, 31–32 (1970).

101. *Parents Involved*, 551 U.S. at 712.

102. Romero argues that the Roberts Court has a particular “racial history project” which uses *Brown v. Bd. of Ed.* as a baseline to promote a progress narrative logic about U.S. race relations. Tom I. Romero, II, *The Keys to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415, 418–20 (2015); see also Mark Tushnet, *Parents Involved and The Struggle for Historical Memory*, 91 IND. L.J. 493, 494 (2015) (tracing the “politics of memory” of *Brown* in *Parents Involved*).

103. In his dissent, Justice Breyer pointed to precisely this difficulty with the majority’s reasoning. *Parents Involved*, 551 U.S. at 806 (Breyer, J., dissenting) (arguing that “the distinction between *de jure* segregation (caused by school systems) and *de facto* segregation (caused, e.g., by housing patterns or generalized societal discrimination) is meaningless in the present context”).

such as voting rights. Not only is affirmative action representative, but as it has been radically narrowed by the Supreme Court, other areas have become primary sites for producing the past in relation to (un)equal rights, powers, and resources in the present. In *Shelby County v. Holder*, the Court found unconstitutional the preclearance requirements of the Voting Rights Act of 1965 (VRA). The majority relied on a racial progress narrative that deliberately severs the conditions of the past (slavery, Reconstruction, segregation) from the situation in the present (imperfect but characterized by relative racial equity).¹⁰⁴ In doing so, it also emphasized repeatedly and emphatically that the VRA was exceptional and extraordinary, justified in its time by the equally exceptional situation of “flagrant” racial discrimination.¹⁰⁵ Because the present is so definitively different from the past, as measured by empirical data points cited by the majority, the extraordinary deviation from equal sovereignty was no longer constitutional.¹⁰⁶ *Shelby* redistributes the right to vote on the basis of a specific historical narrative: the terrible wrongs of slavery and segregation have been largely overcome, making the recognition of racial difference itself both discriminatory and unconstitutional. The law is both the solution to the problem (the majority credits the VRA with reversing racial discrimination in voter registration and turnout) and subsequently the problem itself (because the VRA has put itself out of business, as it were).¹⁰⁷

The gradual quieting of slavery and segregation inherent in re-interpreted stories of equal protection reveal the very history these

104. *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013) (arguing that between 1965 and reauthorization in 2006, “largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers. And yet the coverage formula that Congress reauthorized . . . ignores these developments . . .”).

105. *Id.* at 557 (“Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”).

106. Justice Thomas extended the argument in his concurrence, arguing that Section 5 as well as Section 4 should be found unconstitutional because of positive changed conditions in voter turnout and registration. *Id.* at 557.

107. This is one of the grounds on which Justice Ginsburg dissented in *Shelby Cnty. Id.* at 560 (“[T]he Court today terminates the remedy that proved to be best suited to block that discrimination.”). Combating the statistical data the majority opinion cites with regard to racial gaps in registration, Justice Ginsburg offered a list of specific examples of the ongoing “serious and pervasive problem” of voting discrimination that justified the 2006 reauthorization of the VRA. *Id.* at 575.

accounts seek to overcome. As James Campbell suggested, “[i]n the United States today, slavery remains the acid test of historical reconciliation No subject has been so befogged by myth and misunderstanding, or so difficult for Americans to discuss dispassionately.”¹⁰⁸ Given that the violence, immorality, and illegality of slavery are effectively indisputable, the fact that its meaning and import nonetheless remain so “befogged” suggests a startling set of conflicting legal, moral, and political choices about its present significance. The assertions made that current inequality must be disconnected from past atrocity rely ultimately on the invocation of what Best and Hartman call “the barricade between the slave past and the emancipated present.”¹⁰⁹

C. Counter-Argument: The Slave Past, Reproduced

Many scholars, advocates, and dissenting Supreme Court opinions have consistently argued that today’s racialized inequalities and the economic and legal arrangements that reinforce them cannot be separated legally from past racial violence and inequity. They emphasize the centrality of beneficiaries in the story of slavery and segregation: by articulating the debate in terms of material loss and distributional responsibility, they also undermine the threatening narrative that generalized references to historical discrimination will create limitless claims for correction. They do so by drawing maps of economic, legal, and political continuity that demonstrate the ways in which past racialized resource theft continues to benefit, in a general sense, those who were responsible for it. Even when recognizing the limitations imposed by law, critics suggest that there are policy and political reasons for re-interpreting procedures like the statute of limitations.¹¹⁰ Proponents suggest that the failure to account for the past is precisely what permits the present to appear as a realm of continuous progress.¹¹¹ These narratives emphasize numerous points

108. James T. Campbell, *Settling Accounts? An Americanist Perspective on Historical Reconciliation*, 114 AM. HIST. REV. 963, 971 (2009).

109. Best & Hartman, *supra* note 67, at 7.

110. See, e.g., Malveaux, *supra* note 67, at 116 (“[E]ven assuming that issues such as the identification of plaintiffs, defendant, causation and damages in reparations cases cannot be determined with absolutely certainty, it is important to recognize that the legal system often provides at best ‘rough justice.’”).

111. See Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRV. L. REV. 263, 269 (2015) (noting that “part of the discursive power of civic national identity continues to come from its disavowal of any need for [decolonizing] structural transformation”); see also JOHNSON, *supra* note 13, at 10 (describing the effort to “search out the material history of white supremacy and the alibis in

that presented opportunities for racial and economic restructuring, all of which were either ignored or only temporarily embraced.¹¹²

In the affirmative action cases, a series of dissenting and concurring opinions countered majority assertions of presentist justice, individualized harm, and distant pasts. Although other Justices invoked a brutal past of racial discrimination in *Bakke*, the partial concurrence by Justices Brennan, White, Marshall, and Blackmun reflected on the “American Dilemma” of a nation claiming to be based on equality while upholding slavery.¹¹³ Implicitly, the opinion suggests the impossibility of reaching a discussion about future actions without moving through past injustices. It articulates a tension—if not an endemic racism—to American constitutionalism from the beginning.

Marshall’s separate opinion in *Bakke* tells the story of Black Americans “dragged to this country in chains” and “deprived of all legal rights” in a system that insisted on a language of freedom and equality even while perpetuating slavery and dehumanization. He implies a kind of lost or partial transition during Reconstruction, the result of which is that “[t]he position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.”¹¹⁴ The continuing substantive inequality between Black and white in the U.S. can only be understood, Marshall suggests, in historical context. The past is less a closed category than an open wound that festers in discriminatory practices and distributional disadvantage. Fundamentally, Marshall argues that contemporary inequality must be assessed based on long-term societal racism.

Marshall problematized the individualization of the question, arguing that no individual African American need demonstrate discrimination since “the racism of our society has been so pervasive that none . . . has managed to escape its impact.”¹¹⁵ The implied corollary is that where there is a deprivation of right to some, there has been an award of privilege to others—regardless of individual experience. In his opinion, Blackmun also suggested that the nature

which it has been cloaked . . . to something about structural racism that isn’t otherwise visible . . . the way the racial character of our everyday lives has become inexorable, even as its origins have been insistently obscured.”)

112. See Brophy, *supra* note 60, at 498 (“[h]ad there been adequate measures taken to allow former slaves to gain economic and educational advancement, it is doubtful that anyone would be talking about reparations now”).

113. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1977).

114. *Id.* at 395.

115. *Id.* at 400.

of racial inequality in the United States created a need to use the Fourteenth Amendment in a manner that recognizes not just individual situations of discrimination but also a broader interpretation of inequality, one which accepts that eliminating racism requires that “we must first take account of race.”¹¹⁶ These are, at base, temporal arguments: they establish the inevitability of the present through a series of past societal decisions. Americans in the present are inescapably beneficiaries or victims of the legacies of the past, regardless of individual experience. These arguments are also precisely the points that are set aside or backgrounded in future decisions.

In *Bakke*, Marshall and Blackmun took issue with Powell’s characterization, which suggested that in its efforts to correct societal discrimination, the University of California is holding responsible an innocent man for a harm he could not have committed. Powell argues the program cannot justify “a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”¹¹⁷ In other words, for Powell, the “beneficiaries” are not white Americans who have benefited over time from racist economic structures (as Mamdani has argued with regard to South Africa, or as Coates suggests in the United States).¹¹⁸ The “beneficiaries” are those of the affirmative action program itself and the victims are, essentially, the white applicants who fail to receive admission to medical school. Reversing the role of the beneficiary requires a specific temporal interpretation: the timeline either begins with Bakke’s life or with slavery. If the former, Bakke is the innocent victim in a story that begins and ends with his individual experience and lack of participation in any direct

116. *Id.* at 407; see also *Parents Involved*, 551 U.S. 701, 864 (2007) (Breyer, J., dissenting) (“[The] Equal Protection Clause, ratified following the Civil War, has always distinguished in practice between state action that excludes and thereby subordinates racial minorities and state action that seeks to bring together people of all races.”).

117. *Bakke*, 438 U.S. at 310.

118. Mahmood Mamdani, *The Truth According to the TRC*, in *THE POLITICS OF MEMORY: TRUTH, HEALING, AND SOCIAL JUSTICE* 176, 181 (Ifi Amadiume & Abdullah AnnNa'im, eds., 2000); *Ta-Nehisi Coates Revisits the Case for Reparations*, *NEW YORKER* (May 24, 2019), <https://www.newyorker.com/news/the-new-yorker-interview/ta-nehisi-coates-revisits-the-case-for-reparations> [<https://perma.cc/D93L-LRWJ>] (describing the various forms reparations might take and arguing that most American institutions have “a history of extracting wealth and resources out of the African American community”).

discrimination against African Americans.¹¹⁹ If the latter, Bakke is individually innocent but structurally a beneficiary.

Powell's decision to dehistoricize and decollectivize Bakke's story contrasts with the historical story he tells about the relationship between slavery, the Fourteenth Amendment, and the post-Civil War cases confirming the broad reach of equal protection. Powell's rejection of the "past as prologue" principle lays the ground for successive cases that gradually erase not just reliance on the past but its presence in the first place.¹²⁰ Hence, O'Connor's opinion for the Court in *Grutter*, twenty-five years later, revisited Powell's understanding of "beneficiaries" as those who "benefit" from affirmative action in the present rather than those who benefit from a legacy of past discrimination.¹²¹ Like Powell, O'Connor invokes "innocent third parties," a category that depends on drawing the same sharp line between present and past. Both Justices engage in what Temin and Dahl deem the "tragic narrative" form, which "draws affective boundaries around acknowledgement of present traces of historical justice, thereby severing responsibility for the past despite its continued persistence in the present."¹²²

At the end of his dissenting opinion in the 2007 *Parents Involved* case, Justice Breyer returned the discussion to slavery, placing twenty-first century integration efforts in the context of twentieth century segregation policies that were themselves meant to "perpetuate a caste system rooted in the institutions of slavery and 80

119. Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 94 (1986) ("While these cases looked primarily at sin, they looked too at innocence—the innocence of whites displaced by blacks whom affirmative action favored.").

120. Justice Ginsburg raised the "past as prologue" idea from the opposite perspective in her *Shelby Cnty. v. Holder* dissent. She subtly torqued the majority's progress narrative by arguing that there had been a shift in voting rights because of the VRA, but that the underlying efforts to discriminate have remained. To some degree this is a tale of simultaneous progress and failure: success in backstopping continuing efforts to deny voting rights to people of color but failure in changing the conditions that make those efforts necessary. *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013) (Ginsburg, J., dissenting).

121. *Grutter v. Bollinger*, 539 U.S. 306, 323–326 (2003). As Crenshaw points out, arguments against affirmative action are most often motivated not only by the terms of the specific policy at hand, but also by a "particular orientation towards inequality itself—one that mandates the elimination of race or gender discourses rooted in redistribution." Crenshaw, *supra* note 97, at 126.

122. David Meyer Temin & Adam Dahl, *Narrating Historical Injustice: Political Responsibility and the Politics of Memory*, 70 POL. RES. Q. 905, 912 (2017).

years of legalized subordination.”¹²³ Unlike Justice Thomas, towards whom much of his dissent is directed, Breyer locates the question of distribution in a history of structured, deliberate inequality. He points out that any “costs” assessed for parents who find their children assigned to a school slightly farther from their homes for the sake of integration pale in comparison to the costs borne by people of color still surviving the ongoing implications of slavery and segregation.¹²⁴

Breyer and Thomas assert fundamentally different accounts of harm, benefit, and redistribution. For Breyer, present-day inequalities are direct products of race-based dispossession and violence, while for Thomas, legal measures undid the past discrimination, rendering it irrelevant to today’s economic inequities. Beyond affirmative action, these opposing accounts of the past feed into broader arguments over the ways in which wealth and power have been and should be distributed. The fault line reappears in debates over reparations, where the questions of whether reparations can be justified—and if so, to whom and on which grounds—depend upon assertions of intergenerational benefit and harm. Those who argue on behalf of reparations do so based on the existence of a historical wrong, a continuous refusal to repair that wrong, the consequences of that refusal, and the other distinct wrongs that followed the initial acts. In other words, advocates mobilize based on discrete harms, continuous violence, and legacies of the past.

In a *New York Times Magazine* essay written during the height of the Black Lives Matter uprisings in June 2020, Nikole Hannah-Jones presented the case for reparations precisely on these

123. *Parents Involved*, 551 U.S. 701, 829 (2007) (Breyer, J., dissenting) (“That view [in *Swann*] understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery . . .”).

124. Others, including many critical race scholars, have made parallel and more fundamental points about the deep distributional inequalities experienced by Black people in the United States. As Crenshaw argues, “affirmative action is not about providing preferences at all. Rather, it is about removing and neutralizing the obstacles and conditions that compromise the fair running of the race.” “Structural inequality, exclusionary institutional practices, trans-generational disadvantages and even unconscious biases,” she continues, “are just a few of the conditions that crowd the lanes of would-be recipients of affirmative programs. These conditions are neither mysterious nor unverifiable To attend to the elimination of such circumstances is hardly to promote reverse discrimination. It reflects only a matter of simple justice.” Crenshaw, *supra* note 97, at 132.

grounds, asserting a continuous line of racialized economic dispossession. Although her essay centers on the issue of reparations, it also offers a broader account of the reproductive nature of inequality, subordination, and racism mobilized through the legalized theft of resources and humanity.¹²⁵ In turn, that account supports her argument for reparations in multiple forms, including cash grants, investments in Black communities and institutions, and enforcement of anti-discrimination protections. As Hannah-Jones underlined, this is not a new argument: she cites a 1967 speech in which Martin Luther King, Jr. pointed out that the nineteenth century “freedom from physical slavery” through the Emancipation Proclamation was never balanced by “land to make that freedom meaningful.”¹²⁶ King’s argument linked the account of the past to the need for redistribution in (his) present: whereas political equality in the form of desegregation was “obtained from the power structure at bargain rates,” substantive equality in the form of anti-poverty programs, education, and housing are both literally and politically costly.¹²⁷

Similarly, writer Ta-Nehisi Coates has argued for reparations on the basis of unjust continuities of benefit, theft, and harm, pointing out that both public and private American institutions share “a history of extracting wealth and resources out of the African-American community . . . [B]ehind all of that oppression was actually theft.”¹²⁸ Along with a growing chorus of others, Coates argued that contemporary economic inequalities reflect the historic and ongoing theft of Black resources and the founding of the U.S. on a moral, social, and political economy of racialized inequality.¹²⁹

125. Nikole Hannah-Jones, *It is Time for Reparations*, N.Y. TIMES (June 24, 2020) <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html> (on file with the *Columbia Human Rights Law Review*).

126. *Id.* (quoting Martin Luther King Jr., *Martin Luther King Jr. Saw Three Evils in the World*, THE ATLANTIC (May 10, 1967), <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-hungry-club-forum/552533/> [<https://perma.cc/ZF5R-7YHZ>]).

127. Martin Luther King Jr., *Martin Luther King Jr. Saw Three Evils in the World*, THE ATLANTIC (May 10, 1967), <https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-hungry-club-forum/552533/> [<https://perma.cc/ZF5R-7YHZ>].

128. The New Yorker Radio Hour, *Ta-Nehisi Coates Revisits the Case for Reparations*, NEW YORKER (May 24, 2019), <https://www.wnycstudios.org/podcasts/tnyradiohour/segments/ta-nehisi-coates-revisits-case-reparations> [<https://perma.cc/53W5-A2DV>].

129. See, e.g., Robert Westley, *The Accursed Share: Genealogy, Temporality, and the Problem of Value in Black Reparations Discourse*, 92 REPRESENTATIONS

To assert continuity of not only discrimination but also maldistribution, scholars and activists identify a continuous failure to account for, redress, or repair past dispossession. In her 2019 book *Repair*, legal scholar Katherine Franke argues that societal amnesia in this context has two overarching contemporary political consequences: first, the elimination of slavery from consideration has encouraged the undermining of legal reforms and empowerment projects such as affirmative action or voting rights.¹³⁰ Additionally, de-emphasizing slavery has also reconfigured perceptions of the need to redistribute “public and private resources—whether they be housing, jobs, wealth, or healthcare—[which] can appear to many as unjustified, undeserved or downright contrary.”¹³¹ Franke’s argument for broad reparations borrows from both the history of U.S. struggles over dispossession and resources, and the transnational efforts at recognition located in the transitional justice field. She suggests that collective memory must meet material redistribution in order to satisfy the ethical, political, and legal demands of past American atrocity.¹³²

D. Summary

The contested relationship of slave and segregationist pasts to the radically unequal present in the U.S. has been embedded in American jurisprudence. Those who view U.S. history as primarily a progressive story of the expansion of rights and freedom are in constant conflict with those who view it as chiefly a story of foundational violence, ongoing exclusion, and reproducing harms and privileges.¹³³ The effort to neutralize the past as resolved or

81, 81 (2005) (asserting that “the law is an expression both literally and figuratively of social-economic value”); Harris, *supra* note 41, at 1714 (arguing that “rights in property are contingent on, intertwined with, and conflated with race” and that “historical forms of domination have evolved to reproduce subordination in the present”).

130. FRANKE, *supra* note 4, at 67.

131. *Id.*

132. *Id.* at 66–67.

133. For an example of the first, see *Parents Involved*, 551 U.S. 701, 786 (2007) (Kennedy, J., concurring) (“Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity.”). For discussion of the second, see Rana, *supra* note 111, at 286 (arguing that the United States developed a civic identity as a postcolonial state by “reading out of the collective experience a post-revolutionary colonial past” which in turn opened up a constitutional discourse emphasizing formal integration over substantive redistribution).

unresolvable permits judgments that simultaneously decry past violence and deny its contemporary relevance. Those asserting this view justify “colorblindness” and the maintenance of current legal arrangements based on formal legal progress exemplified by the Reconstruction Amendments, Civil Rights Act, Voting Rights Act, and limited affirmative action. At times, the progress narrative becomes implicit, quieting the past altogether in favor of a contemporary vision that assumes the continual rebirth of equality in American race relations. Those who contest this progress narrative assert that the past is resolved neither by law nor by time. To the contrary, they argue that the capacity to meaningfully exercise rights, as well as the responsibility for racial privilege and harm, emerge from the continuity, legacy, and reproduction of racialized dispossession and violence.¹³⁴ Those seeking to neutralize the past focus on its memorialization but not its relevance to the present, while those seeking to undo current economic, legal, and political arrangements on behalf of racial redistribution assert the inescapability of the past. At stake in these arguments is the distribution of resources, power, responsibility, and benefit among groups and individuals in American society.

Westley maps these positions as “opposing cosmologies”—one emphasizing the reproduction of harm over time and the other claiming that temporal distance essentially renders the harms completed and currently irreparable (or, more radically, as repaired).¹³⁵ The first produces slavery as a category of the distant past that is evil, aberrational, and over. The second produces slavery as continuing violence. They diverge in their vision of “the past as

134. Kathleen Sullivan, *Sins of Discrimination*, 100 HARV. L. REV. 78, 80 (1986) (arguing that affirmative action was being upheld by the Supreme Court at the time “only as precise penance for the specific sins of racism a government, union or employer has committed in the past” but has never drawn the “category of [B]lack ‘victims’ of past discrimination expansively” nor “discount[ed] claims of white ‘innocence’”). Affirmative action litigation has been a major forum for legal arguments over historical responsibility and contemporary distribution. See, e.g., Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1784 (2012) (introducing the term “intentional blindness” to reflect the evolving symbiosis between colorblindness and intent doctrine that actively erases the history and present of racial hierarchy); Gary Peller, *Race Consciousness*, 1990 DUKE L. J. 758, 776 (1990) (discussing affirmative action debates as an example of the “liberal discourse of race” that depends upon ideas of merit, rational competition, and diversity and thus imagines “the category of merit [as] . . . developed outside the economy of social power, with its significant currency of race, class, and gender”).

135. Westley, *supra* note 129, at 85.

bygone and the past as prologue.”¹³⁶ In multiple ways, law becomes a “site for struggles over historical memory.”¹³⁷ As this Section has demonstrated, that struggle is not only about the past but also about the present. The evolution of arguments over affirmative action, reparations, and voting rights demonstrates how courts use an account of progress, individual achievement, and a distant past of legalized harm to justify limiting race consciousness in the present. Their opponents use an account of continuity, legacy, and reproduction to demonstrate why the exercise of rights and the allocation of goods must be redistributed today. There is little doubt that the Black Lives Matter movement, particularly the uprisings over the summer of 2020, has shifted the debate over the relationship between inequality and the past, particularly in terms of reparations.¹³⁸ Yet the framing of the past remains crucial. An argument for reparations could rely on the discrete harm of slavery without asserting the intergenerational nature of either harm or benefit. It might link the need for compensation to the initial theft of humanity rather than to continuities of racialized subordination. For this reason, both the assertion of the past’s relevance and the framing of the past’s *nature* matter in arguments over contemporary inequality.

II. SOUTH AFRICA: TRANSFORMATION AND CONTINUITY

The reproductive nature of responsibility, harm, and benefit has been an enduring feature of South African political and legal debate since the inception of the Truth and Reconciliation Commission.¹³⁹ A critical set of arguments over present distribution in relation to the past of legalized racial subjugation uses the South African constitution and its associated jurisprudence as alternately the exemplar of a radical break with the past and a legalized reconstitution of past inequality. For some advocates and scholars,

136. *Id.*

137. Tushnet, *supra* note 102, at 503.

138. In recent months, support has come from surprising sources. *See, e.g.*, David Brooks, *How to Do Reparations Right*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/united-states-reparations.html> (on file with the *Columbia Human Rights Law Review*) (explaining that reparations should involve “official apology for centuries of slavery and discrimination, and spending money to reduce their effects” through social spending).

139. MAHMOOD MAMDANI, *The Truth According to the TRC*, in *THE POLITICS OF MEMORY: TRUTH, HEALING, AND SOCIAL JUSTICE* 176, 176–77 (Ifi Amadiume & Abdullah An-Na’im eds., 2000).

the arguments reflect a fundamental concern that the very ideas of transition and transformation have obscured the material continuities of colonialism and apartheid. For others, basing arguments about present redistribution primarily on constitutional interpretation is both a temporal and doctrinal mistake.¹⁴⁰ The very notion of a “post-apartheid” country is itself up for debate in today’s South Africa, creating a two-fold problem: the concern that in supposedly accounting (if only halfway) for the past, the state can consider the violence over (and thus the struggle over as well), and the concern that the artificial end to an interim transition allows for the closure of claims against the past.¹⁴¹ Moreover, for some of those concerned with the artificiality of transition, the problem is not only the assertion of an historic rupture at the end of apartheid but also the lack of focus the colonial regime that helped birth apartheid.¹⁴² With apartheid as the problematic past, constitutional rights can provide an answer. With colonialism and conquest as the past, however, land and Indigenous dispossession take center stage. Both the Interim and the Final Constitutions, and the work and report of the Truth and Reconciliation Commission, are critical focal points—not only in their own rights but also as fodder for opposing ideas about legal construction and social change.

A. Background: Democracy and Truth-Telling

In 1992, after five decades of apartheid and anti-apartheid struggle, the African National Congress (ANC) and the apartheid National Party (NP) agreed in principle to a democratic transition. Over the course of years of negotiation, at the Convention for a Democratic South Africa (CODESA) and at Kempton Park, the ANC and the NP—along with other key parties—constructed the

140. See *infra* Section II.B. (evaluating claims that the constitutional process in South Africa represented a transformative legal shift).

141. See, e.g., RITA KESSERLING, *BODIES OF TRUTH: LAW, MEMORY, AND EMANCIPATION IN POST-APARTHEID SOUTH AFRICA* 129 (2016) (“By defining a category of victims and paying reparations to all that fall in the category, government does not only provide resources to a select few; it attempts to define and provide the public good of a postconflict political order.”).

142. See, e.g., M.B. Ramose, *In Memoriam: Sovereignty and the ‘New’ South Africa*, 16 GRIFFITH L. REV. 310, 320 (2007) (“Abolish apartheid, so the reasoning went, then all shall be fine. In this way, the question of freedom in South Africa was reduced to the problem of the constitutional recognition of the ‘civil rights’ of the conquered peoples of South Africa”).

constitutional architecture for South Africa's first democratic elections and new political and legal dispensation.¹⁴³

The negotiations included two areas that laid the foundation for many of the key political and legal debates over the following decades: the modes of accountability for violence committed under apartheid (primarily the trade of amnesty for truth and a focus on testimony) and the economic structure of the "New South Africa" (including private property protections, robust socio-economic rights provisions, and limited land redistribution). The first resulted in a truth commission that represented in many ways the greatest strengths and limitations of the form.¹⁴⁴ The second led to a combination of judicial decisions supporting socio-economic rights and successively weaker economic reforms that resulted in relatively little redistribution of land, power, or resources to the majority of the population.¹⁴⁵

Both the ANC and the apartheid government had an interest in establishing some type of amnesty provision for apartheid-era violence in exchange for "full disclosure"—although not necessarily the form that it eventually took.¹⁴⁶ The amnesty provision became

143. The Drafting and Acceptance of the Constitution, SOUTH AFRICAN HISTORY <https://www.sahistory.org.za/article/drafting-and-acceptance-constitution> [<https://perma.cc/J2SU-HQMT>].

144. Katherine Brown, *FHR's New Webinar Series: Justice Delayed Is Justice Denied*, FOUND. FOR HUM. RTS., <https://unfinishedtrc.co.za/fhrs-new-webinar-series-justice-delayed-is-justice-denied> (on file with the *Columbia Human Rights Law Review*) (discussing the failures of the TRC and lack of criminal prosecutions).

145. See *infra* Section II.C

146. Mahmood Mamdani, *Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 329, 337 (Karen Engle et al., eds., 2016) (noting that the sunset clauses were first suggested by Joe Slovo in *The African Communist* and "undoubtedly represented a consensus position shared by the leadership of both the South African Communist Party and the ANC"). Mac Maharaj writes that the ANC initially suggested a blanket amnesty for everyone in order to create a baseline for negotiations, given the restrictions that had been levied on ANC members. MAC MAHARAJ, BERGHOF RSCH. CTR., *THE ANC AND SOUTH AFRICA'S NEGOTIATED TRANSITION TO DEMOCRACY AND PEACE* 26 (2007). Despite the specificity of these circumstances, Adam Sitze has documented, the conceptualization of amnesty has a long and sordid history in the colonial and apartheid use of indemnity. ADAM SITZE, *THE IMPOSSIBLE MACHINE: A GENEALOGY OF SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* 7 (2013) ("the point of tracing the TRC's unique amnesty power to indemnity in the theory and practice of Diceyan jurisprudence and then tracing Diceyan jurisprudence to the conflicts of seventeenth-century England" is to excavate the

part of the postamble to the Interim Constitution, which set the stage for the establishment of the Truth and Reconciliation Commission.¹⁴⁷ The TRC offered full amnesties to those who testified truthfully and fully about acts of violence committed with a “political objective” between 1990 and 1994.¹⁴⁸ The details remain contested as to how and why precisely the amnesty provision evolved as it did in the Interim Constitution.¹⁴⁹ Regardless, the result was to make amnesty perhaps the most famous aspect of the South African transitional justice process. The TRC was comprised of three committees: Human Rights Violations; Amnesty; and Reparation and Rehabilitation. The Human Rights Violations Committee found more than nineteen thousand people to be victims of gross human rights violations, in addition to which almost three thousand more victims were identified through the amnesty process.¹⁵⁰ The HRVC hearings, at which victims testified at public hearings about violence committed against themselves and their loved ones, were one of the signature aspects of the TRC.¹⁵¹

The TRC and the accompanying practices were, however, only one piece of the transitional constitutional puzzle. The principles agreed upon at Kempton Park for the Interim Constitution included private property protections as part of the Bill of Rights, while leaving land redistribution outside the same Bill. The result, argues Mahmood Mamdani, was that “where property rights clashed, as in the case of white settlers and black natives, the former received Constitutional protection, the latter no more than a formal acknowledgement of law.”¹⁵² Others have suggested that the Interim

ways in which indemnity was “also a technique for reconciling imperial violence in the colony with liberal legality in the metropole”).

147. The Interim Constitution states that “amnesty shall be granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past” through a law established by Parliament that will establish which “mechanisms, criteria, and procedures, including tribunals, if any, through which such amnesty shall be dealt with.” S. AFR. (INTERIM) CONST. § 251, 1993.

148. 1 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 55 (1998).

149. Compare, for example, MacMaharaj’s version of the negotiations with Fanie Du Toit’s. FANIE DU TOIT, WHEN POLITICAL TRANSITIONS WORK 65 (2018); *see also* SITZE, *supra* note 146, at 25 (analyzing the claim that South African amnesty decisions were individualized rather than blanket decisions).

150. 7 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 1 (2002).

151. *Id.*

152. Mamdani, *supra* note 146, at 339.

Constitution's more limited social justice provisions were intended as a temporary compromise measure reached at CODESA rather than the permanent South African dispensation.¹⁵³

The Final Constitution, which was based in part on the results of a widespread public participation campaign, contains an article protecting private property and limits the possibilities for state expropriation, including by requiring "just and equitable" compensation.¹⁵⁴ That compensation requires an "equitable balance between the public interest"—including the state's commitment to land reform and access to natural resources—"and the interests of those affected."¹⁵⁵ The Constitution also proclaims the need for measures to be taken to "foster conditions which enable citizens to gain access to land on an equitable basis" and requires either restitution or "equitable redress," to the extent granted by an Act of Parliament, for property dispossessed after 1913 under "racially discriminatory laws or practices."¹⁵⁶ The final wording was the result of significant debate among the negotiators for the Constitution; the property clause reflects the necessities but also the limits of an issue on which negotiators held radically opposed views.¹⁵⁷ A restitution process was put into place as the "central pillar" of an effort to redistribute land in a racially corrective manner.¹⁵⁸ Yet tensions emerged quickly in relation to remedying the past as opposed to the present. The land claims process reflected and sometimes exacerbated the debate over focusing on historical wrongs versus contemporary development goals.¹⁵⁹

The Final Constitution also includes explicit socio-economic rights protections, many of which were litigated in the early years of the new Constitutional Court. Thus, the Constitution includes rights of access to health care, adequate housing, sufficient food and water,

153. DU TOIT, *supra* note 149, at 97.

154. S. AFR. CONST. § 25, 1996.

155. *Id.*

156. *Id.*

157. Heinz Klug, *Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa*, 34 S. AFR. J. ON HUM. RTS. 469, 486–87 (2018).

158. Ruth Hall, *Reconciling the Past, Present, and Future: The Parameters and Practices of Land Restitution in South Africa*, in LAND, MEMORY, RECONSTRUCTION AND JUSTICE: PERSPECTIVES ON LAND CLAIMS IN SOUTH AFRICA 17, 20 (Cherryl Walker et al., eds., 2010).

159. *Id.* at 20–21 (2010); *see also* Klug, *supra* note 157, at 471 (revisiting the pre-transition debates among the ANC, the apartheid government, and others about the insertion of a right to property in the new Constitution and such a right's relationship to the return of stolen land).

and social security, as well as a right to education.¹⁶⁰ These measures, along with far-reaching language in the broader text and further rights protections in the Bill of Rights, led Karl Klare to interpret the Constitution as “postliberal,” meaning it can be read as “*social, redistributive, caring, positive, [and] at least partly horizontal, participatory, multicultural, and self-conscious* about its historical setting and transformative role and mission.”¹⁶¹ The question of how to read the Constitution in relation to the violence of the past and how to understand its vision of the (potential) future have been central to debates over race and economic distribution.

The documents negotiated at Kempton Park and subsequently in the Final Constitution reflected a combination of urgent compromise and deep reflection. In subsequent years, debates erupted over whether those initial texts either created the possibility for a broad, flexible interpretive process that would engender the redistribution of wealth and power, or represented a straitjacket limiting the possibility for economic and racial equality.¹⁶² The capacity and willingness of the courts to re-order the country’s entrenched racial and economic hierarchies through transformative interpretive protocols became an ongoing source of radical disagreement.¹⁶³

160. S. AFR. CONST. §§ 26–29, 1996.

161. Klare makes clear that there is no one “correct” reading of the Constitution; others could equally find the South African Constitution to be far more liberal than postliberal and could reject much of his interpretation. Though Klare suggests that he would be “quite prepared to contend that the postliberal reading is the *best* interpretation,” his article undertakes a different task. Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 153 (1998); see also Catherine Albertyn, *(In)equality and the South African Constitution*, 36 DEV. S. AFR. 751, 755 (2019) (arguing that in addition to considering court decisions, “the challenge of transformation lies far more within the purview of the executive, legislature, and administration, than the courts”).

162. Sanele Sibande, *Not Purpose Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty*, 22 STELLENBOSCH L. REV. 482, 486 (2011) (arguing that even a progressive transformative constitutionalism is overly embedded in a liberal paradigm that “makes it ill-suited for achieving the social, economic, and political vision it proclaims”—particularly when it comes to not only eradicating poverty but achieving “true social and economic emancipation”).

163. See, e.g., *id.* at 493 (arguing that “[w]ithout the translation of the goals of transformation into explicitly entrenched constitutional provisions that demand reconstruction, redistribution and more deeply democratic popular participation that go beyond the Bill of Rights, it is arguable that transformative constitutionalism was always going to struggle to entrench itself,” especially given

B. Argument: The Apartheid Past, Transformed

Both international and national commentators marked South Africa's transition as a radical break with the past. In some cases, the argument of a rupture was accompanied by a description of closure endemic to much of the broader transitional justice enterprise. Historian Berber Bevernage points to closure discourse as an inherent aspect of truth commissions: historical discourse's "performativity manifests itself as a tendency to restore or to create a break between past and present by reinforcing or imposing a sense of temporal 'distance.'"¹⁶⁴ In South Africa, that distance was enforced by constitutionalist discourses that emphasized human rights and the rule of law as the markers of a radical break with the past, facilitated through transitional processes of truth and amnesty.¹⁶⁵ That break was accomplished and argued in South Africa in multiple ways: the constitutional and reconciliatory discourse itself; the payment by President Mbeki of (very limited) reparations; the (silent) decision not to pursue prosecutions against those who did not apply for or did not receive amnesty; legal decisions referencing the transition as the baseline for new constitutional interpretation; and political discourse emphasizing political change over economic continuity.¹⁶⁶ One of the

the overall liberal democratic constitutional scheme); *see also* Dennis Davis, *Transformation: The Constitutional Promise and Reality*, 26 S. AFR. J. ON HUM. RTS. 85, 87 (2010) ("[W]hatever the constitutional design, the political and legal culture within society will all too often influence the developing jurisprudence away from that which may have been on the minds of the drafters at the time that they so drafted the Constitution."); Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796, 798 (2007) (arguing that "[a] closer look at the manner in which the Court 'proceduralizes' its inquiry into compliance with socioeconomic obligations reveals the complicity of socioeconomic rights discourse in the sidelining of the very interests that prompted the inclusion of justiciable socioeconomic rights in the constitutional text").

164. BERBER BEVERNAGE, HISTORY, MEMORY, AND STATE-SPONSORED VIOLENCE 169 (2012).

165. In a judicial decision finding that the applicant, du Toit, was not entitled to be rehired to the police following his conviction despite a grant of amnesty, Chief Justice Langa noted that "[a]mnesty . . . is part of a restorative and prospective process of transitional justice, heralding the coming-of-age of the property rule of law in a society emerging from conflict." Justice Langa further noted that amnesty was legally permissible because "this was an extraordinary time and extraordinary measures had to be taken." *Du Toit v. Minister for Safety and Security* 2009 (6) SA 128 (CC) at 16 para. 27 (S. Afr.).

166. The result of the amnesty process has been heavily contested on many grounds. One ground that is particularly relevant to the question of time relates to the pressure to prosecute cases that never came before the TRC or for which

ongoing tensions in the South African context is between transitional rhetoric emphasizing rupture and transformative discourse emphasizing the potential for redistribution or restitution.¹⁶⁷ Those who find transformation an inadequate response to colonial oppression and apartheid see the two as far less distinct.¹⁶⁸

The interwoven nature of the constitutional deliberations and the construction of the TRC added to the idea put forward in the Interim Constitution of a “historic bridge” between apartheid and the future, in which justice would serve as a temporary transitional placeholder between the illiberal violent past and the democratic future.¹⁶⁹ The South African Constitutional Court reinforced the concepts of rupture and closure in its jurisprudence, beginning with

the alleged perpetrators did not receive amnesty. Completing the “unfinished business” of the TRC has been an important project of human rights lawyers in the past decade, including former TRC Commissioner Yasmin Sooka. See, e.g., Katherine Brown, *FHR’s New Webinar Series: Justice Delayed is Justice Denied*, FOUND. FOR HUM. RTS., <https://unfinishedtrc.co.za/fhrs-new-webinar-series-justice-delayed-is-justice-denied> (on file with the *Columbia Human Rights Law Review*) (discussing the failures of the TRC and lack of criminal prosecutions). In a 2019 decision, the High Court of South Africa (Gauteng Local Division) found, based in part on testimony from the former National Director of Public Prosecutions, a pattern of “what can only be described as high level executive interference on investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017.” *Rodrigues v. National Director of Public Prosecutions of South Africa et al.* 2019 (3) All SA 962 (GJ) at 11 para. 23 (S. Afr.).

167. Section 9(2) of the Constitution frames equality in terms of positive measures to rebalance the scales. S. AFR. CONST. § 9(2), 1996. Albertyn points out that the section “enables, but does not mandate, positive measures and redistribution as part of equality.” Albertyn, *supra* note 161, at 760.

168. Tshepo Madlingozi describes restitution and reparation as the precise forms of justice that are blocked rather than facilitated by the 1996 Constitution. Tshepo Madlingozi, *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution*, 28 STELLENBOSCH L. REV. 123, 141 (2017); see also *infra* Section II.C (discussing Madlingozi’s arguments).

169. S. AFR. (INTERIM) CONST. § 251, 1993 (“This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and justice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans . . .”). This expression of law as a “bridge” echoes Robert Cover’s notion of law as a “bridge to the future” built by “each community . . . with the materials of sacred narrative.” Cover’s proposition is both normative and temporal; law is a bridge “in normative space,” but the spatial metaphor is also a temporal one, reaching from the “world-that-is” to “our projections of alternative ‘worlds that might be.’” Robert M. Cover, *The Folktales of Jurisdiction*, 14 CAP. U. L. REV. 179, 181 (1985).

the 1996 *AZAPO* decision. In that case, the newly appointed Constitutional Court faced the difficult decision of either upholding or overturning the government's implementation of an individualized civil and criminal amnesty process under the TRC.¹⁷⁰ The families of slain anti-apartheid activists, including Steve Biko, argued that the very possibility of amnesty violated the rights of those who believed that perpetrators should be prosecuted, punished, and required to pay civil compensation to survivors, and that the state should be held responsible for the losses suffered "in consequence of the criminal and delictual acts of the employees of the state."¹⁷¹ In determining the legality of amnesty, the Court read a sense of rupture into the constitutional intentions: the constitutional negotiators realized that "[i]t might be necessary in crucial areas to close the book on that past."¹⁷² Thus, amnesty was understood both in the negotiations and later by the Court as a method for implementing the necessary rupture with the past in order to avoid violent resistance to the new order by those who had previously enjoyed legally recognized racialized superiority.

Fourteen years later, the Court reflected on the implementation of amnesty, once again deploying language of rupture and closure.¹⁷³ The applicant, a former South African police officer, was discharged from the police for his participation in the "Motherwell Four" murders. He subsequently received amnesty from the Amnesty Committee and sought reinstatement with the police department based on his amnesty. The High Court upheld the lower court's decision against du Toit's reinstatement based on a contextual interpretation of the amnesty clause. Referencing Justice Mahomed's decision in *AZAPO*, Chief Justice Langa suggested that the adoption of the Constitution, with its reconciliatory epilogue, reflected the national "commitment to reconciliation and national unity and its realisation that many of the unjust consequences of the past can never be fully reversed."¹⁷⁴ Justice Langa's reflection on both the Constitution and the *AZAPO* Court's interpretation of its provisions suggest that despite the frustrating inability to undo past violence, it must nonetheless be left in that past. In construing the broad

170. *Azanian Peoples Organization (AZAPO) et al. v. President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) at 10–11 para. 8 (S. Afr.).

171. *Id.*

172. *Id.* at 3 para. 2.

173. *Du Toit v. Minister for Safety and Security* 2009 (6) SA 128 (CC) (S. Afr.).

174. *Id.* at 12 para. 18.

meaning of transitional justice, the Court characterized it as “heralding the coming-of-age of the proper rule of law” and the purpose of amnesty as “bring[ing] closure and understanding.”¹⁷⁵ The invocation of amnesty as a tool of closure for the past is critical for its justification; only if amnesty provides a feasible trade for reconciliation can its inherent betrayal of the rule of law be legitimized.¹⁷⁶ Moreover, the *du Toit* Court suggested that closure of the past took priority over remedy of past acts to the extent necessary for the future, considered in terms of reconciliation. Thus, while the Reconciliation Act was “to a certain extent, enacted in order to remedy the failures of the past, . . . the primary aim of the Act was to use the closure acquired as a stepping stone to reconciliation for the future.”¹⁷⁷ Like *AZAPO*, the *du Toit* opinion emphasized the necessary rupture created by amnesty. However, the opinion is also characterized by an attitude of resigned pragmatism in the face of a past that is ultimately both closed and not entirely resolved. By the time the Constitutional Court turned to a third case investigating the aftermath of amnesty, resigned pragmatism had turned to concern over what precisely amnesty may or may not erase in the past. In *McBride*, a defamation case, Justice Cameron attributes to amnesty a “modest and practical purport,” one which can stop the consequences of the act for the perpetrator but not erase the past.¹⁷⁸ The opinion still attributes to the Constitution and the Court’s jurisprudence the commitment to “transforming [South African] society from an oppressive past to a non-racial, just and united nation,” but places that transformative power in the context of a continuing conversation about individual actions under apartheid.¹⁷⁹

In other early cases, the Court emphasized the role of the Constitution not as part of a long-derived social consensus that “evolved incrementally from a stable and unbroken past,” but instead as a “decisive break from, and a ringing rejection of, that part of the

175. *Id.* at 13 para. 21–22.

176. *Id.* at 16 para. 27 (“This limitation [of fundamental rights] is permitted by the Constitution itself, and to that extent there is an adjustment to what in fact constitutes the ‘rule of law’. In *AZAPO*, the Court found that the ultimate aim of the truth and reconciliation process justifies the severe limitation on rights . . .”).

177. *Id.* at 29 para. 55.

178. *The Citizen 1978 (Pty) Ltd et al. v. McBride* 2011 (4) SA 191 (CC) at 37–38 para. 69 (S. Afr.) (upholding the applicant-newspaper’s publication of articles naming Robert McBride a murderer regardless of his amnesty, but finding defamation in the accusation that McBride lacked contrition about his acts).

179. *Id.* at 39–40 para. 74.

past which is disgracefully racist, authoritarian, insular, and repressive.”¹⁸⁰ As part of the package of transitional practices, the Court opined that the Constitution stands for a liberal democratic future set against a past that “institutionalized and legitimized racism,” not least through the law itself.¹⁸¹ Thus, the Constitution is meant to “provide a transition from these grossly unacceptable features of the past.”¹⁸² Commentators supported this reading of both the Constitution and the Court’s interpretation of it: “*Makwanyane* . . . represented a foundational moment, a line drawn in the sands of South Africa’s history marking the start of a new legal era.”¹⁸³ South African constitutional scholar Pierre de Vos reads this “grand narrative” as a consistent foundation for the Constitutional Court’s judgments, viewing the “interim Constitution as a link between a dark, apartheid past and a bright, human-rights-based future.”¹⁸⁴

Transitional rhetoric emphasizing not just the terrible past but the hopeful future is, as South African legal scholar Karin van Marle points out, deeply romantic in its invocation of “the discourse of the possibilities of a new order and the forgetting of the past,” a “romantic restoration of the rule of law.”¹⁸⁵ Under such a reading, the romantic overcomes the tragic so that rather than an emphasis on loss and impossibility, there is promise of closure and repair. Temin and Dahl argue that the romantic genre portrays the present as innocent by inaugurating a “legal and temporal break” with the past through a “public performance of acknowledgement.”¹⁸⁶ This “politics of exculpation” makes clear a wrongful past but does so in service not of redress but of ritual purification of the present.¹⁸⁷ Despite what

180. *S. v. Makwanyane* 1995 (2) SACR 1 (CC) at 151–52 para. 262 (S. Afr.) (finding capital punishment illegal in South Africa).

181. *Id.*

182. *Id.*

183. MICHELLE LE ROUX & DENNIS DAVIS, *LAWFARE: JUDGING POLITICS IN SOUTH AFRICA* 174 (2019).

184. Pierre de Vos, *A Bridge Too Far?*, 17 S. AFR. J. ON HUM. RTS. 1, 10 (2001).

185. Karin Van Marle, *Reflections on Post-Apartheid Being and Becoming in the Aftermath of Amnesty: Du Toit v. Minister of Safety and Security*, 3 CONST. CT. REV. 347, 357 (2010); see also LE ROUX & DAVIS, *supra* note 183, at 17 (pointing out the “mistakes made through the almost unqualified praise, indeed the triumphalism, that has accompanied constitutional writings over the past two decades,” as in constitutional law textbooks, various commentaries on the Chaskalson Court, and the works of Justice Albie Sachs).

186. Temin & Dahl, *supra* note 122, at 909.

187. *Id.*

may well have been realistic decisions by negotiators and political leaders looking for a way out of political stalemate with as few lives lost as possible, the surrounding discourses of transition and reconciliation tended to emphasize the romantic along with the pragmatic.¹⁸⁸

Those who treated the constitutional transition with more cautious skepticism than romanticism argued that the Constitution was not itself an obstacle to change or an engine of (false or real) complete transformation, but rather part of an interactive, interpretive process dependent upon not just judicial interpretation but also legislative and executive action.¹⁸⁹ Legal scholar and South African Judge Dennis Davis argued in this vein that:

The Constitution does not preclude a rigorous examination of the nature and implications of our colonial past. To the contrary, only by a painfully sustained consideration of history will it be possible to understand the role of law in the reproduction of the society inherited from the past. And only after this exercise of deconstruction has been under-taken will we be in a position to reimagine a legal system that can contribute to make the country whole.¹⁹⁰

Davis's argument—that the Constitution (and the decisions interpreting it) does not obstruct inquiry into the past—reflects an

188. Fanie du Toit suggests that the image of reconciliation as a naïve or romantic conjoining of enemies has little purchase in the real world or with regard to the South African transition, which he regards as a compromise among realists, including Mandela, a “visionary and principled pragmatist.” DU TOIT, *supra* note 149, at 38 (arguing that “what convinced apartheid and ANC leaders to turn to reconciliation as a means to end apartheid was not an individualized or generalized sense of forgiveness but a political realism that faced reality as it was”).

189. This Article interprets struggles over redistribution and equality through the lens of past-focused justice. In doing so, it references but does not directly engage with a related debate over the capacity of socio-economic rights—and of the South African Constitution particularly—to act as a mechanism and enforcer of redistribution. Within this debate, scholars such as Albertyn argue that while courts may currently play a “defensive role” when it comes to inequality, they have the *capacity* under the Constitution to “advance meaningful redistribution and material equality”—if the government makes “transformative policy choices.” Albertyn, *supra* note 161, 762–63; *see also* Klare, *supra* note 160, at 150 (arguing that “transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law”).

190. D. M. Davis, *Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?*, 34 S. AFR. J. ON HUM. RTS. 359, 373 (2018).

attempt to manage the tension between a romanticized rupture argument that views the Constitution as the answer to apartheid and a continuity counter-argument that understands the Constitution as a continuation of colonialism.¹⁹¹

C. Counter-Argument: Apartheid and Transition, Continuous

Frustrations with the particularities of the TRC's operation gave way over time with a more widespread counter-argument against the closure narrative of the transition. The concern began with the TRC but encompassed a far broader set of questions about the notion of transition and transformation, the failures of constitutional protections, and continuities of colonialism, apartheid, and the "new South Africa."¹⁹² At stake was a fundamental tension: was transition about progress, marked by immediate political rights and slow economic transformation, or about subjugation, marked by economic betrayal and the elimination of material or conceptual redress for apartheid and colonialism?¹⁹³ Continuities in inequality, failures of accountability, and the lack of racial redistribution outside a narrow band of Black South Africans created cataclysmic ongoing anger in the decades after the 1994 elections.¹⁹⁴ Both sides of the

191. Davis's article appears in a special issue of the *South African Journal on Human Rights* edited by Joel Modiri, which aimed itself precisely at this set of debates. As Modiri summarizes in his introduction, the articles in the issue "take unambiguous positions in relation to the South African constitutional order, ranging from optimism about its democratic and transformative potential to scepticism concerning its responsiveness to colonial and imperial histories and extending further to radical and abolitionist critiques of the political imaginary upon which the constitution is premised." Joel M. Modiri, *Introduction to Special Issue: Conquest, Constitutionalism, and Democratic Contestations*, 34 S. AFR. J. ON HUM. RTS. 295, 296 (2018).

192. Cedric Robinson remarked that the "research and reportage of the Truth and Reconciliation Commission produce a closed text consistent with the idea that apartheid was a unique, localized, aberrant, and particularly virulent phenomenon." Cedric Robinson, *On the Truth and Reconciliation Commission*, in *ON RACIAL CAPITALISM, BLACK INTERNATIONALISM, AND CULTURES OF RESISTANCE* 356, 357 (H.L.T. Quan ed., 2019).

193. See generally Stathis Kouvelakis, *The Marxian Critique of Citizenship: For a Rereading of On the Jewish Question*, 104 S. ATL. Q. 707 (2005) (arguing that economic continuity does not negate real political transformation in the form of rights; rather, the concern is that the acquisition of political rights such as suffrage distract from, obscure, or enable continuing inequality and dispossession).

194. See, e.g., Joel Modiri, *Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence*, 34 S. AFR. J. ON HUM. RTS. 300, 309 (2018) ("As the hope and euphoria of the Mandela republic waned in the face of the ongoing

debate place distributional inequality at the center of their arguments, but whereas the argument on behalf of rupture reflected a focus on the present, the counter-argument found dangerous any implication that constitutional rupture reflected meaningful redress.¹⁹⁵ Joel Modiri, reflecting more than a decade after the constitutional transition, argued that the Constitution itself “must be implicated in the continuation of colonial-apartheid power relations, value systems and subjectivities. How else could we explain why the advent of constitutional democracy in South Africa has left white supremacy and coloniality largely undisturbed?”¹⁹⁶

Although much of the *AZAPO* opinion reinforced the same sense of separation and break from the past that featured in later constitutional and TRC rhetoric, Justice Mahomed devoted a few paragraphs to reflecting on (economic) continuity in the midst of (political) rupture. Contemplating the plaintiffs’ assertion that the state should not be indemnified from providing compensation to the families of victims of state violence, Justice Mahomed argued in temporal and distributional terms for an examination of constitutional imperatives. Bringing economic justice into the opinion for the first time, he argued for attention to the broadest possible effects of apartheid, including “the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment” for “generations of children born and yet to be born.”¹⁹⁷ Analysis of *AZAPO* often focuses on the impossible choice between accountability

horror of the black condition and the devastations of global capitalism, the pithy phrase ‘you can’t eat a constitution’ became a popular refrain.”).

195. De Vos suggests that the particular “grand narrative” he traces in Constitutional Court interpretation might have the effect of “hamper[ing] the use of the Bill of Rights to protect newly emerging marginalised or oppressed people.” De Vos, *supra* note 184, at 28. Although he addresses material inequality less directly, he points out that one possible consequence of the grand narrative is that judges will be fettered in their analysis of capitalism in apartheid South Africa. *See id.* at 29 n.32 (“As South Africa changes, progressive judges might want to rethink the benign role attributed to capitalism under apartheid, but will be unable to do so if the grand narrative—silent on this issue—becomes so entrenched and accepted that no challenge to it is possible.”); *see also* Jason Brickhill & Yana Van Leeve, *Transformative Constitutionalism— Guiding Light or Empty Slogan?*, 2015 ACTA JURIDICA 141, 164–65 (2015) (“[A]lthough ‘transformation-speak’ has become part of the institutional culture of the profession, it lacks coherence . . . [A]lthough important, changes in values and discourse alone have little impact on the material conditions in which the majority of people live.”).

196. Modiri, *supra* note 194, at 305.

197. *Azanian Peoples Organization (AZAPO) et al. v. President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC) at 38 para. 43 (S. Afr.).

and truth, but another choice lurks here: “giving preference to the formidable delictual claims of those who suffered from acts of murder, torture, or assault” would require “diverting . . . desperately needed funds in the crucial areas of education, housing and primary health care.”¹⁹⁸ These are distributional questions that come in part in temporal terms: redressing the individual past or reconstructing the societal future, contrasting the inevitably continuing economic consequences for most South Africans of apartheid’s effects with the political and legal changes implemented through the transition. Significantly, the *AZAPO* opinion places these concerns in a judgment framed not in terms of racial domination but minority rule.¹⁹⁹ The judgment thus foreshadows not only ongoing debates over the value of foregrounding or forgetting the past in legal and political discourse over distribution but also the racialized economic hierarchies of both past and present.

The tension between political rupture and economic continuity recurred in the Constitutional Court’s early cycle of economic rights cases.²⁰⁰ In *South Africa v. Grootboom*, the Court faced an early question about the interpretation of the right to access to adequate housing. In 1998, Irene Grootboom and several hundred others were evicted from the vacant private property to which they had temporarily moved after living for years under horrific conditions (including lack of water, sewage, and electricity services) in the Western Cape township of Wallacedene. In finding that the state was required to create a housing plan that would provide urgent relief to individuals living in appalling crisis conditions, the Court affirmed that “rights need to be interpreted and understood in their social and historical context.”²⁰¹ That contextual interpretation requires the

198. *Id.* at 39 para. 44.

199. *Id.* at para. 1 (“For decades South Africa has been dominated by a deep conflict between a minority which reserved for itself all control over the political instruments of the state and a majority who sought to resist that domination.”). My thanks to Christopher Gevers for this point.

200. *See Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) at para. 8 (S. Afr.) (writing that wealth disparities “already existed when the Constitution was adopted and a commitment to address them, and to transform our society . . . lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring”).

201. *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC) at para. 25 (S. Afr.) [hereinafter *Grootboom*]. De Vos argues that this interpretative canon demonstrates the “transformative nature of the various provisions of the Bill of Rights,” building on Karl Klare’s influential description of transformative constitutionalism. Pierre De Vos,

Court to mark the root cause of housing shortages and inequality in colonialism and apartheid.²⁰² It also allows the Court to point out the continuities of not just unequal housing generally but also the mode of eviction in particular, which was “reminiscent of apartheid-style evictions.”²⁰³ The Court finds that determining whether a particular program meets the standard of “reasonableness” requires considering “housing problems in their social, economic and historical context.”²⁰⁴ In these regards, the continuity of the past through constitutional rupture into the present appears central to the decision-making processes of the Court and its requirements for government programs. Reasonableness also requires attention to “available resources”²⁰⁵ —a criterion which relies on evaluating present resources, despite the obvious fact that prior decisions during apartheid and in transition have shaped both the sum of resources available and their existing social distribution—while at the same time accounting for the “structural inequalities in society.”²⁰⁶

South Africa’s public and complex reckoning with the past shaped many of its own counter-arguments. Some came in the mode of public protest over both specific economic policies and the continuing daily experience of Black poverty and immiseration under a majority government after so long suffering under the lash of white rule.²⁰⁷ But the legal and cultural counter-argument came in the form

Grootboom, *the Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. ON HUM. RTS. 258, 270 (2001).

202. *Grootboom*, *supra* note 201, at para. 6 (“The cause of the acute housing shortage lies in apartheid . . . untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.”).

203. *Id.* at para. 10.

204. *Id.* at para 43.

205. *Id.* at para 46.

206. De Vos, *supra* note 201, at 272. The Court deploys balancing constantly, not just between available resources and reasonable provision of the right, but also between long-term planning and urgent relief “for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.” *Grootboom*, *supra* note 201, at para 99.

207. *See, e.g.*, Sean Jacobs, *Postapartheid South Africa’s Negative Moment*, AFRICA IS A COUNTRY (May 18, 2016), <https://africasacountry.com/2016/05/postapartheid-south-africas-negative-moment> [https://perma.cc/EC64-D5RX] (describing growing dissent against the ANC majority, including through student protests, the development of the Economic Freedom Fighters, and the use of “decolonization” rather than “transformation” as the objective); Katlego Disemelo, *South African Student Protests Are About Much More Than Just #feesmustfall*, THE CONVERSATION (Oct. 27, 2015), <https://theconversation.com/south-african->

of reconnecting the dots between apartheid and the present, minimizing or criticizing the terms of transition or exposing the contradictory nature of transitional rhetoric itself.²⁰⁸ Madlingozi argues that transformative discourse—including and especially around constitutionalism—supported the continuity that the rhetoric of rupture hid.²⁰⁹ The notion of a simultaneously endless transition from which the government had at the same time largely divested itself, appeared to license specific government actions.

Some legal commentators read Constitutional Court jurisprudence in light of a critical understanding of economic and racialized continuity. Scholar Joel Modiri argues that understanding 1994 as the critical fulcrum between past and future creates particular legal deformations, as when the Court's decisions emphasize "past' or 'previous' disadvantage, which limits itself to the pre-1994 period."²¹⁰ Modiri adds that in its effort to separate past from present, the Court "places an undue emphasis on the abolition of legal and political apartheid, and not on social, cultural, spatial,

student-protests-are-about-much-more-than-just-feesmustfall-49776

[<https://perma.cc/CG6E-HYNY>] (describing the intersectional protests, which are not only about the daily experience of racism, but also the overarching "failures of the heterosexual, patriarchal, neoliberal capitalist values" of South African universities and the country in which they operate).

208. Klare points out the surprising minimization in the *Makwanyane* case of both equality and race. While discussion of the Equality Clause appears, it is not used in what would likely have been the most obvious application: the impossibility of a race-neutral death penalty in a situation of radically racialized economic inequality. Klare, *supra* note 161, at 174. ("[I]t remains a puzzle why this Court, given its obvious sensitivity and commitment to the equality guarantee, did not invoke it more centrally . . ."). In doing so, Klare argues, the justices essentially undermine their own more transformative interpretations, which specifically invoke the apartheid past in order to emphasize a future characterized by *ubuntu*. Klare *supra* note 161, at 173 ("[O]ne thinks particularly of the opinions of Justices Langa, Madala, Mahomed, and Mokgoro seeking to give content to the concept of ubuntu and/or otherwise explaining their opposition to capital punishment in philosophical terms and also specifically in terms of the evils of the apartheid system . . .").

209. Tshepo Madlingozi, *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution*, 28 STELLENBOSCH L. REV. 123, 146 (2017) ("[P]ost-1994 constitutional re-arrangements are transforming society in ways that do not instantiate a fundamental rupture with the inherited, sedimented and bifurcated social structure in terms of which the majority of black people remain confined in a 'zone of non-beings.'")

210. Joel Modiri, *The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa*, 28 S. AFR. J. ON HUM. RTS. 405, 431 (2012) (emphasis added).

epistemological and economic apartheid, which was left virtually unchanged post-1994.”²¹¹ Even naming particular harms as “historical” is a semantic effort at temporal distancing, one which contributes to the receding nature of some forms of violence. The notion of closure proclaimed in transitional discourse creates a false rupture.

Distributional claims in contemporary South Africa permeated the political and legal space; one of the most prominent flash points was land dispossession, expropriation, and restitution. Thirteen years after the declared end of (formal) apartheid, Achille Mbembe argued that racism had transmuted but not disappeared, notably in the arena of past-focused policy where white political parties and organizations complained of the unfairness of policies “aimed at redressing past injustices” and undoing past inequalities.²¹² In 2018, the ANC-led government appointed an ad hoc committee to investigate a constitutional amendment to “make expropriation without compensation more explicit” on the basis of overcoming past disparities of wealth.²¹³ For South African philosopher Mogobe Bernard Ramose, the Constitution itself is “based firmly on the epistemological paradigm of the conqueror” and thus embedded in a

211. *Id.*

212. Achille Mbembe, *Whiteness Without Apartheid: The Limits of Racial Freedom*, OPENDEMOCRACY (July 4, 2007), https://www.opendemocracy.net/en/whiteness_without_apartheid_the_limits_of_racial_freedom/ [https://perma.cc/9JVD-WD34].

213. *National Assembly Approves Process to Amend Section 25 of the Constitution*, PARLIAMENT OF THE REPUBLIC OF S. AFR. (Dec. 4, 2018), <https://www.parliament.gov.za/press-releases/national-assembly-approves-process-amend-section-25-constitution> [https://perma.cc/NUW5-8T3R]. Evidence of the persistence of inequality includes the racial disparity in private land holdings; in 2017, for instance, white individuals owned 72% of the farms and agricultural holdings in South Africa. REPUBLIC OF S. AFR., RURAL DEV. & LAND REFORM DEP'T, LAND AUDIT REPORT: PHASE II: PRIVATE LAND OWNERSHIP BY RACE, GENDER AND NATIONALITY 7 (2nd ed. 2017), available at https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf (on file with the *Columbia Human Rights Law Review*). For a recent illustration of South Africa's reckoning with the legacy of its oppressive past, see Cyril Ramaphosa, President, Republic of S. Afr., *Inauguration Speech*, TIMESLIVE (May 25, 2019), <https://www.timeslive.co.za/politics/2019-05-25-in-full-president-cyril-ramaphosas-inauguration-speech/> [https://perma.cc/254P-ZP2M] (“As the shackles of oppression have fallen away, [the people] have felt their horizons widen But they have also known moments of doubt. They have felt the cold shadow of a past so cruel and iniquitous that it has . . . threatened to eclipse the very achievement of their hard-won freedom.”)

racist, colonial framework.²¹⁴ Ramose draws a direct line from the colonial “doctrine of Discovery,” which justified the theft of Indigenous land, to the contemporary “protection of unjustly economic power and its associated wealth” found in even the most seemingly progressive constitution.²¹⁵

The fundamentally racialized nature of continuing inequality in a society that claims through constitutional jurisprudence to have overcome apartheid leads Tshepo Madlingozi to argue that contemporary South Africa inhabits a “time of neo-apartheid,” governed by a neo-apartheid constitutionalism.²¹⁶ This terminology is meant to call attention to how a new liberal democratic constitutional architecture accommodates the devaluation of Black lives through an “inherited, sedimented and bifurcated social configuration”—one in which whites and middle-class Blacks live in a world of liberal democracy and human rights while poor, Black South Africans live in a world of invisible death and precarious life.²¹⁷ Madlingozi’s reading of “post-apartheid” constitutional discourse as transformative chiefly in its hardening of apartheid-era separation under the guise of liberal progress exposes the counter-argument’s consequences: like Modiri, Madlingozi argues that considering justice “done” or past violence “complete” has a particular racial and political valence.²¹⁸

D. Summary

There may be no more famous exemplar of “reckoning with the past” than South Africa. The argument that radical change was constitutionalized in 1994 has been countered by assertions that the Constitution itself reflected a lack of change.²¹⁹ Both arguments rely on specific accounts of the past and of present racialized inequality. The transition involved a series of profound choices to memorialize, understand, and repair a past of brutal racialized violence and

214. Mogobe Bernard Ramose, *Towards a Post-Conquest South Africa: Beyond the Constitution of 1996*, 34 S. AFR. J. ON HUM. RTS. 326, 338 (2018).

215. *Id.* at 339–40.

216. Madlingozi, *supra* note 209, at 125.

217. *Id.*

218. *Id.* at 125–26. Le Roux and Davis specifically discuss Modiri and Madlingozi as part of a broader trend towards viewing the Constitution as fundamentally a problem for radical change rather than a facilitator of substantive transformation, writing that the “redress of the past and adequate protection for those on the margins have not taken place is undeniable. We would argue that blame for this political, or indeed legal, failure cannot be placed on the Constitution.” LE ROUX & DAVIS, *supra* note 183, at 17–18.

219. *See supra* notes 192–99 and accompanying text.

dispossession. The new Constitution and the early decisions interpreting it reinforced the performance of rupture that the TRC and the elections constructed.²²⁰ Those decisions self-consciously reckoned with the relationship between a violently unequal past and an aspirational new political reality. In doing so, they produced a story of the past as not fully resolved but at least partially separable from the present and future. To those critical of the failure of the New South Africa to redistribute economic power and resources effectively, the Court's engagement with the past appeared partial and political. A deeply contextual and often historicized understanding of substantive equality yielded, in some cases, to an individualized liberal model of rights that could not foreground "an understanding of more material systemic issues and social relationships."²²¹ In the process, some asserted, a continuous line ran from conquest and colonialism through apartheid and after transition. As a result, the Constitution and the legal infrastructure it supported obstructed radical redistribution of legal and economic power reflective of a new racial and political reality. Others defended the transition as a genuine, if incomplete, rupture and the Constitution as equally capable of fomenting transformation as fixing stasis.²²² Both groups mobilized the past in an effort to articulate the possibilities for altering the inequality of the present. At stake in these debates are three interwoven issues: first, how and whether the pasts of both colonialism and apartheid have been conquered; second, whether to define the economic and political nature of the transition as a rupture in time or a problematic compromise with the past; and third, whether the constitutional order itself can or should be mobilized on behalf of substantive equality or if it must be resisted as a tool of further oppression.

III. CANADA: THE SETTLER-COLONIAL PRESENT

Canadian efforts to address colonial violence against Indigenous groups have revealed how efforts to memorialize and repair the past can fuel or frustrate projects to decolonize the present. Memorialization and repair are hardly mutually exclusive with decolonial efforts. But while narrations of past harms can lead to

220. See *supra* notes 161–67 and accompanying text.

221. Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Inequality*, 14 S. AFR. J. ON HUM. RTS. 248, 258 (1998).

222. LE ROUX & DAVIS, *supra* note 183, at 18.

reparations and reconciliation, they can also be mobilized by opponents of redistribution to argue that the past is indeed past. The material stakes are high: reckoning with the past can mean paying out individual reparations and delivering meaningful apologies or the reorientation of settler-Indigenous relations, in part through greater Indigenous self-governance over land and resources. The first are far from insignificant but many advocates find them frustratingly incomplete as a response to the entrenched and ongoing settler-colonial paradigm.²²³

The Truth and Reconciliation Commission (TRC), established in 2008 to investigate Canada's Indian Residential School system as part of the settlement agreement with survivors of that system, concluded that the Canadian government had been responsible for "cultural genocide" that produced generations of harm and trauma.²²⁴ The TRC took place after the closure of the last residential school in 1996 and after the agreement had guaranteed individual payments to survivors.²²⁵ Based in part on one of the TRC's ninety-six Calls to Action in its final report, the government established a National Inquiry into Missing and Murdered Indigenous Women, Girls, and Two Spirit Persons (the "Inquiry") in 2015.²²⁶ Four years later, the

223. See Konstantin Petoukhov, *Recognition, Redistribution, and Representation: Assessing the Transformative Potential of Reparations for the Indian Residential Schools Experience*, 3 MCGILL SOCIO. REV. 73, 74 (2013) (describing the shortcomings of Canada's reparations program for Indigenous peoples); *id.* at 87 ("Developing an effective remedy against colonial injustices would [further] require the . . . government to recognize, fully acknowledge, and commit to eradicate colonialism, legacies of which continue to produce profound negative impacts on the lives of Indigenous people."); see also Corntassel et al., *supra* note 27, at 145 ("[A]ny pursuit of reconciliation with the state must first acknowledge the asymmetrical power relationships between states and Indigenous peoples which can so easily derail questions of justice and decolonization.").

224. 5 TRUTH & RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 54–55 (2015) [hereinafter TRC, SUMMARY OF THE FINAL REPORT] ("Residential schooling was always more than simply an educational program: it was an integral part of a conscious policy of cultural genocide.").

225. The Gordon Residential School, the last remaining federally-administered facility, closed in November 1996, and the compensation agreement received judicial approval in December 2006. *A Timeline of Residential Schools, the Truth and Reconciliation Commission*, CBC NEWS (Mar. 25, 2014), <https://www.cbc.ca/news/canada/a-timeline-of-residential-schools-the-truth-and-reconciliation-commission-1.724434> [<https://perma.cc/SV2J-CC64>].

226. *Timeline of Key Milestones*, NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, <https://www.mmiwg-ffada.ca/timeline/>

Inquiry found the government responsible for *ongoing* genocide—not limited to cultural or past genocide.²²⁷ This conclusion provoked heated debate; critics questioned how contemporary murders and disappearances could be attributed to the Canadian state as part of ongoing genocide.²²⁸ The question of whether the colonization, displacement, and dispossession of Indigenous peoples and lands was part of a brutal past or a genocidal present became central.

The debates had two layers: first, whether genocide was an appropriate label at all and, second, whether it continues to apply.²²⁹ They were often framed in terms of doctrinal difference, but those legal distinctions related closely to the temporal frame of violence and its effects on the individual or collective form of repair. If brutality against Indigenous peoples was principally understood through the institutional framework of the Indian Residential School system, then

[<https://perma.cc/49PN-6EBY>]; see also TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 181 (“Call to Action 41[:] We call upon the federal government . . . to appoint a public inquiry into the causes of, and remedies for, the disproportionate victimization of Aboriginal women and girls.”)

227. See NAT’L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, 1A RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 12 (2019) [hereinafter NAT’L INQUIRY, FINAL REPORT, VOL. 1A] (“For far too long, colonial and discriminatory policies, practices and attitudes have subjected Indigenous women, girls, and 2SLGBTQQIA people to violence in this country — a violence that unfortunately . . . has become normalized — and continues on an ongoing basis.”).

228. For instance, Conservative Leader Andrew Scheer disputed the report’s use of the “genocide” label. Kerri Breen, *Andrew Scheer Rejects Use of ‘Genocide’ in Reference to Indigenous Women, Girls*, GLOB. NEWS (June 10, 2019), <https://globalnews.ca/news/5371277/andrew-genocide-indigenous-women/> [<https://perma.cc/8ZZQ-3XH3>] (“I believe that the tragedy that has happened to this vulnerable section of our society is its own thing. I don’t believe it falls into the category, to the definition of genocide.”). Bernard Valcourt, a Conservative party official and former Minister of Aboriginal Affairs, similarly rejected the label and derided the “propogandist report” for its “thunderous silly conclusion that all we wanted to do was to kill them all[.]” Bernard Valcourt, (@BernardValcourt) TWITTER (May 31, 2019, 5:30 PM), <https://twitter.com/BernardValcourt/status/1134572772007579648> [<https://perma.cc/E3LC-C8HQ>].

229. DAVID B. MACDONALD, THE SLEEPING GIANT AWAKENS: GENOCIDE, INDIAN RESIDENTIAL SCHOOLS, AND THE CHALLENGE OF CONCILIATION 4–6 (2019). These were not, of course, the only bases of disagreement. See Umut Özsü, *Genocide as Fact and Form*, 22 J. GENOCIDE RSCH. 62, 64 (2019) (arguing that the Canadian debate over the definitions of genocide exposes the particularities of the term itself, especially tensions between its limited legal definition and how its “abstract generality . . . enables those who employ it to highlight the intrinsically systemic character of such destruction”).

that violence could be remedied (arguably) with the closure of the schools and the payment of individual reparations. Despite the TRC's explicit recognition of intergenerational trauma, some commentators and government actors used the "past" framing of genocide as a justification for more meager actions in the present.²³⁰ By contrast, if the Indian Residential Schools were merely one piece of a larger colonial system that continues today through government actions and inaction that (re)produce conditions of Indigenous poverty, trauma, and vulnerability to violence, then the necessary remedies would encompass the redistribution not just of resources but also of sovereignty and self-determination over those resources.²³¹ Thus, whether genocide was in the past or present fed into arguments over remedy, repair, and the nature of violence as individual or structural. Categorizing the violence in terms of individual cases of abuse in the residential schools or individual murders of women and girls focused attention on events rather than systems and on singular moments rather than the broad sweep of settler-colonial actions. The arguments reflected a fundamental disagreement over the nature of violence, the continuity from past to present of settler-colonialism, and the responsibility of the Canadian state to redistribute resources and recognize Indigenous sovereignties on that basis.

A. Background: Investigating Indigenous Genocide

The Truth and Reconciliation Commission of Canada (TRC) emerged as part of the settlement of several class action suits challenging the physical and sexual abuse experienced by children in

230. See TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 158 ("Sexual and physical abuse, as well as separation from families and communities, caused lasting trauma for many The effects of this trauma were often passed on to the children of the residential school Survivors and sometimes to their grandchildren."); see also NAT'L INQUIRY INTO MISSING & MURDERED INDIGENOUS WOMEN & GIRLS, EXECUTIVE SUMMARY, RECLAIMING POWER AND PLACE: THE FINAL REPORT OF THE NATIONAL INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN AND GIRLS 33 (2019), https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Executive_Summary.pdf [<https://perma.cc/Q2PX-AL82>] [hereinafter NAT'L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY] ("One of the most critical ways that the security of Indigenous women and girls is jeopardized is as a result of the *intergenerational trauma* that marks many Indigenous communities, families, and relationships." (emphasis added)).

231. Corntassel et al., *supra* note 27 at 144–45 ("Any meaningful reconciliation effort must confront colonialism not only historically but as part of an ongoing process that continues to impact generations of Indigenous youth and families").

residential schools.²³² Rosemary Nagy traces the starting point for eventual settlement agreement to 1990, when the Grand Chief of the Manitoba Assembly of Chiefs discussed on national television his experiences of abuse in the residential school system. The government immediately denied the need for any sort of inquiry, partly on temporal grounds familiar from other contexts.²³³

After a series of short-lived initiatives and partial apologies, a group of survivors began litigation against the government in the form of a massive class action lawsuit and resulted in the Settlement Agreement and the establishment of the TRC in 2008.²³⁴ The 2007 Indian Residential Schools Settlement Agreement allotted “approximately \$5 billion for compensation, commemoration, healing, and the establishment of the TRC.”²³⁵

Along with a public apology from the Prime Minister and the establishment of funds for individual payments to survivors, the Truth and Reconciliation Commission was intended to create space for survivors of the Residential Schools to testify to their abuse and brutalization at the hands of state and church officials. The Commission’s mandate incorporated truth-seeking and reconciliation; it operated for six years across Canada, receiving statements from over six thousand survivors and witnesses.²³⁶ Additional information was gathered through federal documents and interviews with former school staff; reconciliation efforts included National Events to raise “public awareness” and to include observances following the “cultural

232. MACDONALD, *supra* note 229, at 19.

233. Nagy cites a *Windsor Star* article in which the Minister of Indian Affairs, Tom Siddon, was quoted saying that there was no need for an inquiry “to find out that governments didn’t, 20 or 30 or 40 years ago, do things the right way.” Rosemary Nagy, *The Truth and Reconciliation Commission of Canada: Genesis and Design*, 29 CAN. J. L. & SOC’Y 199, 204 (2014) (quoting Joan Bryden, *Siddon Refuses ‘Witch Hunt’ into Indian Schools*, WINDSOR STAR, Nov. 1, 1990, at E3). Rahul Rao’s description of British government debates over responsibility and apology for the slave trade echo the denial of the need to inquire or apologize: “The more widely articulated temporal objection to apology underscored a putative lack of connection between those who committed morally heinous acts and those being called upon to apologise on their behalf.” RAHUL RAO, *OUT OF TIME: THE QUEER POLITICS OF POSTCOLONIALITY* 121 (2020).

234. *Id.* at 205–06.

235. *Id.* at 200. The IRSSA did not include every survivor of the IRS nor every facility that operated as “residential institution[s] for Indigenous children.” MACDONALD, *supra* note 229, at 20.

236. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at v.

protocols, customs, and traditions of the Aboriginal peoples in whose territories the Commission was a guest.”²³⁷

In 2015, the TRC published its final report, concluding that the Canadian government had committed “cultural genocide” against Indigenous peoples over the course of a century.²³⁸ The Residential School System, which housed “more than 150,000 children from the 1870s until 1996 . . . was aimed at ‘killing the Indian in the child’ and assimilating First Nations, Métis, and Inuit children into white settler society” by forcibly placing them in abusive, underfunded, neglected, and sometimes lethal institutions.²³⁹

The Commission placed the residential school system in the context of an expansive extractive colonial settlement project.²⁴⁰ The Final Report depicted the isolation, brutality, poverty, and abuse that children in the residential schools experienced.²⁴¹ The system worked to actively enforce the assumption of Christian and white European superiority over Indigenous peoples and languages. Under this framework, the schools suppressed Indigenous languages and cultures; imposed strict discipline for infractions that included using one’s native language; institutionalized child neglect; and were so poorly staffed that students were “prey to sexual and physical

237. *Id.* at 30.

238. The TRC’s final report defined cultural genocide as:
 [T]he destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.

Id. at 1.

239. Rosemary Nagy & Robinder Kaur Sehdev, *Introduction: Residential Schools and Decolonization*, 27 CAN. J.L. & SOC. 67, 67 (2012).

240. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 4 (“The Canadian government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources.”). In discussing the heavily Western-focused expansion of the school system in the late nineteenth century, the Commission points out that this provides “further evidence that the federal government conceived of the schools as effective instruments in the colonization of the western territories acquired after Confederation.” *Id.* at 210; *see also* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GEN. RES. 387, 388 (2006) (“Territoriality is settler colonialism’s specific, irreducible element.”)

241. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 4.

abusers.”²⁴² Moreover, by creating the residential school system, the government “essentially declared Aboriginal people to be unfit parents.”²⁴³ The residential school system was a “central element in the federal government’s Aboriginal policy” from the outset; the Canadian state was established in 1867 and by 1883, it had established three major residential schools in western Canada.²⁴⁴ From there, the numbers increased rapidly until the closure of the last federally funded schools in 1996.²⁴⁵ The 1920 Indian Act amendments permitted the government to force any First Nations child to attend a residential school.²⁴⁶ However, it was already permitted by 1896 that any “Indian agent of justice of the peace” had the power to remove children from their homes if the agent determined it necessary.²⁴⁷ Indigenous parents who refused to send their children were subject to fines or jail.²⁴⁸

The TRC observed in its final report that the ultimate goal of the residential school system and the rest of the government’s colonial policies—to definitively wipe out Canada’s Indigenous peoples—failed, since “aboriginal people have refused to surrender their identity”.²⁴⁹ Its 94 Calls to Action have been implemented unevenly, including through further official apologies, regular land acknowledgements, and curricular changes at the secondary, undergraduate, and law school levels.²⁵⁰ The TRC also called on the

242. *Id.*

243. *Id.*

244. *Id.* at 3

245. *Id.* at 3. Approximately 150,000 Indigenous children attended residential schools. MACDONALD, *supra* note 229, at 16. Residential schools predated the official starting point of the Canadian state schools; a number of churches were running residential schools over the prior century. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 4.

246. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 62.

247. *Id.* at 60–61.

248. MACDONALD, *supra* note 229, at 73.

249. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 6.

250. *Id.* at 168, 221; Stephen Marche, *Canada’s Impossible Acknowledgement*, NEW YORKER (Sept. 17, 2017) <https://www.newyorker.com/culture/culture-desk/canadas-impossible-acknowledgment> (on file with the *Columbia Human Rights Law Review*). *But see* Khelsilem, *Justin Trudeau Promised to Protect Indigenous Rights. He Lied, Again*, THE GUARDIAN (June 19, 2018), <https://www.theguardian.com/world/commentisfree/2018/jun/19/salish-sea-pipeline-indigenous-salish-sea-canada-trans-mountain> [<https://perma.cc/3P8A-HDA3>] (arguing that Prime Minister Trudeau has violated the promises of his government to respect Indigenous rights by moving to complete the Trans Mountain pipeline Expansion Project over the objections of the Squamish Nation whose territory is threatened).

Canadian government to adopt and implement the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), a recommendation that became a rallying point for activists as well as a source of frustration.²⁵¹ The UNDRIP would require far more involvement, including consultation and consent, by Indigenous peoples in the extractive and legislative projects that affect them.

The TRC's Calls to Action also included the need for a national inquiry into the ongoing disappearances and murders of Indigenous women and girls. The National Inquiry into Missing and Murdered Indigenous Women and Girls (NIMMIWG) began work in September 2016 investigating "systemic causes of all forms of violence . . . against indigenous women and girls in Canada . . . [and] institutional policies and practices implemented in response."²⁵² The Inquiry investigated a broad array of violence and discrimination against First Nations, Métis, and Inuit women, girls, and 2SLGBTQQIA people.²⁵³ The Truth-Gathering Process included testimonies by family members and survivors of violence, institutional hearings, expert testimony, and submissions by selected groups.²⁵⁴ It was premised on a family-focused, "trauma-informed,"

251. Khelsilem, and Jonathan Sas, *Indigenous Rights Bill Weak, But Necessary*, TORONTO STAR, (Jan. 3, 2021) <https://www.thestar.com/opinion/contributors/2021/01/04/indigenous-rights-bill-weak-but-necessary.html> [<https://perma.cc/2X5L-3F8B>].

252. NAT'L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY, *supra* note 230, at 57–58; TRUTH & RECONCILIATION COMM'N OF CAN., CALLS TO ACTION 4 (2015) (demanding a public inquiry into the causes and remedies for disproportionate victimization of Indigenous women).

253. NAT'L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY, *supra* note 230 at 11–12. 2SLGBTQQIA refers to Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex, and asexual people. Merrit Kennedy, *Genocide Has Been Committed Against Indigenous Women and Girls, Canadian Panel Says*, NPR (June 3, 2019) <https://www.npr.org/2019/06/03/729258906/genocide-has-been-committed-against-indigenous-women-and-girls-canadian-panel-sa#:~:text=The%20National%20Inquiry's%20full%20report,%2C%20questioning%2C%20intersex%20and%20asexual> [<https://perma.cc/4GKU-9NN7>].

254. NAT'L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY *supra* note 230 at 11–12. Individuals were given the option to testify privately or publicly; institutional hearings included a focus on the "systematic causes of institutionalized violence." The parties with standing were "groups with a direct interest in the issue of violence against Indigenous women girls, and 2SLGBTQQIA people that applied for additional rights to participate in the process." NAT'L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY, *supra* note 230, at 6. More than 2,380 people participated in the Inquiry in various ways, including through testimonies at public and private hearings, statement submission, expert witnessing, and artistic contributions. NAT'L INQUIRY, FINAL REPORT, VOL. 1A, *supra* note 227, at 49.

and “decolonizing” process.²⁵⁵ The final report concluded that the present-day violence investigated by the Inquiry “amounts to a race-based genocide of Indigenous Peoples.”²⁵⁶ As such, the Inquiry found “serious reasons to believe that Canada’s past and present policies, omissions, and actions . . . amount to genocide, in breach of Canada’s international obligations, triggering its responsibility under international law.” The Inquiry found the Canadian state responsible not only for repairing past harms but for ending present violence.²⁵⁷ The findings generated significant legal and political debate.

B. Argument: Repairing the Brutal Past

One major line of argument distinguished state responsibility for recognizing and repairing the past from the need to transform settler-Indigenous relations today. The TRC report was eminently clear about the intergenerational nature of trauma and harm and the ongoing effects of the residential school system.²⁵⁸ Nonetheless, its mandate, while broad, focused specifically on a system whose institutions officially closed in 1996. Moreover, it followed both an official apology and an arrangement for individual compensation to survivors of that system.²⁵⁹ Those who viewed cultural genocide as performed primarily through the Residential Schools and the assimilationist policy driving them could use these measures to argue the completion rather than continuity of responsibility.

In 2008, Prime Minister Stephen Harper offered an official apology “on behalf of the government of Canada and all Canadians” to “former students of Indian residential schools,” and said that the treatment of these students was a “sad chapter in our history.”²⁶⁰ Harper’s apology came in the context of the Indian Residential

255. NAT’L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY, *supra* note 230, at 5.

256. NAT’L INQUIRY INTO MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS, A LEGAL ANALYSIS OF GENOCIDE: SUPPLEMENTARY REPORT 1 (2019) [hereinafter NAT’L INQUIRY, SUPPLEMENTARY REPORT].

257. *Id.*

258. See THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA: CANADA’S RESIDENTIAL SCHOOLS: THE LEGACY 3–4 (2015).

259. *Id.* at 68, 104.

260. *Text of Harper’s Residential Schools Apology*, GLOBE & MAIL (June 11, 2008), <https://www.theglobeandmail.com/news/national/text-of-harpers-residential-schools-apology/article18451969/> [https://perma.cc/P95Z-VXCS].

Schools Settlement Agreement, which also established the TRC.²⁶¹ Both Harper's apology and the Settlement Agreement were interpreted by some (both supporters and critics) as establishing a form of closure, delineating a clear line between past abuse in the schools and present-day inequalities.²⁶² Harper himself emphasized the "new beginning" the Agreement would offer and the "new relationship between aboriginal peoples and other Canadians" that would be facilitated by these processes.²⁶³ "Reconciliation" terminology became increasingly common in Canadian politics and law.²⁶⁴ Once the TRC's report was published, its 94 Calls to Action "galvanized officials, activists, and academics alike in a process of policy reform, largely under the impetus of the change in direction announced by the new Liberal government."²⁶⁵ Yet reconciliation sometimes appeared to function as a "contradictory process that both acknowledges collective guilt and an ongoing debt to survivors, while at the same time sharply isolating the injustice and abuse as an error of a previous time emerging from an unconnected set of institutions and structures."²⁶⁶ In other words, for those who supported a recognition of past wrongdoing, but only as *past*, the Settlement Agreement, the apology, and the TRC represented a useful mode of limited responsibility.²⁶⁷ The result was to use the rich report of the

261. See TAMARA STARBLANKET, *SUFFER THE LITTLE CHILDREN: GENOCIDE, INDIGENOUS NATIONS AND THE CANADIAN STATE* 26 (2018) (describing the 2008 apology from Prime Minister Stephen Harper to former students of Indian residential schools as "the crown jewel [of conceding limited and past wrongs].").

262. James Miles, *Teaching History for Truth and Reconciliation: The Challenges and Opportunities of Narrativity, Temporality, and Identity*, 53 MCGILL J. ED. 294, 302 (2018) (arguing that Harper's statement "temporally frames settler colonialism as an event of the past . . . disconnected from our present society and current institutions. A discourse that temporalizes historical injustice as a 'dark part' . . . in our history works to deny or silence both broader historical narratives and ongoing injustices.").

263. *Text of Harper's Residential Schools Apology*, *supra* note 260.

264. RONALD NIEZEN, *TRUTH AND INDIGNATION: CANADA'S TRUTH AND RECONCILIATION COMMISSION ON INDIAN RESIDENTIAL SCHOOLS* 164 (2d ed. 2017).

265. *Id.*

266. Miles, *supra* note 262, at 302.

267. For discussion of the limits of this approach, see Andrew Woolford, *Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada*, 3 SETTLER COLONIAL STUD. 65, 68 (2013) (arguing that the compensation package of the Settlement Agreement was endemically limited since one part "merely marks the time one spent in a residential school" and the other makes "harm . . . individualized, itemized, and . . . governable so it can be delineated, counted, measured, estimated, and compensated").

TRC on behalf of (thin) reconciliation in the present as a remedy for violence in the past.²⁶⁸

The TRC's report made clear that the effects of the Residential School system are multigenerational, economic, social, cultural, and political. It framed the story of the IRS in terms of both the long history of settler-colonial violence in North America and contemporary trauma and inequality. However, the TRC did not begin operations until the schools had closed. Moreover, it was designed to follow an individual compensation scheme settled after numerous class action lawsuits.²⁶⁹ Broadly, the "absence of commitment to broader structural changes to coincide with the establishment of the TRC means that much of the burden of provoking such change has rested with the work of the TRC itself."²⁷⁰ The resulting gap between narrating the past and redistribution in the present was less about the efforts of the TRC itself than about those who viewed genocide as, at best, a historical issue and thus framed TRC as solely a remedy for past harms. Indeed, for others, even the label "genocide" for past Canadian actions was a semantic bridge too far due to the lack of intent to destroy the group as a whole.²⁷¹

In many ways the release of the NIMMIWG report highlighted existing divisions in discourses of reconciliation and reparation. The use of the term "genocide" to characterize contemporary violence against Indigenous women, girls, and two spirit persons provoked outrage. The critics attacked what they saw as unnecessary conflation of individually tragic situations of the present with the collective violence of the past.²⁷² In resisting the

268. As the TRC proceeded, Paulette Regan argued for a definition of reconciliation that embodied decolonization rather than one focused on putting leaving a sad past behind. PAULETTE REGAN, *UNSETTLING THE SETTLER WITHIN: INDIAN RESIDENTIAL SCHOOLS, TRUTH TELLING AND RECONCILIATION IN CANADA* 60 (2010).

269. THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA: *CANADA'S RESIDENTIAL SCHOOLS: THE LEGACY* 145 (2015).

270. Michael Coyle, *The Transformative Potential of the Truth and Reconciliation Commission: A Skeptic's Perspective*, 95 *CAN. B. REV.* 767, 774 (2017).

271. For discussion of these arguments, see MACDONALD, *supra* note 229, at 146–64.

272. See, e.g., John Ivison, *MMIWG Report Is Devastating, But Its Uncompromising Nature May Limit Its Impact*, *NAT'L POST* (June 3, 2019), <https://nationalpost.com/opinion/john-ivison-mmiw-report-is-devastating-but-its-uncompromising-nature-may-limit-its-potential> [<https://perma.cc/YST5-5CQJ>] (suggesting that the Inquiry compromised their specialized mandate to deal with

characterization of the violence (rather than the harm) as continuing rather than completed, the argument laid the ground for a rejection of decolonial approaches that would reconfigure the relationships between settlers and Indigenous peoples and between state and Indigenous sovereignties.

The legal supplement to the NIMMIWG report and the authority of the lawyers and judges who authored it further stoked the fires of this debate around genocide and responsibility. Critics of the Inquiry's findings mobilized quickly, objecting strenuously to the notion that the Canadian state is presently responsible for genocide against Indigenous peoples.²⁷³ While state policies in the past may have aimed at the violent assimilation of Indigenous peoples into a European settler society, they insisted that today's violence was the province of individual wrongdoers, not state action. The past, in other words, is truly past.

contemporary violence against Indigenous women and girls by drawing broad conclusions about genocide and long-term institutional violence).

273. For defenses of the use of 'genocide' in the MMIWG report, see, for example, Andrew Woolford, *Canada's MMIWG Report Spurs Debate on the Shifting Definitions of Genocide*, THE CONVERSATION (June 6, 2019), <https://theconversation.com/canadas-mmiwg-report-spurs-debate-on-the-shifting-definitions-of-genocide-118324> [<https://perma.cc/E3WM-Q8QJ>] ("Rather than staunchly defend a narrow conception of genocide, it is time to demand this concept to do what it was intended to do: enable human thriving through respectful collective relations."); Michael Fakhri, *Canada Avoids Indigenous Reconciliation and the UN Declaration on the Rights of Indigenous Peoples*, EJIL:TALK! (July 3, 2019) <https://www.ejiltalk.org/canada-avoids-indigenous-reconciliation-and-the-un-declaration-on-the-rights-of-indigenous-peoples/> [<https://perma.cc/4T8V-EK9H>] (explaining the importance of using genocide terminology as a method for internationalizing settler-colonialism, foregrounding Indigenous experience, and understanding the concept as a situation of continuous harm rather than past violence). For arguments on the misuse of genocide by the MMIWG, see, for example, Erna Paris, *The Report on Missing and Murdered Indigenous Women Was Searing and Important, Marred Only by Its Inaccurate Genocide Charge*, GLOBE & MAIL (June 4, 2019), <https://www.theglobeandmail.com/opinion/article-the-mmiwg-report-was-searing-and-important-marred-only-by-its/> [<https://perma.cc/B3NA-8MS8>] (differentiating the "commonplace domestic criminals" from "génocidaires set on destroying a group" and criticizing the "abuse of the word genocide" in the current era); Joseph Rikhof, *The National Inquiry into Missing and Murdered Indigenous Women Final Report and Genocide*, OPINIO JURIS (June 11, 2019), <http://opiniojuris.org/2019/06/11/the-national-inquiry-into-missing-and-murdered-indigenous-women-final-report-and-genocide%EF%BB%BF/> [<https://perma.cc/JRS8-U7KB>] (problematizing the legal arguments in the Supplement to the Report, on the grounds of retroactivity and the exclusion of "cultural" genocide from the Genocide Convention, among others).

The Globe and Mail published an editorial expressing shock that the MMIWG commission had accused Canada of “being in the act of committing one of the most reviled crimes in history.”²⁷⁴ In other words, the concern may be partially based on the use of legal terminology, but was undoubtedly also about the notion of ongoing genocide, which the newspaper contrasts with the “policy of the federal government for at least two decades . . . of reconciliation and redress.”²⁷⁵ The editorial continued on to argue that the commissioners might want to “litigate an accusation of genocide by Canadian governments in the 18th and 19th centuries, and in part of the 20th. They might even win their case.” They should not, however, translate that concern about “the harm its governments caused in the past” or about “racist attitudes [that] persist among some people” into a belief that the “country is, at this very moment, pursuing a policy of genocide against Indigenous people.”²⁷⁶ The *Globe and Mail* editorial reflects a particular temporal move: it located violence in the past in order to contrast it with a progressive future and an uncertain present. It also carefully separated government policy from individual attitudes, suggesting that the passage of time represents progress from structural harm to individual beliefs. That separation lends itself naturally to the move towards criminalization (incarcerating those committing the murders) and away from restructuring (keeping separate questions of land, resource exploitation, and self-determination).

Other commentators agreed, suggesting that “even right-thinking people who are appalled by the victimization statistics are likely to recoil at the charge that they are complicit in genocide Are newly-arrived Canadians going to feel remorse for a colonial past for which they bear no responsibility?”²⁷⁷ The temporal piece is interwoven with a sense of diluted or dissipated

274. Editorial, *Is Canada Committing Genocide? That Doesn't Add Up*, GLOBE & MAIL (June 6, 2019), <https://www.theglobeandmail.com/opinion/editorials/article-is-canada-committing-genocide-that-doesnt-add-up/> [<https://perma.cc/52D2-GJ47>].

275. *Id.*

276. *Id.*

277. Ivison, *supra* note 272. In fact, as Taiaiake Alfred argues, “newly arrived” Canadians too should experience a sense of responsibility, as beneficiaries of colonial crimes: “What was stolen must be given back, amends must be made for the crimes that were committed, from which Settlers, old families and recent immigrants alike, have gained their existences as citizens of these colonial countries.” TAIAlAKE ALFRED, *WASASE: INDIGENOUS PATHWAYS OF ACTION AND FREEDOM* 153 (2005) (ebook).

responsibility: ‘the colonial past,’ the ‘newly-arrived.’ Together, it adds up to an argument of “closure and for families to put their pain behind them. The world is full of weeping but it does not go backward.”²⁷⁸ Instead of moving forward towards reconciliation, “where Indigenous and non-Indigenous Canadians could come together to condemn an unacceptable past,” the opportunity was squandered, critics argued, by an Inquiry that overreached by assigning contemporary blame.²⁷⁹ The argument shares with the “present genocide” claim the picture of the brutal, horrific past but views that past as complete rather than as bleeding continuously into the present.

C. Counter-Argument: Restructuring the Violent Present

In her study of the Truth and Reconciliation Commission, for which she served as Research Director, Paulette Regan declares that Canadian society remains (as of 2011) “a very long way from the substantive restitution, reparations, and social transformation that critics identify as essential to just relations and authentic reconciliation.”²⁸⁰ For many years, Indigenous and non-Indigenous scholars and activists have asserted that reconciliation could just as easily substantiate colonialism as disrupt it.²⁸¹ Taiaiake Alfred writes that the “logic of reconciliation” will “enshrine colonial injustices” unless it involves “massive restitution, including land, financial transfers, and other forms of assistance to compensate for past harms and continuing injustices committed against our peoples.”²⁸² These positions weave together four distinct threads of presentism: harm, violence, genocide, and redistribution. The first focuses attention on intergenerational trauma, the second on violence as collective and

278. Ivison, *supra* note 272.

279. *Id.*

280. REGAN, *supra* note 268, at 62.

281. See, e.g., Jeff Corntassel & Cindy Holder, *Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru*, 9 HUM. RTS. REV. 465, 486 (2008) (arguing that “[a]nalyzing . . . events from a vantage point of indigenous self-determination and decolonization exposes the ‘politics of distraction’ strategies practiced by policy elites in framing the discourse of reconciliation”).

282. ALFRED, *supra* note 277, at 152. The tension between recognition and redistribution, often placed out within reconciliation conversations, relates closely to Nancy Fraser’s well-known critiques. Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age*, 212 NEW LEFT REV. 68, 69–74 (1995). For a discussion of Fraser in relation to the Canadian case, see Petoukhov, *supra* note 223, at 75–77 (2013).

structural as well as individual, the third on genocide as slow rather than rapid and discrete, and the fourth on the need for self-determination rather than reforms that aim to preserve the existing system. Each of these positions potentially aligns with both the TRC and NIMMIWG visions—even if commentators sometimes sought (and sometimes succeeded) to use the MMIWG report as a cudgel against the TRC.²⁸³

While both the TRC and the MMIWG Reports referenced genocide, the former framed it in the past tense while the latter found a “‘manifest pattern’ attributable to present-day Canadian state conduct with Indigenous communities.”²⁸⁴ The MMIWG Report took up the findings made by the Truth Commission and extended their reach, emphasizing continuities of both violence and responsibility. The Report reflects the complexity of using the terminology of ‘genocide’ to categorize the actions the National Inquiry traced; it concludes that genocide is “the sum of the social practices, assumptions, and actions detailed within this report; as many witnesses expressed, this country is at war, and Indigenous women, girls, and 2SLGBTQQIA people are under siege.”²⁸⁵

Whereas the TRC focused on cultural genocide and differentiating it from situations of physical genocide, the MMIWG report included a 45-page supplement on the legal definition of genocide, defending the inclusion of Canada on the list of genocidal regimes.²⁸⁶ The Supplementary Report’s interpretation refuted familiar temporal parameters of genocide in two interrelated ways: by classifying genocide as a series of acts of slow violence over centuries

283. For example, the framework of reconciliation and the Commission’s Calls to Action included an emphasis on the need for Indigenous self-determination and for redress. TRC, SUMMARY OF THE FINAL REPORT, *supra* note 224, at 137.

284. NAT’L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY, *supra* note 230, at 25. The Report continued, “This conduct includes both proactive measures to destroy, assimilate, and eliminate Indigenous peoples, as well as omissions by the Canadian government to ensure safety, equality, and access to essential services which have had direct, life-threatening consequences on Indigenous communities, in particular on women, girls, and 2SLGBTQQIA people.” *Id.*

285. NAT’L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY *supra* note 230, at 3.

286. On the TRC’s use of ‘cultural’ rather than ‘physical’ genocide, see MACDONALD, *supra* note 229, at 128–29. NAT’L INQUIRY, SUPPLEMENTARY REPORT, *supra* note 256, at 9–10 (“The intent to destroy Indigenous peoples in Canada was implemented gradually and intermittently In addition to the lethal conduct, the non-lethal tactics used were no less destructive and fall within the scope of the crime of genocide.”).

rather than an event of limited time and intense violence and by interpreting contemporary failures by the Canadian state—as well as its ongoing policies—as part of the “composite act” of genocide.²⁸⁷ The authors pointed out that it is the very lack of temporal parameters of colonial genocide that clashes with the “popular notions of genocide as a determinate, quantifiable event.”²⁸⁸

Genocidal continuity is understood in the MMIWG Report as a structural problem, a framing that “means that we can’t dismiss events as parts of the past, or as elements of someone else’s history. This prevents the dismissal of Indian residential schools, or the Sixties Scoop, as events that people should just ‘get over.’”²⁸⁹ The emphasis on ‘root causes’ of violence was directed not at focusing on the past but, to the contrary, holding the contemporary state responsible.²⁹⁰ The Supplementary Report placed contemporary inequalities in a direct causal line from long-term colonial practices, but it also made deliberately more difficult any attempt to disconnect present from past—or even to establish violence as “past” at all.

The present genocide argument places residential schools in the context of a long-term effort to eliminate Indigenous peoples altogether and represents the contemporary situation as the next step in that continuous, murderous history. Sociologist Andrew Woolford points out that the deployment of the term “genocide” to classify official Canadian policy towards Indigenous groups pre-dated the TRC; it was used in relation to a host of actions taken against Indigenous peoples, including “sporadic and small-scale massacres, forced removals, negligent disease spread, prohibition of cultural practices such as the potlatch, welfare-state child removals, and the ecological devastation of indigenous territories.”²⁹¹ The terminology was meant to foreground the ways in which colonial actions were directed at eliminating the physical and social life of Indigenous

287. NAT’L INQUIRY, SUPPLEMENTARY REPORT, *supra* note 256, at 9–10.

288. *Id.* at 10.

289. NAT’L INQUIRY, FINAL REPORT, EXECUTIVE SUMMARY, *supra* note 230, at 17. On the “Sixties Scoop,” see MACDONALD, *supra* note 229, at 93–100 (describing the policy changes that focused on systematically removing Indigenous children from their families through child welfare agencies).

290. NAT’L INQUIRY, SUPPLEMENTARY REPORT, *supra* note 256, at 8 (arguing that “[g]enocide is a root cause of the violence perpetrated against Indigenous women and girls, not only because of the genocidal acts that were and still are perpetrated against them, but also because of all the societal vulnerabilities it fosters”).

291. Andrew Woolford, *Unsettling Genocide and Transforming Group Relations in Canada*, 7 DIRECTIONS 44, 45 (citations omitted).

peoples and to destroy any possibility for Indigenous self-determination.²⁹² Moreover, it responded to habitual concessions by Canadian governments of less serious violations “invariably described as ‘tragedies’ rather than as criminal acts.”²⁹³

One of the critical bases for the argument of genocide was to expose historical continuities dependent upon collective and structural violence.²⁹⁴ Rather than understanding the brutal treatment of Indigenous people as a “punctuated historical phenomenon” in which colonial episodes are interspersed with progressive moments, the invocation of genocide made it clear that “Canada has always been and remains a colonial country.”²⁹⁵ The Supplementary Report found that the state possessed the requisite *mens rea* for genocide based on both actions and failures to act: “Canada has displayed a continuous policy, with . . . an ultimately steady intention, to destroy Indigenous peoples physically, biologically, and as social units.”²⁹⁶ Legal scholar Michael Fakhri argued that this conclusion permits a much broader inquiry into the structural and collective responsibility and actions that institute and permit genocidal policies, rather than a focus on individual criminal acts.²⁹⁷ Moreover, it potentially addresses concerns about a progress narrative, contributing to the view that “the harms of colonialism are not past atrocities we have collectively overcome, but rather continuing injustices, which move in an odd and jarring misstep with public narratives in an age of reconciliation.”²⁹⁸ The MMIWG Report and its supporters, who argued that prior inquiries had failed to fully grapple with the continuing nature of colonial violence, as evidenced by their reluctance to name genocide, linked past to present and thus pinned responsibility for contemporary violence directly on the Canadian state.

292. *Id.* (noting that genocide was “entwined with Indigenous assertions of self-determination”).

293. STARBLANKET, *supra* note 261, at 26.

294. NAT’L INQUIRY, SUPPLEMENTARY REPORT, *supra* note 256, at 25 (“These historical policies are appalling in their systematic destruction of Indigenous communities, but what is more appalling is that many of these policies continue today under a different guise.”).

295. Fakhri, *supra* note 273.

296. NAT’L INQUIRY, SUPPLEMENTARY REPORT, *supra* note 256, at 24.

297. Fakhri, *supra* note 273.

298. Catherine Bell & Hadley Friedland, *Law, Justice, and Reconciliation in Post-TRC Canada*, 56 ALTA. L. REV. 659, 666 (2019).

D. Summary

The Canadian case highlights the stakes of how arguments over the past function in a settler-colonial present. The TRC and the NIMMIWG determined that genocide is both a past and present phenomenon, in terms of acts, omissions, and consequences. While they differed in their findings—with the TRC emphasizing past cultural genocide and the NIMMIWG placing genocide squarely in the present—they presented a clear argument for what Patrick Wolfe has called the “logic of elimination.”²⁹⁹ Despite the consonance between the two, however, they were mobilized in different ways by commentators seeking justification for opposing views, particularly on whether the violence is continuous or complete.

The competing mobilizations of the two reports made clear that arguments over the correct classification of genocide and responsibility are equally struggles over how fundamentally the distribution of resources, power, land, and sovereignty should or can shift from settlers (back) to Indigenous peoples. These arguments rely upon specific narrations of racialized violence. If that violence, in its genocidal form, is indeed past, then it can be, or has already been, resolved through specific institutional and compensatory forms: the closure of residential schools, apologies by government leaders, payment of individual reparations, and granting of rights and representation in the Canadian government structure. If the violence, especially in its genocidal form, is marked by continuity through time, then a fundamental shift in settler-Indigenous relations is required. Read together, the TRC and NIMMIWG reports add texture and detail to Wolfe’s argument that settler colonization is a “structure rather than an event,” characterized by “continuity through time.”³⁰⁰

At stake in these debates are the material contours of decolonial projects. Settler-Indigenous relations have been structured by treaties, by the doctrine of self-determination, and by territoriality. As a result, by asserting the embedded hierarchies of unequal legalities, decolonial projects resist narratives that suggest a distant or partially-remedied past. Referencing a series of maps showing the transfer of land from Indigenous to white ownership between 1850 and 1990, Tuck and Yang argue that “[s]ettler colonization can be visually understood as the unbroken pace of invasion, and settler occupation, into Native lands Decolonization, as a process, would repatriate land to

299. Wolfe, *supra* note 240, at 390.

300. *Id.*

indigenous peoples, *reversing the timeline* of these images.”³⁰¹ As others have argued, the entire notion of *reconciliation* in the Canadian context betrays the reality that there is no moment of conciliation to return to, only one to produce.³⁰² When it comes to land, however, there is a timeline to reverse: the taking of Indigenous lands and the reformulation of Indigenous life through deliberate assimilation and abuse.³⁰³

IV. ISRAEL/PALESTINE: THE PRESENT PAST

Unlike the U.S., South Africa, or Canada cases, the nature of the political settlement in the Israeli-Palestinian case remains undetermined. As a result, the stakes are particularly clear when opposing parties assert different narratives of the violent past to support competing arguments over the unequal present. The contemporary distribution of goods, resources, land, and population has been shaped by the Oslo Accords (1993–95) and the accompanying legal, political, and economic arrangements.³⁰⁴ As the following sections discuss, those arrangements included an agreement to leave the past to the side for an indefinite period of time, which has now stretched into decades.³⁰⁵ As a result, one of the major debates of the post-1993 era has been between those arguing for the centrality of the past in determining the future’s settlement and those reinforcing the decision to separate history and memory from the distribution of sovereignty, resources, and power.³⁰⁶

Prior to 1993, divergent portrayals of the region’s history—for example, Palestinian Nakba (catastrophe) versus Israeli independence—had hardened; many commentators portrayed the situation as two mutually exclusive narratives with competing claims

301. Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y* 1, 25 (2012) (emphasis added).

302. MACDONALD, *supra* note 229, at 7.

303. See, e.g., Jeff Corntassel, *Re-Envisioning Resurgence: Indigenous Pathways to Decolonization and Sustainable Self-Determination*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y* 86, 94 (2012) (arguing that reconciliation is not a simple matter of assigning land *title*, since title without actual restitution is not only meaningless but potentially harmful if it used to “promote ‘certainty’ of land title” for purposes of attracting corporate investment).

304. Declaration of Principles on Interim Self-Government Arrangements, *Isr.-P.L.O.*, Sept. 13, 1993, 32 *I.L.M.* 1525 [hereinafter Oslo I], Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, *Isr.-P.L.O.*, Sept. 28, 1995, Art. XXXI(5), 36 *I.L.M.* 557 [hereinafter Oslo II].

305. See *infra* notes 321–22 and accompanying text.

306. See *infra* Sections IV.A–B.

to historical accuracy.³⁰⁷ When the Oslo process separated past from present, portraying the former as a secondary issue to be deferred or resolved unofficially, it separated the distribution of resources in the present from narratives of the past. In doing so, it also endorsed a presentist approach that appeared to critics to support the more powerful Israeli state over Palestinian claims to emancipation.³⁰⁸ In this context, arguments and counter-arguments are structured not only around distance from the past or closure of responsibility, as in other cases this Article discusses, but around whether the past should play any role at all in contemporary distributional decisions at all. A two-level disagreement emerges: first, a longstanding set of debates over the nature of and responsibility for events of earlier eras, and second, a more recent argument over whether those debates are materially relevant to contemporary negotiations over the distribution of territory, population, and sovereignty. This Section focuses on the latter but is inevitably informed by the former.³⁰⁹

Although Oslo's proponents sought primarily to sever historical claims in the name of gradual and sustainable peace, the effect appeared to critics to privilege one narrative over the other. Oslo's advocates argued that the past is too freighted to operate as a baseline for negotiating the distribution of territory and power, while critics countered that only by looking to a particular past could a just distribution be negotiated. Those advocating a break with the past appeared largely victorious when the Oslo Accords were put into place, fundamentally reshaping Palestinian politics, law, and economics while largely cutting off consideration of the past.³¹⁰ The

307. See, e.g., Ariel Meyerstein, *Transitional Justice and Post-Conflict Israel/Palestine: Assessing the Applicability of the Truth Commission Paradigm*, 38 CASE W. RES. J. INT'L L. 281, 284 (2006–07) (analyzing the conflict in terms of a “conflict culture” whose “foundational feature . . . is the mutual denial by both sides of the other side’s distinct and oppositional narrative of the conflict”).

308. See *infra* notes 332–35 and accompanying text.

309. On the first, see, e.g., Meyerstein, *supra* note 307, at 349–50 (suggesting both the need and possible design considerations for an Israeli-Palestinian Truth Commission, focusing on the need to address conflicting narratives of the past in the “peace beyond the peace process”); Aeyal Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 79–80 (2004) (describing debates in Israeli historiography, reliance on the Zionist narrative by the Israeli High Court, and the need to develop a “bridging narrative” which would be plural and inclusive in nature).

310. There were parallel acts within Israel. See Budget Foundations Law (Amendment No. 40), 5771-2011 (2011) (Isr.), *unofficially translated in* ADALAH, “NAKBA LAW”—AMENDMENT NO. 40 TO THE BUDGETS FOUNDATIONS LAW 686, 686–

counter-argument that emerged was based both on the longstanding assertion of the importance of the past for Palestinian rights and on a specific application of that significant past to the post-Oslo era.³¹¹ It asserts that neglecting responsibility for past violence obscures ongoing harm and responsibility. As a result, they argue that the Oslo process created a constantly deferred future that made an unbearable present interminable.³¹²

A. Background: Negotiating the Oslo Accords

A “historic” handshake³¹³ between Palestinian Liberation Organization (PLO) Chairman Yassir Arafat and Israeli Prime Minister Yitzhak Rabin in 1993 set in motion not just the parameters for ongoing negotiations but a new set of political, legal, spatial, and social arrangements.³¹⁴ The Oslo regime created a tripartite division of Palestinian territory differentiated by the degree of authority the newly established Palestinian Authority would exercise over it.³¹⁵ The process was premised on a gradualist, “confidence-building” framework, in which issues of significant disagreement were tabled for an undeclared later date while incremental, often technical measures of cooperation were put into place in the present.³¹⁶ Issues designated “permanent status” were bracketed for future discussion: Palestinian refugees, Jerusalem, borders, settlements, and security.³¹⁷ Prior to resolving these issues, the agreements subdivided Palestinian territory, established limited Palestinian self-governance, and put in place security measures and security cooperation.³¹⁸ The regime as a whole was bolstered by a new humanitarian aid architecture, which entered the West Bank and

87, <https://www.adalah.org/en/law/view/496> [<https://perma.cc/V82Z-X9N5>] (reducing or withholding funding for any institution holding an activity that, among other things, is commemorating “the day of the establishment of the state as a day of mourning”).

311. *See infra* Part IV.C

312. *See infra* Part IV.C

313. Miller, *supra* note 17, at 333.

314. Oslo I, *supra* note 304.

315. Oslo II, *supra* note 304, at Art. XIII (setting forth a plan of phased transfer of jurisdiction by Areas A, B, and C).

316. *Id.* art. XVI (describing “Confidence Building Measures” including the gradual release of Palestinian detainees and prisoners).

317. *Id.* art. XXXI(5).

318. *Id.* arts. IX–XII (describing the Palestinian Council arrangements for security).

Gaza to materially support the hybridized system of Israeli/international/Palestinian governance.³¹⁹

As has been extensively documented, the status quo that emerged after 1993 froze in place many of the explicitly temporary aspects of the agreements.³²⁰ The Palestinian Authority continued to operate in the West Bank while the Hamas movement eventually took over governance in Gaza; both, however, remained under the overall control of the Israeli state.³²¹ The regime set in place with Oslo became marked by the combination of technical cooperation and substantive deferral. The regime was premised on a temporary set of agreements. As the possibility of a finalized agreement receded over time, however, those agreements became the new rule of law.³²² The architecture the Accords put in place—particularly the model of territorial integration and population separation—became increasingly difficult to alter.

B. Argument: Avoiding the Warring Past

The move to “mutual recognition” between warring but unequal parties was one of the most significant aspects of the Oslo process.³²³ The creation of the Palestinian Authority (PA) signaled

319. Miller, *supra* note 17, at 333–34 (describing the critical role of international actors in the making of the Oslo regime, which effectively shifted the framework away from occupation and towards a division of territory from population, with most of the material responsibility for Palestinian life shifted from the occupier to international organizations and the Palestinian Authority).

320. This is not to suggest, however, that the reality on the ground remained static. Most relevant for this section, the settlement blocs and settler population have continued to increase dramatically since 1993. See B'TSELEM: THE ISRAELI INFO. CTR. FOR HUM. RTS. IN THE OCCUPIED TERRITORIES, REALITY CHECK: ALMOST FIFTY YEARS OF OCCUPATION 4 (2016) (noting that the settlements' population has “more than tripled since the Oslo Accords were signed”).

321. *Ruling Palestine I: Gaza Under Hamas*, INT'L CRISIS GRP. (Mar. 19, 2008), <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/israelpalestine/ruling-palestine-i-gaza-under-hamas> [https://perma.cc/XZ77-WZU4]; *Ruling Palestine II: The West Bank Model?* INT'L CRISIS GRP. (July 17, 2008), <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/israelpalestine/ruling-palestine-ii-west-bank-model> [https://perma.cc/Q3AY-MMH9] (summarizing differentiated models of Palestinian governance in Gaza and the West Bank).

322. AEYAL GROSS, *THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION* 186–96 (2017).

323. Avi Shlaim, *The Oslo Accord*, 23 J. PAL. STUD. 24, 25 (1994) (explaining that an agreement on mutual recognition paved the way for negotiations towards an agreement on Palestinian self-government).

that full Palestinian self-governance was a reliable possibility. Moreover the “historic” nature of the agreements, touted widely, consistently marked them as a rupture in time. Descriptions of the handshake and the agreement to negotiate as unprecedented all contributed to a view of Oslo as a radical change in the status quo.³²⁴ Moreover, the process itself implicitly suggested resolution in the form of not just partition, but two states (although no document ever formally stated a Palestinian state as an end result).³²⁵ After decades of national suppression, putting Palestinian representation on par with Israeli government officials appeared to create a wholly new relationship between the warring parties.³²⁶ Suddenly, the parties were “partners in peace,”³²⁷ a framing possible only through rhetoric of comparable claims rather than competing victimhood. The ostensible parity between them was by all accounts promising,³²⁸ in large part because it was new; its newness implied that what came after 1993 would differ from all that had come before. In doing so, it bolstered the claim that the past should remain both cloistered and private (or, at least, limited to national/ethnic borders).

Ostensible parity was established not only through formal recognition or the creation of the PA, but also by cutting off discussion of the past.³²⁹ The predominant, if often implicit, argument

324. *Id.* at 25.

325. CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS 155 (2000) (pointing out the Declaration of Principles’ “deafening silence on what the end goal of the negotiations is to be. Ultimately, its language is consistent with two radically different underlying visions of the possible end-game”). One vision proposes Palestinian statehood in the West Bank and Gaza, while the other calls for a more stunted version of Palestinian autonomy. *Id.*

326. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 182–83, ¶ 118 (July 9) [hereinafter Legal Consequences] (stating that the “existence of a ‘Palestinian people’” for purposes of self-determination is “no longer in issue,” not least due to the recognition of the PLO as representative of the Palestinian people in the Letters of Mutual Recognition). For an interesting parallel, which could be imagined as South Africa’s version of parity, see Ramose, *supra* note 214, at 340 (“[I]t is preposterous blindness to history to claim that the ‘secret talks’ held before the ‘negotiations’ for the ‘new’ South Africa were not between ‘conqueror’ and ‘conquered’ but between parties who accepted that no solution was possible unless it was reached between equals . . .”).

327. Ian S. Lustick, *Ending Protracted Conflicts: The Oslo Peace Process Between Political Partnership and Legality*, 30 CORNELL INT’L L.J. 741, 744 (1997).

328. *Id.*

329. See Ron Dudai, *A Model for Dealing with the Past in the Israeli-Palestinian Context*, 1 INT’L J. TRANSITIONAL JUST. 249, 252 (2007) (“[B]oth

underlying the Oslo process was that the past was an area of impossible, intractable conflict full of competing and equally justifiable claims. At best, the conflict narratives of the past could after many years be bridged or communicated in ways that might eventually promote resolution; at worst, paying too much attention to the past would fuel further suffering.³³⁰ Negotiators' strategy, therefore, was to gradually eliminate its significance in favor of promises of equal treatment (for the Palestinians), security (for the Israelis), and economic growth (for both groups). Historical claims, collective memory practices, and accountability mechanisms for past offenses were largely considered private efforts that fell outside the scope of official negotiations and state-building.³³¹

The Oslo regime was notable for the absence of any measures (or discussion thereof) for confronting, understanding, memorializing, prosecuting, or even noting past violence.³³² Restitution, reparation,

leaderships eschewed discussions of the past and transitional justice mechanisms were never proposed; to a large degree this has been due to a pragmatic assumption that dealing with the past would be counter-productive and that the focus should be on designing instrumental agreements for the future.”).

330. Robert I. Rotberg, *Building Legitimacy Through Narrative*, in ISRAELI AND PALESTINIAN NARRATIVES OF CONFLICT: HISTORY'S DOUBLE HELIX 1, 5 (Robert I. Rotberg ed., 2006) (asserting that reconciliation depends upon mutual recognition of conflicting but legitimate national narratives).

331. Seeds of Peace and the Parents Circle-Families Forum emerged as models of private and unofficial reconciliation and mourning practices operating across national boundaries. The founders of these organizations understood their efforts as working against, beyond, or in alignment with developments at the policy and diplomatic levels. See JOHN WALLACH & MICHAEL WALLACH, THE ENEMY HAS A FACE: THE SEEDS OF PEACE EXPERIENCE 11 (2000) (describing Seeds of Peace as “an idea that seemed to make sense: Bring the next generation together before they too fall victim to the hate that ensnares their parents and grandparents . . . I became so convinced that this was the only way to break the unending cycles of violence . . .”); see also Bettina Marta Prato, *The Politics of Melancholic Reason: The Experience of the Israeli-Palestinian Parents' Circle*, 11 PARALLAX 117, 123–24 (2005) (“Driven by the desire to find instruments for mourning and to take back some capacity for action from policymakers, Frankenthal decided to establish a partnership with other bereaved parents from both sides.”).

332. See Kathleen Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 FORDHAM INT'L L.J. 934, 955 (2003) (“The question of accountability for the past abuses, an essential component of any transitional process, was conspicuously absent from the Oslo II Accords.”); see also Ron Dudai & Hillel Cohen, *Triangle of Betrayal: Collaborators and Transitional Justice in the Israeli-Palestinian Conflict*, 6 J. HUM. RTS. 37, 48 (2007) (“In the 1994–1995 agreements between Israel and the PLO, the emerging Palestinian Authority (PA) undertook to refrain from prosecuting or persecuting former collaborators.”); Gross, *supra* note 309, at 48–49 (presenting the amnesty process, which “leaves

and redress were largely off the table, appearing only in discussions of the “final status” issues.³³³ Oslo constituted a rupture without a transition. The premise that revisiting the past would automatically entail conflict rather than peace was based in part on the framework of partition, which suggested that each national movement could eventually retreat behind closed territorial borders and maintain their separate versions of the past.³³⁴ Oslo’s partition logic built on decades of understanding the conflict as one framed around “the struggle over whose narrative describing the history of the conflict . . . is the true or morally superior one.”³³⁵

Oslo endorsed a model of moderate redistribution through complete separation; separation would allow for the continuity of conflicting pasts through national containment. The past featured as a site of bloodshed, contestation, and irreparable harm.³³⁶ The present became a place of technical cooperation, increasing separation, interim plans, and an agreement to disagree about the most fundamental divisions among the parties. Among the different mechanisms used to achieve this was the categorization of past-inflected issues—such as the right of return for refugees—as “final status” questions that remain (still) unaddressed.³³⁷ As a result,

the past behind,” as one approach to resolving the tension in transitional justice between acknowledging past human rights violations and looking toward a new political future).

333. Are Hovdenak, *Trading Refugees for Land and Symbols: The Palestinian Negotiation Strategy in the Oslo Process*, 22 *J. REFUGEE STUD.* 30, 44 (2008) (discussing Israeli and Palestinian negotiating positions at Oslo and Camp David on the return of Palestinian refugees generally as well as reparations in particular).

334. Daniel Bar-On & Sami Adwan, *The Psychology of Better Dialogue Between Two Separate But Interdependent Narratives*, in *ISRAELI AND PALESTINIAN NARRATIVES OF CONFLICT: HISTORY’S DOUBLE HELIX* 205, 216 (Robert I. Rotberg, ed., 2006) (“The idea of developing two separate narratives [rather than a single “bridging narrative”] is linked to the proposed, political two-state solution to the Israeli-Palestinian conflict.”). Khoury argues that the “national partition paradigm” of the Oslo process created a “narrative partition” as well, one “unequally policed” on the Palestinian and Israeli sides since the former remained under occupation. Nadim Khoury, *National Narratives and the Oslo Peace Process*, 22 *NATIONS & NATIONALISM* 465, 470–71 (2016).

335. Bar-On & Adwan, *supra* note 334, at 205.

336. Tom Hill suggests that Oslo’s logic was based on “sidelining the discursive aspects of the conflict, and above all bypassing the issue of conflicting narratives.” Tom Hill, *1948 After Oslo: Truth and Reconciliation in Palestinian Discourse*, 13 *MEDITERRANEAN POL.* 151, 154 (2008).

337. *Israel’s Refusal to Grant Palestinian Refugees Right to Return Has Fuelled Seven Decades of Suffering*, AMNESTY INT’L (May 15, 2019) <https://www.amnesty.org/en/latest/news/2019/05/israels-refusal-to-grant->

arguments over the distribution of resources, territory, and power—including sovereign power—were limited to present, temporary arrangements.

In January 2020, the Trump administration released its “Peace to Prosperity” plan, which in many ways crystallized the logic of Oslo’s rupture with the past.³³⁸ The plan affirmed that “[r]eciting past narratives about the conflict is unproductive” because “the solution must be forward-looking.”³³⁹ Its “conceptual maps” offer a partition plan based largely on maintaining the status quo, with some additional land swaps.³⁴⁰ The result is a plan based on simultaneously dismissing the significance of the past as divisive and freezing the territorial present in place for the future.

C. Counter-Argument: Preserving the Unequal Past

Counter-arguments to Oslo that mobilized accounts of the past developed both among parties sympathetic to official Israeli annexation of Palestinian territories and among those resisting the erosion of Palestinian rights and control.³⁴¹ According to the latter group, on which this Section focuses, the original proposition of Oslo (i.e., that separation, both physical and narrative) and its practices (e.g., technical cooperation and temporary arrangements) exacerbated existing inequalities of resources and power rather than making their

palestinian-refugees-right-to-return-has-fuelled-seven-decades-of-suffering/
[<https://perma.cc/644G-6AEK>]

338. WHITE HOUSE, PEACE TO PROSPERITY: A VISION TO IMPROVE THE LIVES OF THE PALESTINIAN AND ISRAELI PEOPLE 6 (2020), <https://www.whitehouse.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf> [<https://perma.cc/WY34-V9K7>].

339. *Id.*

340. *Id.* app. 1.

341. Both groups draw on historical narratives of continuity in different ways and for opposing reasons: the first uses the past as justification for expanding the status quo while the second mobilizes historical continuity to resist it. *See, e.g.*, THE HOLOCAUST AND THE NAKBA: A NEW GRAMMAR OF TRAUMA AND HISTORY 2 (Bashir Bashir & Amos Goldberg eds., 2018) (discussing the centrality of the Holocaust and the Nakba to contemporary Jewish and Palestinian “collective identity and consciousness” and the political mobilization of both nationally traumatic events). It is worth noting that the narrative approach of proponents of Israeli annexation has great significance, to be sure; a combination of reinvigorated Jewish and nationalist history, along with the deployment of Holocaust narratives, have bolstered much of the settlement project and development of the contemporary Israeli state. However, owing to space and resource constraints, this Section focuses on critics and advocates focused on Palestinian claims about the past.

resolution more plausible.³⁴² Critics assert the centrality of continuing violence and inequality rather than the significance of 1993 as a rupture in time.³⁴³ The combination of an occupation with no fixed temporal parameters and a peace process with no recognition or redress of the past assured the continuity of asymmetric power both materially and discursively.³⁴⁴ In addition, the deliberate focus on the collective memory of Nakba as the origin story of Palestinian dispossession and violence provides a counter-weight to the Oslo regime's presentism.³⁴⁵

If arguments in South Africa were structured in relation to legal arguments about permanent closure, those about the Israeli-Palestinian conflict have been characterized by permanent transition.

342. Neve Gordon describes the Oslo regime as altering rather than diminishing Israeli control and territorial exploitation; rather than a "colonization" principle, the "separation" principle entailed "outsourcing" population control to the Palestinian Authority. NEVE GORDON, *ISRAEL'S OCCUPATION* xix (2008).

343. Sara Roy, *Why Peace Failed: An Oslo Autopsy*, 101 *CURRENT HIST.* 8, 9 (2002) ("The Oslo process . . . did not represent the end of Israeli occupation but its continuation The structural relationship between occupier and occupied, and the gross asymmetries in power that attend it, were not dismantled . . . but reinforced and strengthened."); see also GORDON, *supra* note 342, at xix ("I firmly believe that one cannot understand the current disputes informing the Israeli-Palestinian conflict without taking into account the ethnic cleansing that took place during and after the 1948 war.")

344. On the reproduction of legal and material inequality through indeterminate occupation see, e.g., Orna Naftali et al., *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 *BERKELEY J. INT'L L.* 551, 604 (2005) (asserting the illegality of the Israeli occupation based on, among other factors, the "indefinite" nature of the occupation, which is violative of the temporal requirements of the law of occupation); GROSS, *supra* note 322, at 181 (describing the indeterminacy of occupation, particularly as applied to the Palestinian territories, and emphasizing that the Oslo Accords "left this structure [from 1967] intact while adding a layer of indeterminacy"). On the reproduction of material and symbolic inequality through the failure to either address or redress the past, see, e.g., Hill, *supra* note 336, at 156 (describing Palestinian objections to the emphasis on "dialogue initiatives" under the Oslo regime because they "not only serve no useful purpose . . . but, worse, do tremendous harm, by promoting to Israeli and Western audiences an illusion of symmetry and equivalence between the two narratives" that encourages either passivity or concessions by the weaker party).

345. Some Palestinian commentators describe collective memory as a resistance mechanism. See NAKBA: PALESTINE, 1948, AND THE CLAIMS OF MEMORY 6 (Ahmad H. Sa'di & Lila Abu-Lughod eds., 2007) [hereinafter NAKBA] ("Palestinian memory is, by dint of its preservation and social production under the conditions of its silencing by the thundering story of Zionism, dissident memory, counter-memory. It contributes to a counter-history.").

Permanent transition became defined by Palestinian waiting (temporal and spatial immobility), an occupation with no fixed endpoint, international metrics for Palestinian governance, and the irrelevance of the past.³⁴⁶ Whereas arguments in South Africa focused on the law of permanent closure, those about the Israeli-Palestinian conflict have emphasized permanent transition.³⁴⁷ In this sense, constituting the Oslo regime engendered both a permanent transition and an understanding of the present disconnected from both any interpretation of the past and any plan for the future. The Oslo process's statebuilding model restructured demands and actions around an imagined future, rather than an ongoing liberation struggle structured around redress for past violence.³⁴⁸

Efforts to memorialize and retrieve a partially-erased past reflect the argument that only by preserving the past can better distribution—whether of security, goods, legitimacy, or land—be achieved. Both the conflict over 1948, and the attempt to bring it back to the center of the conflict, represent a battle over material distribution as well as over the legitimacy of claims.³⁴⁹ The right of return of Palestinian refugees has become not only a legal, demographic, and political battle, but also a temporal one over the continuity of claims from 1948.³⁵⁰ The structure of argument under the Oslo regime—for example, continuous deferral of the issue of the Palestinian refugees' return—produced counter-arguments of past

346. See Miller, *supra* note 17, at 410.

347. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 121 (July 9) (noting concern that the wall and “its associated régime create a ‘fait accompli’ on the ground that could well become permanent”).

348. See Nasser Abourahme, *The Productive Ambivalences of Post-Revolutionary Time: Discourse, Aesthetics, and the Political Subject of the Palestinian Present*, in TIME, TEMPORALITY AND VIOLENCE IN INTERNATIONAL RELATIONS: (DE)FATALIZING THE PRESENT, FORGING RADICAL ALTERNATIVES 129, 151 (Anna M. Agathangelou & Kyle D. Killian eds., 2016) (describing the spatio-temporal quality of Palestinian state-building as a “perpetual, suspended present . . . trapped, seemingly perpetually, between the (endless) colonial present and the (deferred) postcolonial future”).

349. See NOURA EREKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 236 (2019) (“Any possible future necessitates an accounting of this [settler-colonial] history, not simply for the sake of cathartic truth telling, but for the sake of decolonization.”)

350. See, e.g., AKEVOT INST. FOR ISRAELI-PALESTINIAN CONFLICT RSCH., SILENCING: DSDE'S CONCEALMENT OF DOCUMENTS IN ARCHIVES 9, 13 (2019) (reporting on the denial of public access to historical records on the Nakba that contain differing narratives on the reason for Palestinian refugees' migration in 1948).

violence, which were asserted via suits for access to military archives or by marking destroyed villages.³⁵¹ As sociologist Ronit Lentin argued in 2010, “the memory of the Nakba has for a number of years been in the process of being recovered, recorded, revived, theorised, and politicised for the benefit not only of the past, but also of the present and the future.”³⁵² Lentin highlights the ways in which insistence on the centrality of 1948 became a tool not only for collective memory, but also for arguing over the current distribution of territory and population across historic Palestine.³⁵³

For Palestinians and their advocates, the continuity between past and present marks the impossibility of removing the former from a struggle over the latter. As Sa’di and Abu-Lughod note, “[f]or Palestinians, still living their dispossession . . . many still immersed in matters of survival, the past is neither distant nor over.”³⁵⁴ To the contrary, events themselves are experienced as repetitive and reproductive rather than as discrete. Sociologist Lena Jayyusi argues that this is what is “so distinctive of the Palestinian experience of time and memory”: every event is the “same but different from the last,” simultaneously a present experience and a memory of the Nakba.³⁵⁵

D. Summary

Although the handshakes and declarations of 1993 have been overtaken by subsequent events, much of the conceptual framework of Oslo remains. That framework depended upon temporary actions, a focus on the present and very near future, a project of partition, and a rejection of the past as an unrelenting source of violence and

351. For example, the organization Zochrot seeks to “promote acknowledgement and accountability for the ongoing injustices of the Nakba,”; the Akevot Institute for Israeli-Palestinian Conflict Research “locates, digitizes and catalogues various forms of documentation on the Israeli-Palestinian conflict.” *Our Vision*, ZOCHROT, <https://www.zochrot.org/en/content/17> [<https://perma.cc/6QZQ-NGVE>]; *About*, AKEVOT, <https://www.akevot.org.il/en/about/> [<https://perma.cc/NJ5E-ESED>]. For critical discussion of Zochrot’s work as performative, see RONIT LENTIN, CO-MEMORY AND MELANCHOLIA: ISRAELIS MEMORIALISING THE PALESTINIAN NAKBA 127–50 (2010).

352. LENTIN, *supra* note 351, at 21.

353. *Id.*

354. NAKBA, *supra* note 345, at 10.

355. *Id.* at 19. Editors Sa’di and Abu-Lughod further this point with a generational gloss, arguing that “[r]esistance to freezing the past and focusing on the Nakba” exists in both refugee camps and among Palestinians living in Israel. *Id.* at 20.

intractable division. The architects' argument was that the nature of violently competing narratives would make the necessary negotiations impossible. That argument depended on the projected parity of the two parties as equal claimants to victimhood and on the plausible separation of present concerns from past events. The counterargument re-linked the present to the past along two axes: the continuation, repetition, and reproduction of violence over the past century and a half, and especially since Israel's establishment in 1948; and the intimate link between the distribution of resources, power, sovereignties, and rights in the present and in the past.³⁵⁶ To sever the past, these critics argued, was less to ignore it than to privilege the version that "won" on the ground.

CONCLUSION: COMPLEXITIES AND CONSEQUENCES

For those seeking to challenge the political, legal, and economic arrangements of the present, it sometimes appears self-evident that excavating an unjust, racist past will remedy an unequal, racist present. When violent racialized pasts have been actively ignored, quieted, severed, or apparently resolved, reasserting that past becomes its own political struggle. As this Article demonstrates, the work of remembering is taking place in legal and political forums around the world. Advocates have demonstrated the power of centering the past for comprehending the radical injustice of the present and for justifying the redistribution of power and resources.

The case studies, however, also reveal the complexities of foregrounding the past in battles over the distribution of power and resources in the present. Both sides of a given contest—those wishing for a radical change to present circumstance and those advocating for reformist or conservative agendas—mobilize the past for their own benefit. In this sense, the contest is not over whether the past is relevant but over *which* past is represented in legal judgment, government policy, and social movements, and how precisely that past is understood to influence the present. The present might be the legacy, afterlife, reproduction, or continuation of the past. The present might also be a triumph over the past, reflecting a progress

356. Hill, *supra* note 336, at 155 ("Palestinian engagement with truth and reconciliation discourse has . . . been prompted with undoing this equivalence [between Jewish and Palestinian claims to history]. The concern has been to restore history as the central object of political negotiation rather than as subject to it . . .").

that negates or overcomes past oppression. These varying positions suggest varied legal and political responses. They reveal the tremendous responsibility of legal institutions for producing, characterizing, and mobilizing the past in ways that have direct material consequences.

The very institutions imbued with the power to re-examine the past can at times neutralize or limit its relevance for present redistribution. Reparations risk halting discussion of present-day racialized inequalities even when the institutions seek the opposite.³⁵⁷ Past-focused strategies can lead advocates to emphasize one past at the expense of another, foreground violent perpetrators over racialized beneficiaries, transform political subjects into hapless victims, and/or stress physical violence rather than economic privilege.³⁵⁸ As the cases demonstrate, mobilizing the past can be instrumentalized by different groups with divergent interests.

The concern that focusing on the past—or at least a particular characterization of it—might displace, distract, or demobilize the very struggles over present inequality that advocates seek to emphasize is not new. As the “Age of Memory” took hold at the end of the Cold War, social and political theorists voiced concern about past-focused politics. They viewed the emphasis on the past as “replac[ing] the future as the temporal horizon in which to think about politics.”³⁵⁹ Where future-focused or utopian politics emphasized radical redistribution and restructuring, these theorists argued, the increasing interest in truth commissions, memory projects,

357. See Gross, *supra* note 53, at 308 (“Critics of slavery reparations . . . fear that a focus on slavery will minimize continuing racial harms, allowing Americans to believe that injustice was part of the deep past.”); JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* 165–66 (2006) (arguing that the demand for reparations can potentially focus attention on past oppression as an excuse for “perpetuating contemporary injustices” or “reinforce the group differences that underlay past mistreatment”).

358. See generally Aurélien Pradier et al., *Between Transitional Justice and Politics: Reparations in South Africa*, 25 S. AFR. J. INT’L AFF. 301 (2018) (using the South African case to demonstrate the ways in which reparations can be politically instrumentalized, turn increasingly abstract, and fail to assist the victims they claim to compensate); Tshepo Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*, 2 J. HUM. RTS. PRAC. 208 (2010) (critiquing the emphasis of the transitional justice industry on helpless, racialized victims as disempowering); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275 (2008) (analyzing the “worrying ways in which the scope of transitional justice can be depoliticized and narrowed,” particularly in the realms of “gender, power, and structural violence”).

359. TORPEY, *supra* note 357, at 18.

transitional justice, and reparations reflected the post-Cold War victory of limited, liberal reformist agendas bent on maintaining unequal economic and political arrangements.³⁶⁰ These concerns resonate today as battles over decolonizing the present not only mobilize the past but protest the ways in which it has previously been captured and contained.

The Canadian and South African cases reveal the ways in which inquiries designed to remedy violent pasts can be mobilized to obstruct rather than support radical redistribution or decolonization in the present. In South Africa, the discourse around a break from apartheid led critics to question legal judgments that they argue not only circumvent the continuing role of apartheid but privilege a spectacular, heinous apartheid past over a longer one of colonialism and conquest. In other words, the apparent closure of one past led to arguments over reopening another. Although the specifics of those arguments emerged in response to political and legal developments over time, the foundations were laid by those who questioned the TRC's methods and mandate almost immediately.³⁶¹ Mahmood

360. These arguments developed over time as the focus on the past became increasingly entrenched, particularly through the practices of transitional justice. See, e.g., Charles S. Maier, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, 5 HIST. & MEMORY 136, 150 (1993) (suggesting that the “surfeit of memory is a . . . retreat from transformative politics . . . [and reflects] the loss of a future orientation”); ROBERT MEISTER, *AFTER EVIL: A POLITICS OF HUMAN RIGHTS* 21–31 (2011) (characterizing transitional justice as endemically resistant to more revolutionary politics by relieving beneficiaries of responsibility for their privileges); DAVID SCOTT, *OMENS OF ADVERSITY: TRAGEDY, TIME, MEMORY, JUSTICE* 127–64 (2014) (critiquing the liberal ideology of transitional justice, which uses trials and commissions to refigure the past as one of illiberalism, victimhood, and trauma and the present as a liberalizing victory); ENZO TRAVERSO, *LEFT-WING MELANCHOLIA: MARXISM, HISTORY, AND MEMORY* 9 (2016) (“The obsession with the past that is shaping our time results from this eclipse of utopias: a world without utopias inevitably looks back.”). Moreover, they have fed into a larger set of arguments over the reliance on the past as partial, demobilizing, or counter-productive. See, e.g., Angela P. Harris, *Turning the Angel: The Uses of Critical Legal History*, 1 FREEDOM CTR. J. 45, 58 (2009) (“[f]reedom must transcend the limits of previous injury” and, as such, “the Thirteenth Amendment . . . should not be understood as simply about ending repression, but about affirmatively destabilizing relations of caste, and about making possible new notions of freedom that may not at all be founded in past victimization”).

361. Mahmood Mamdani, *Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission*, 32 DIACRITICS 32, 57 (2002) (criticizing the TRCs tendency “not only to *dehistoricize* and *decontextualize* the story of apartheid but also to individualize the wrongs done by apartheid”); Madeleine Fullard & Nicky Rousseau, *An Imperfect Past: The Truth and*

Mamdani's now-famous critique of the TRC focused precisely on the significant gap between accounting for the violent past and addressing its influence on the unequal present.³⁶² He argued that a focus on perpetrators necessarily obscured the role of beneficiaries.³⁶³ As a result, the racialized privilege that apartheid produced was backgrounded behind the spectacular and excessive violence it exerted. According to Mamdani, the production of the past countered rather than enabled a significant redistribution of resources along racial and class lines.³⁶⁴ Recognizing one past may be simultaneously important and problematic if it obscures another, closes off broader contexts, or limits legal claims.

In Canada, too, the past has been simultaneously embraced and obscured. The federal government has admitted responsibility not only for the past but for the present, legally and politically conceptualizing historical continuity in a way that is largely absent elsewhere.³⁶⁵ Yet among Indigenous activists and allies, there is ongoing frustration with the failure to link that admission to meaningful redistribution of resources in the present—particularly when the distribution to Indigenous peoples might involve a different distribution of resources for non-Indigenous Canadians.³⁶⁶ The

Reconciliation Commission in Transition, in STATE OF THE NATION: SOUTH AFRICA 2003–2004, at 78, 83–84 (John Daniel et al. eds., 2003) (criticizing the TRC's "narrow focus on direct acts of political repression, to the exclusion of the far more widespread and numerous abuses" and "host of legislative cruelties" that constituted the "wider context of apartheid," which included forced removals, land expropriation, and segregationist "pass" laws that affected millions of citizens).

362. Mahmood Mamdani, *The Truth According to the TRC*, in THE POLITICS OF MEMORY: TRUTH, HEALING AND SOCIAL JUSTICE 176, 180–83 (Ifi Amadiume & Abdullahi An-Naim, eds., 2000).

363. *Id.*

364. *Id.*

365. Catharine Tunney, *Trudeau Says Deaths and Disappearances of Indigenous Women and Girls Amount to 'Genocide'*, CBC NEWS (June 4, 2019), <https://www.cbc.ca/news/politics/trudeau-mmiwg-genocide-1.5161681> [<https://perma.cc/BM5Q-CY9T>].

366. Tracey Lindeman, *Justin Trudeau Tells Canada Protesters: 'The Barricades Need to Come Down'*, THE GUARDIAN (Feb. 21, 2020), <https://www.theguardian.com/world/2020/feb/21/justin-trudeau-canada-rail-blockades> [<https://perma.cc/TFP7-62AM>]; *Lifespan of Indigenous People 15 Years Shorter Than That of Other Canadians, Federal Documents Say*, CBC NEWS (Jan. 23, 2018), <https://www.cbc.ca/news/health/indigenous-people-live-15-years-less-philpott-briefing-1.4500307> [<https://perma.cc/ZUZ7-VZYM>] (discussing the lower quality of life for Indigenous people in Canada); *Poverty in Canada*, CAN. POVERTY INST., <https://www.povertyinstitute.ca/poverty-canada> [<https://perma.cc/JGK5-K3SM>] (providing reports on poverty in Canada).

Canadian case reveals that recognizing responsibility does not necessarily lead to decolonization.

None of these considerations eliminate the significance of framing current inequalities in terms of past violence; to the contrary, they place in the center the question of how to do so most effectively. The U.S. and Israeli-Palestinian cases make clear what is at stake when legal and political decisions suppress the violent past: the maintenance of structural arrangements of dispossession and domination. Repeated efforts by powerful actors in multiple countries to corral, quell, or erase histories of racial and ethnic oppression, violence, dispossession, and displacement make it imperative that those pasts be heard, seen, and recognized. Racialized inequalities of power, resources, and legitimacy in the present require challenge and redistribution. It is at the meeting point of those two interwoven agendas—to assert the violence of the past and to overcome the inequalities of the present—that so many contemporary struggles must be fought. As this Article has demonstrated, material consequences flow from legally determining the present as a legacy of the past, the past as continuous with the present, or the two as legally separable.

The material and political connection between the unequally violent past and violently unequal present has reemerged in powerful forms in the Black Lives Matter movement in the United States and beyond. Growing calls for both reparation and redistribution were reignited after the murder of George Floyd and the protests and reckonings that followed it. The movement brought these struggles once more to the fore by emphasizing the reproductive nature of intersectional, racialized violence and inequality.³⁶⁷ In doing so, the Black Lives Matter movement picked up simultaneously on critical contemporary conversations about global (in)justice and on post-Cold War debates over the ways in which focusing on the past might inform or obstruct revolutionary redistributive projects.

367. In her analysis of the Movement for Black Lives Vision Statement, Amna Akbar illuminates the contrast between liberal law reform efforts and radical social justice movements, demonstrating how the Statement relies on the evolution of inequality and justice over time through the framework of racial capitalism. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 413 (2018) (pointing out that a radical social justice agenda is based on an effort “to protest an enduring set of social structures rooted in European and settler colonialism and the Atlantic slave trade; to fight for transformative change, justice, and liberation; and to invest in a redistributive and transformative project”).

Many of the predominant arguments in law and politics about the need to address present inequality use the past as a source of legitimacy and justification: the material and symbolic scales must be balanced because of the legacies of the past or, indeed, because the past never ended. Today's inequalities are continuously both justified and opposed based on past events. The many sites of contestation discussed here reveal the ways in which the vocabulary of time shapes arguments about justice. The questions of whether the past is, in Faulknerian terms, past at all, whether it can be or has been resolved, whether it can be sealed off with the appropriate accounting, and what practices would make that plausible, are, in the end, arguments over how societies have distributed harm, privilege, resources, and legitimacy.³⁶⁸

368. "The past is never dead. It's not even past." WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1951).