# Racial Justice and Peace

YUVRAJ JOSHI*

*The United States recently saw the largest racial justice protests in its history. An estimated 15 to 26 million people took to the streets over the police killings of Breonna Taylor, Tony McDade, George Floyd, and countless other Black people. This Article explores how these protests and their chants of "No Justice! No Peace!" should lead us to reconsider American equality law.*

*This Article surfaces legal claims—here called "peace–justice claims"—that address the relationship between ameliorating racial inequality and achieving peace. Using unpublished archival documents, it tells the story of how Americans embroiled in early desegregation debates sought competing visions of peace that either included or excluded justice. Furthermore, it demonstrates how the Supreme Court's landmark decision in* Cooper v. Aaron *arbitrated those claims in favor of integration. This Article also traces how those claims have evolved and how the Court has used peace and justice considerations to limit rather than advance minority rights. This analysis shows that intertwined arguments about justice and peace lie at the heart of equal protection doctrine.*

*Using sources of both legal and social history to identify peace–justice claims, this Article contributes to a "new civil rights history," expanding the scope of legal actors beyond lawyers and judges to include policymakers, social activists, and lay people. Juxtaposing minority claims with court-developed legal doctrine highlights the Supreme Court's inadequate recognition of the peace–justice interests at stake. Proposing "No Justice! No Peace!" as a corrective to the law, this Article argues that courts should recognize the exclusion and estrangement of Black people*

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*as a basis for minority-protective interpretations of the Constitution.*

*This attention to peace–justice claims is enriched by insights from transitional justice, a field that aims to help societies to overcome conflict and oppression. Although societies require both peace and justice, these values sometimes appear in tension, leading to what is internationally known as the "peace versus justice dilemma." Viewing American legal cases as sites of this dilemma draws attention to whether courts seek a "negative peace" based on the suppression of social conflict or a "positive peace" grounded in the pursuit of social justice. This Article demonstrates why and how American law should strive for positive peace by addressing structural inequalities.*

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—Pledge signed at the March on Washington, August 28, 1963[1]

*"No Justice! No Peace!"*

—Chant at the March on Washington, August 28, 2020[2]

## INTRODUCTION

Questions of justice and peace are entangled in conversations about social unrest. In June 2020, an estimated 15 to 26 million Americans took to the streets over the killings of Breonna Taylor, Tony McDade, George Floyd, Ahmaud Arbery, and countless other Black people.[3] Protestors chanting "No Justice! No Peace!"—a rallying cry for racial justice since the 1980s[4]—demanded a reckoning with white supremacy in the United States.[5] These protestors were overwhelmingly peaceful in the face of brutal responses by police and white

1. Pledge, March on Washington for Jobs and Freedom (Aug. 28, 1963) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001473/001473_019_0528/001473_019_0528_From_1_to_276.pdf [https://perma.cc/CLW5-YH48].

2. Brakkton Booker, *Thousands Gather for March on Washington to Demand Police Reform and Racial Equality*, NPR (Aug. 28, 2020, 4:13 PM), https://www.npr.org/2020/08/28/905914974/thousands-gather-for-march-on-washington-to-demand-police-reform-and-racial-equa [https://perma.cc/666K-JSPE].

3. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

4. Linguist Ben Zimmer traces "No Justice! No Peace!" to protests following the December 1986 murder of Michael Griffith, a 23-year-old Black man, by a white mob. Ben Zimmer, *No Justice, No Peace*, LANGUAGE LOG (July 15, 2013, 10:13 AM), https://languagelog.ldc.upenn.edu/nll/?p=5249 [https://perma.cc/PB4T-TDCE]. *The New York Times* first reported on the slogan's use in March 1987 after a police officer was acquitted for murdering Eleanor Bumpurs, a 66-year-old Black woman with a disability, in her own home. Mary Connelly & Carlyle C. Douglas, *Bumpurs Trial Ends in Acquittal and Anger*, N.Y. TIMES, Mar. 1, 1987, at E6. A few months later, a profile of activist Sonny Carson described "No Justice! No Peace!" as the rallying cry for his cause, quoting him as saying: "You don't give us any justice, then there ain't going to be no peace." Dena Kleiman, *Limelight Shines Again on Sonny Carson*, N.Y. TIMES, July 6, 1987, at 33.

5. *See infra* Section I.B. Although this Article concerns the United States, the 2020 protests and their aftermath had important transnational dimensions. *See generally* E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 HARV. L. REV. F. 378 (2020) (describing transnational advocacy in the wake of George Floyd's murder).

supremacist militias.[6] Despite this, the Trump Administration dismissed their justice-seeking demands on the basis that protestors were violent disruptors of peace in "anarchist jurisdictions."[7]

These competing perspectives on justice and peace are part of a long American tradition. Throughout history, racial equality advocates have linked justice with peace, in part to counter claims that equality should be limited in order to preserve tranquility, stability, and social harmony.[8] The Supreme Court has vacillated between these competing claims in cases ranging from *Dred Scott v. Sandford*[9] to *Brown v. Board of Education*.[10] Yet, although considerations of justice and peace permeate American legal discourse, American legal scholarship lacks the conceptual and analytical tools to fully grapple with them, tools which this Article offers.

This Article reframes racial equality debates as debates over racial justice and peace. It surfaces legal claims that address the relationship between ameliorating racial inequality and achieving peace, which it calls "peace–justice claims." Using unpublished archival documents, the Article tells the story of how Americans embroiled in early desegregation debates sought competing visions of peace that either included or excluded justice. It then explains how the Supreme Court arbitrated those claims to promote integration despite massive resistance. The Article also traces how those claims have evolved and how an increasingly reactionary Court has used peace and justice considerations to limit rather than advance minority rights. This analysis shows that intertwined arguments about justice and peace, not just equality and dignity, lie at the heart of equal protection doctrine.

Expanding the scope of legal actors beyond lawyers and judges, this analysis of peace–justice claims contributes to what Risa Goluboff calls the "new civil rights history."[11] By using sources of both legal and social history to capture the

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6. Erica Chenoweth & Jeremy Pressman, *This Summer's Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020), https://www.washingtonpost.com/politics/2020/10/16/this-summers-black-lives-matter-protesters-were-overwhelmingly-peaceful-our-research-finds/.

7. Maggie Haberman & Jesse McKinley, *Trump Moves to Cut Federal Funding from Democratic Cities*, N.Y. TIMES (Sept. 2, 2020), https://www.nytimes.com/2020/09/02/us/politics/trump-funding-cities.html (quoting memorandum from President Donald Trump to Russell T. Vought, Dir., Off. of Mgmt. & Budget and William P. Barr, U.S. Att'y Gen.). While a notable recent example, this episode was hardly the first time that state and non-state actors in the United States have responded to antiracism protests with brute force.

8. *See infra* Sections I.B, II.A, and II.B.

9. 60 U.S. (19 How.) 393 (1857) (holding that descendants of slaves could not be citizens of the United States).

10. 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Fourteenth Amendment).

11. Risa Goluboff, *Lawyers, Law, and the New Civil Rights History*, 126 HARV. L. REV. 2312, 2319 (2013) (reviewing KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012)) (stating that the new civil rights history "takes law seriously on its own terms but defines 'law' capaciously" and "explores the relationship between the many lay and professional actors involved in changing legal conceptions"). In addition to legal historians, scholars of American political development as well as political sociologists have focused on this larger sphere of actors. *See generally* RACE AND AMERICAN POLITICAL DEVELOPMENT (Joseph Lowndes et al. eds., 2008) (offering a historical, institutional, and discursive account of the role of race in American politics); Kenneth T.

claims of policymakers, social activists, and lay people,[12] this Article adopts "an expansive approach to the cast of historical actors, the arenas in which they acted, the types of sources that can provide information about them, and the questions one might ask about the past."[13] Such an approach reveals both the overlaps and the tensions between the peace–justice claims of ordinary people and legal doctrine as developed by courts and "opens up space for alternative conceptions" of the peace–justice nexus.[14]

This attention to peace–justice considerations also places the United States in a global conversation about "transitional justice."[15] This Article is one in a series of papers examining American racial justice issues from an international transitional justice perspective.[16] Although societies transitioning from oppressive pasts require both peace and justice, these values sometimes appear in tension, leading

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Andrews, *The Impacts of Social Movements on the Political Process: The Civil Rights Movement and Black Electoral Politics in Mississippi*, 62 AM. SOCIO. REV. 800 (1997) (examining the influence of local mobilization in Mississippi communities that experienced unprecedented levels of political transformation during the 1960s).

12. *See* Catherine L. Fisk & Robert W. Gordon, *Foreword: "Law As . . .": Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519, 526 (2011).

13. Goluboff, *supra* note 11, at 2326.

14. *Id.* at 2327. This analysis also furthers scholarship about how social movements mobilize around and shape the law. *See generally* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014) (arguing that Civil Rights Era social movements served as sources of law and shaped formal legal changes); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013) (book review) (arguing that social movement theory can support a nuanced account of constitutional change by framing courts as centers for mobilization and contestation).

15. Transitional justice is a field of practice and research focused on how societies move away from oppression and violence toward a more just and peaceful order. Transitional justice *practice* involves developing and implementing processes to overcome systematic human rights abuses. Most often, transitional justice is associated with measures such as truth and reconciliation commissions, criminal prosecutions, reparations programs, and institutional reforms. Transitional justice *research* contemplates questions of "transition" (what constitutes a transition and how a transition should be accomplished) and those of "justice" (what justice requires and what shape justice should take). It not only describes various countries' transitional approaches but also identifies promises and limitations of transitional approaches and distinguishes between desirable and undesirable transitional justice. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) (examining twentieth century transitions to democracy in several countries); Pablo de Greiff, *Theorizing Transitional Justice*, 51 NOMOS 31 (2012) (describing a normative conception of transitional justice).

16. In this series of papers, I show how international transitional justice theory can serve as an important independent perspective from which to examine American laws and policies concerning racism. *See generally* Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181 (2021) [hereinafter Joshi, *Racial Transition*] (theorizing "reckoning" and "distancing" approaches to America's racial transition and evaluating these approaches in light of transitional justice values); Yuvraj Joshi, *Affirmative Action as Transitional Justice*, 2020 WIS. L. REV. 1 (2020) [hereinafter Joshi, *Affirmative Action as Transitional Justice*] (comparing affirmative action in South Africa and the United States to show how integrating affirmative action and transitional justice can advance our understanding of both practices); Yuvraj Joshi, *Racial Equality Compromises*, 111 CALIF. L. REV. (forthcoming 2023) [hereinafter Joshi, *Racial Equality Compromises*] (using transitional justice theory to demonstrate that legal decisions on racial equality are compromises and to deliberate whether those compromises are defensible or undesirable); Yuvraj Joshi, *Racial Transitional Justice in the United States*, *in* RACE & NATIONAL SECURITY (Matiangai Sirleaf ed., forthcoming 2023) [hereinafter Joshi, *Racial Transitional Justice in the United States*] (proposing that the centuries-long oppression of Black Americans necessitates a systematic response through transitional justice); Yuvraj Joshi, *Does Transitional Justice Belong in the United States?*, JUST SEC. (July 13, 2020), https://www.justsecurity.org/71372/does-transitional-justice-belong-in-the-united-states/ [https://perma.cc/VU5N-LAPF] (same).

to what is internationally known as the "peace versus justice dilemma."[17] The dilemma arises when societies face choices between short-term peace and stability and the pursuit of long-term justice. Viewing American legal cases as sites of this dilemma draws attention to the particular ways that courts define and prioritize peace and justice.[18]

To demonstrate how peace–justice concerns permeate the law, this Article proceeds in four parts. Part I first describes how international transitional justice theory can elucidate American racial justice debates.[19] It contemplates the "peace versus justice dilemma" and the differences between "negative" and "positive" peace,[20] which are frames used throughout this Article to analyze peace–justice claims in the United States. Furthermore, it explores a critical strand of transitional justice theory which cautions against ignoring the justice claims of disenfranchised groups and endlessly delaying justice for a temporary peace—lessons which have particular relevance for the United States.

Part I then demonstrates how American racial justice advocates from the Civil Rights Era to the present day have linked their visions of justice with peace. It studies previously uncited archival materials[21] alongside the public speeches and writings of three civil rights leaders: Dr. Martin Luther King, Jr., Bayard Rustin,

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No previous scholarship has focused on American racial equality law as a site of the peace versus justice dilemma. However, American transitional dilemmas include "a reconciliation between moving away from pervasive and pernicious use of race and continuing to use race to remedy historical wrongs, between looking forward and looking backward, between the individual and the collective, and between peace and justice." Joshi, *Affirmative Action as Transitional Justice*, *supra*, at 17–25. Even beyond the racial equality context, the United States has faced versions of the peace versus justice dilemma. For example, in January 2021, Donald Trump's attempts to overturn the results of a democratic election culminated in a violent insurrection at the United States Capitol. Americans debated whether to hold Trump and his enablers accountable or whether to "move on" in the interest of social stability. This tension between the pursuit of accountability and stability could be understood as another peace versus justice dilemma. *See* Joshi, *Racial Transitional Justice in the United States*, *supra*.

17. For a detailed discussion of the peace versus justice dilemma, see *infra* Section I.A.

18. For example, whereas American judges have limited affirmative action in order to mitigate feelings of resentment among white people, South African judges have upheld affirmative action *despite* those feelings in order to "heal the divisions of the past and promote the achievement of equality[.]" *S. Afr. Police Serv. v. Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC) at 1233 para. 131 (S. Afr.). *Compare id.* (suggesting that burdens on a member of a dominant racial group may be "justified in pursuit of the aim of equality to restore some of the dignity of those humiliated by apartheid"), *with* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (arguing that members of the dominant racial group "are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others").

19. The relationship of justice to peace is a central topic in many international legal fields. *See generally infra* notes 43–46 (transitional justice); LOUISE MALLINDER, AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE (2008) (human rights); SIMON CHESTERMAN, JUST WAR OR JUST PEACE?: HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW (2001) (just war); Tove Grete Lie, Helga Malmin Binningsbø & Scott Gates, *Post-Conflict Justice and Sustainable Peace* (World Bank Pol'y Rsch. Working Paper No. 4191, 2007) (peace and conflict); Jennifer J. Llewellyn, *Integrating Peace, Justice and Development in a Relational Approach to Peacebuilding*, 6 ETHICS & SOC. WELFARE 290 (2012) (development).

20. Although most prevalent in transitional justice discourse, this distinction has American roots. *See infra* text accompanying notes 82–86.

21. Searches for much of the archival materials used throughout this Article produced no results on Google Scholar, HeinOnline, JSTOR, Westlaw, or LexisNexis.

and A. Philip Randolph.[22] Pairing these historical records with national and local reporting of recent antiracism protests highlights that Black activists have made peace–justice claims for decades.[23] It further points to the need for including Black activist voices in legal discourse.[24] These insights from transitional justice theory and racial justice movements lay the foundation for the legal analysis that follows in Part II.

Part II examines *Cooper v. Aaron*,[25] a 1958 desegregation case,[26] as perhaps the Supreme Court's most significant judgment about racial justice and peace. Drawing on archival documents, this Part surfaces peace–justice claims made by both integrationists and segregationists[27] following *Brown v. Board of Education* and throughout the Little Rock Crisis of 1957.[28] Through a close reading of the

22. This Article thus includes figures "from below" (including Bayard Rustin and A. Philip Randolph) in civil rights accounts. *See* Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2714, 2721–22 (2014).

23. While this Article focuses on the Civil Rights Era and succeeding decades, both racists and antiracists have long framed their causes using the language of peace and justice. With Ulysses S. Grant's election in November 1868, for example, an opinion piece opposing racial justice lambasted his plans for Reconstruction as "'peace,' founded upon injustice and tyranny" and warned that "there can be no peace without justice." *What is Peace?*, VINCENNES WKLY. W. SUN (Nov. 14, 1868). By contrast, Frederick Douglass wrote in 1859: "There can be no virtue without freedom, and no peace without justice." Frederick Douglass Autograph (on file with the Beinecke Rare Book and Manuscript Library), https://collections.library.yale.edu/catalog/2005513. Frustrated in her pursuit of racial justice decades later, Ida B. Wells wrote in her diary on April 11, 1887: "O God, is there no redress, no peace, no justice in this land for us?" Alfreda M. Duster, *Introduction* to IDA B. WELLS, CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS, at xviii–xix (Alfreda M. Duster ed., 2d ed. 2020).

The interplay between peace and justice also arose in earlier legal discussions. In the Freedmen's Bureau debate in 1866, Congressman Ignatius L. Donnelly urged giving Black men equal opportunity so they would be "interested with you in preserving the peace of the country." CONG. GLOBE, 39th Cong., 1st Sess. 589 (1866). Furthermore, when *Plessy v. Ferguson* maintained racial apartheid for "the preservation of the public peace and good order[,]" 163 U.S. 537, 550 (1896), Justice Harlan dissented that segregation "can have no other result than to render permanent peace impossible, and to keep alive a conflict of races." *Id.* at 561 (1896) (Harlan, J., dissenting).

24. *See generally* Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991) (discussing the history of Black legal scholarship and how it frames race as part of legal discourse).

25. 358 U.S. 1 (1958).

26. *Cooper v. Aaron* is usually studied as a leading case about judicial supremacy. *See, e.g.*, Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 11 (2007) ("The Pure Judicial Supremacy Model endorses all of the claims of judicial power asserted by the Supreme Court in *Cooper v. Aaron*."); Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. 1728, 1753 (2017) ("[T]he Court's assertion of judicial supremacy in *Cooper v. Aaron* did not go unquestioned but led instead to democratic objections of diverse forms.").

27. While this Article focuses on the debate between integrationists and segregationists, there were other constituencies whose primary goal was to obtain resources for the Black community. Derrick Bell critiqued NAACP lawyers for not listening to certain community members who sought this goal. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 480 (1976).

28. The Little Rock Crisis of 1957 arose when Orval Faubus, then Governor of Arkansas, refused to allow the integration of Central High School. *See infra* Section II.B; *see generally* ELIZABETH JACOWAY, TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION (2008) (providing a historical account of the Little Rock Crisis); DAISY BATES, THE LONG SHADOW OF LITTLE ROCK: A MEMOIR (1962) (providing an autobiographical account of the same).

court filings and various opinions in the *Cooper v. Aaron* litigation, Part II shows how the Supreme Court was invited to address a version of the peace versus justice dilemma. Although the Court tackled the dilemma decisively, it did so in a narrow manner.

*Cooper v. Aaron* held that Arkansas state officials, who had refused to abide by *Brown v. Board of Education*, must begin desegregating the state's public schools.[29] Rejecting a school board's proposal to reverse and postpone integration in order to maintain "public peace," the Court concluded that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."[30] However, whereas many civil rights activists saw integration as a means to a more just and enduring peace, *Cooper* adopted a limited peace–justice analysis. While the Court rejected white hostility as a legitimate basis for *denying* the constitutional rights of Black people, it stopped short of recognizing minority frustration as justification for *safeguarding* those rights.[31] Had the Court accomplished the latter, equal protection law might have evolved differently. This account of *Cooper v. Aaron* attempts not only to contribute to the historical record but also to elucidate the present social unrest and its relationship to the law.

Part III extends the analysis beyond *Cooper v. Aaron* to more recent racial inclusion cases in which claims to peace and justice have arisen. This analysis reveals that Americans continue to call upon courts to interpret the Constitution with attention to peace and justice considerations, with markedly different results. Whereas white parents' claims that school integration would harm their children and threaten racial harmony failed to prevail in 1957, similar claims made fifty years later have found a more receptive audience. Cases such as *Parents Involved v. Seattle*[32] have departed from *Cooper*, as a more reactionary Court now curtails minority rights to preserve racial harmony.

Part III considers the limitations of this more reactionary approach to preserving racial harmony and what it would mean for the law to facilitate a more peaceful and just political order. While the post-*Cooper* Court has invoked white resentment as a valid reason to *limit* minority-protective interpretations of the Constitution, it has ignored the exclusion and estrangement of racial minorities as a reason to *expand* minority-protective interpretations. More fundamentally, the Court has prioritized a negative peace based on the suppression of social conflict over a positive peace grounded in the pursuit of social justice.[33] In slowing the

29. *Cooper*, 358 U.S. at 12, 16.

30. *Id.* at 16.

31. This account joins research that reconsiders landmark racial equality cases in light of enduring racial stratification and strife. *See, e.g.*, Lia Epperson, Brown*'s Dream Deferred: Lessons on Democracy and Identity from* Cooper v. Aaron *to the "School-to-Prison Pipeline,"* 49 WAKE FOREST L. REV. 687, 688 (2014); Angela Onwuachi-Willig, *Reconceptualizing the Harms of Discrimination: How* Brown v. Board of Education *Helped to Further White Supremacy*, 105 VA. L. REV. 343, 355 (2019).

32. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1 (*Parents Involved*), 551 U.S. 701 (2007) (holding that use of race as an explicit factor in allocating spots in oversubscribed high schools violates the Equal Protection Clause).

33. For a description of positive and negative peace, see *infra* notes 55–58 and accompanying text.

pace of racial progress in the name of stability and harmony, the Court has acted so regressively that it has incentivized excluded minorities to turn away from the legal system and take to the streets, thus threatening the very peace it claims to protect. In this way, Supreme Court jurisprudence actually works to undermine the values it purports to uphold.[34]

Proposing "No Justice! No Peace!" as an urgent corrective to the law,[35] Part IV discusses four areas where jurisprudence could be more attuned to racial justice concerns and more conducive to the pursuit of a positive peace: affirmative action, voting rights, the First Amendment, and the Fourth Amendment.[36] Given the Roberts Court's unpromising record on racial justice issues, Part IV also highlights some non-Court-centered paths to positive peace.[37] The analysis developed here could also be extended to a wider range of contexts in which claims to peace and justice arise, including gender and LGBTQ+ equality.[38]

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34. *See infra* Section III.C.

35. In addition to being an urgent corrective for legal cases, chants of "No Justice! No Peace!" offer a constructive agenda for social and legal reforms. *See infra* Section I.B.

36. This Article's analysis of peace–justice claims bridges and extends prominent theories of equal protection law. Constitutional law scholarship has divided racial equality opinions into two categories: an "anti-classification" perspective concerned with individual colorblindness and an "anti-subordination" perspective concerned with group inequalities. *See generally* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9 (2003) (explicating these categories). As this Article shows, *both* these perspectives involve peace–justice claims. *Anti-classification* involves the *justice* claim that racial categorization demeans everyone by rendering race salient in public life as well as the *peace* claim that racial classifications are inherently divisive. *Id.* at 10. *Anti-subordination* involves the *justice* claim that racial inequalities will endure and worsen without race-sensitive solutions as well as the *peace* claim that society will not have enduring racial harmony without racial equity. *Id.* at 9. Because peace–justice claims arise from all sides, we can better understand racial equality debates and decisions by paying close attention to those competing claims.

This Article's transitional-justice-inflected analysis also extends an "anti-balkanization" analysis by illuminating a wide range of peace–justice considerations. Reva Siegel has shown how the Justices in the political middle of the Court (like Powell and Kennedy) have reasoned from an anti-balkanization perspective that is "more concerned with social cohesion than with colorblindness." *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011). Siegel astutely observes that anti-balkanization shares some similarity with "transitional justice strategies that endeavor to promote peace and forge bonds of community that support the growth of a new sociopolitical order." *Id.* at 1337 n.165. While transitional justice is certainly concerned with social cohesion (or "reconciliation"), transitional justice's concern with peace is more wide-ranging—spanning from the prevention of violent conflict to the promotion of a positive peace grounded in justice.

37. *See* Joshi, *Racial Transition*, *supra* note 16, at 1182 (describing the Roberts Court's "distancing" approach to America's racist past).

38. Although this Article focuses on racial equality, opponents of gender and LGBTQ+ equality also depict equality as a threat to peace. Prior to joining the bench, Stuart Kyle Duncan, one of Donald Trump's appointees to the Fifth Circuit, described the Supreme Court's decision ensuring marriage equality as "an abject failure" that "imperils civil peace." Yuvraj Joshi, *How Trump Will Threaten LGBTQ+ Rights for Decades to Come*, THEM (Nov. 7, 2017), https://www.them.us/story/how-trump-threatens-lgbtq-rights [https://perma.cc/6U7N-M4K5]; *see also* Mark Joseph Stern, *The Trump Bench: Kyle Duncan*, SLATE (Jan. 22, 2020, 12:31 PM), https://slate.com/news-and-politics/2020/01/the-trump-bench-kyle-duncan-the-fifth-circuit.html [https://perma.cc/V5ZS-82FK] (describing Judge Duncan's professional history).

This Article concludes that recent antiracism protests should lead us to reconsider the peace–justice compromises of prior decades.[39] As American institutions continue to grapple with peace versus justice dilemmas, these protests present openings for prioritizing minority concerns and promoting a justice-based peace.

## I. PEACE–JUSTICE FRAMEWORKS

This Article aims to give visibility to *legal* peace–justice claims. As a foundation for the legal analysis that follows, this Part draws on insights from two sources whose connections scholars have only recently begun to trace: transitional justice theory and racial justice movements. Section I.A explains the peace versus justice dilemma discussed in transitional justice theory and its relevance for America's transition from white supremacy. It further highlights a distinction between negative and positive peace, which is rooted in both transitional justice theory and Black political thought.[40] Section I.B then analyzes negative and positive peace claims gleaned from the Civil Rights Movement and the Black Lives Matter Movement. By recognizing that legal peace–justice arguments have both international parallels and American antecedents, we can undertake a more comparatively and historically grounded analysis of race jurisprudence, subjecting judicial accounts to fresh critical scrutiny.[41]

### A. TRANSITIONAL JUSTICE THEORY

Transitional justice concerns how societies move from oppression and violence toward a more just and peaceful order.[42] One of the central discussions in transitional justice is the "peace versus justice dilemma,"[43] which seeks to "reconcile

39. Research suggests that the 2020 antiracism protests "swiftly decreased favorability toward the police and increased perceived anti-Black discrimination among low-prejudice and politically liberal Americans." Tyler T. Reny & Benjamin J. Newman, *The Opinion-Mobilizing Effect of Social Protest Against Police Violence: Evidence from the 2020 George Floyd Protests*, 115 AM. POL. SCI. REV. 1499, 1499 (2021). In contrast, "attitudes among high-prejudice and politically conservative Americans either remained unchanged or evinced only small and ephemeral shifts." *Id*. *See also* TAEKU LEE, MOBILIZING PUBLIC OPINION: BLACK INSURGENCY AND RACIAL ATTITUDES IN THE CIVIL RIGHTS ERA (2002) (arguing that geographic, institutional, historical, and issue-specific contexts—not elites—motivate changes of opinion during times of social unrest).

40. The relationship of justice to peace is a central topic in the history of political thought, including in Plato's *Republic*, Hobbes's *Leviathan*, and Kant's *Perpetual Peace*. *See generally* PLATO, REPUBLIC (C. D. C. Reeve trans., 2004) (375 B.C.); THOMAS HOBBES, LEVIATHAN: OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL (A.R. Waller ed., 1904) (1651); IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY (3d. ed., M. Campbell Smith trans., 1917) (1795).

41. Merging theory and doctrine, critique and analysis, and different disciplines is the enterprise of "critical analysis of law." *See Critical Analysis of Law and the New Interdisciplinarity*, 1 CRITITCAL ANALYSIS. L. 1 (2014) (inaugural issue aiming to capture the diversity of approaches to critically engaging with the law).

42. For a description of transitional justice, see *supra* note 15. For an account of racial transitional justice in the United States, see generally Joshi, *Racial Transition*, *supra* note 16; Joshi, *Affirmative Action as Transitional Justice*, *supra* note 16; Joshi, *Racial Equality Compromises*, *supra* note 16; and Joshi, *Racial Transitional Justice in the United States*, *supra* note 16.

43. For an introduction to the peace versus justice dilemma, see generally Chandra Lekha Sriram, *Justice as Peace? Liberal Peacebuilding and Strategies of Transitional Justice*, 21 GLOB. SOC'Y 579

legitimate claims for justice with equally legitimate claims for stability and social peace."[44] Transitional justice scholarship on this dilemma grapples with questions such as: What is "peace" and what is "justice"? Are peace and justice competing goals or are they compatible and even complementary? Are peace and justice of similar normative and practical importance or should one take priority over the other? Is the relationship between peace and justice inherent or is it contingent on particular circumstances?[45]

Transitional justice scholars and practitioners have examined these questions with respect to countries other than the United States.[46] Yet, the peace versus justice dilemma also animates America's transition from slavery, segregation, and white supremacy. As the United States has attempted to transition from racial apartheid to inclusive democracy, it has sought to balance pursuing racial equality with ensuring social stability and harmony. When public officials or American people have disagreed about how that balance should be struck, some have called upon the courts to settle versions of the peace versus justice dilemma.

This Article uses transitional justice theory to elucidate racial equality law in two main ways. First, it reframes legal debates as peace versus justice questions to reveal several important features of race jurisprudence, including: the peace–justice *claims* that litigants and other stakeholders in equality disputes make; the peace–justice *considerations* that judges and other decisionmakers bring to bear on these disputes; the peace–justice *nexus* these decisionmakers envision; and the *balance* they strike between ameliorating inequality and achieving peace. Second, the Article merges insights from transitional justice theory and racial justice movements to examine how courts settle peace–justice dilemmas.

The following insights from transitional justice theory shed light on American race jurisprudence.

*Viewing peace and justice in dichotomous terms oversimplifies the dilemma.*— Although peace and justice are often intertwined goals,[47] the pursuit of one does not categorically support or undermine the other.[48] For example, Chandra Lekha

(2007) (arguing the transitional justice and liberal peacebuilding share under-examined assumptions and unintended consequences) and Cecilia Albin, *Peace vs. Justice—and Beyond*, *in* THE SAGE HANDBOOK OF CONFLICT RESOLUTION 580 (Jacob Bercovitch et al. eds., 2009) (discussing various meanings of peace and justice and the relationship between them).

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

45. *See infra* text accompanying notes 47–80.

46. *See, e.g.*, PEACE VERSUS JUSTICE?: THE DILEMMA OF TRANSITIONAL JUSTICE IN AFRICA (Chandra Lekha Sriram & Suren Pillay eds., 2009) [hereinafter PEACE VERSUS JUSTICE?] (considering approaches to accountability and peacebuilding across Africa); AFR. UNION, TRANSITIONAL JUSTICE POLICY (2019), https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf [https://perma.cc/EY4S-3VMH] (discussing the relationship between justice and peace directly and in considerable detail).

47. *See* Melissa S. Williams & Rosemary Nagy, *Introduction*, 51 NOMOS 1, 7 (2012) (describing justice as "a support for peace and stability").

48. Chandra Lekha Sriram, *Transitional Justice and Peacebuilding*, *in* PEACE VERSUS JUSTICE?, *supra* note 46, at 1, 5 (describing peace versus justice dilemma as "often overstated" and "grossly oversimplified"); Albin, *supra* note 43, at 581 (explaining that "some principles or aspects of justice

Sriram cautions against presuming that justice amounts to peace because accountability measures may be destabilizing, institutional reforms may generate conflict, and certain justice strategies may be inappropriate to the legal and political circumstances of the place in which they are applied.[49] While transitional justice measures may be necessary *despite* these threats to immediate peace, potential challenges to building democratic institutions should not be dismissed.[50]

Because transitioning to democracy requires both peace and justice, decision-makers should strive to achieve both values rather than one or the other.[51] Payam Akhavan thus criticizes "judicial romantics" who seek justice at all costs as well as "political realists" who seek peace by placating powerful actors, as both approaches sacrifice too much of one or the other value.[52] These insights invite us to consider how peace and justice are balanced in court cases and how they relate to each other outside the rigid dichotomies in which they are often framed.[53]

*Societies confront myriad choices about what versions of peace and justice to pursue*.—In transitional justice discourse, *peace* may refer to the ending of violent conflict, moving from violent conflict to legal and political contestation, settling the particular issues that inspired conflict, or resolving the deeper causes underlying conflict.[54] Similarly, *justice* may refer to accountability for wrongdoing, the implementation of remedial and redistributive measures, or the restructuring of oppressive systems. How peace relates to justice depends in part on what versions of peace and justice are sought.

Transitional justice's discussions of negative and positive peace[55] reveal that suppressing conflict is not enough for states to transition from an oppressive regime to an egalitarian one; societies must ultimately strive for justice by

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relax or even remove the tension with peace while others increase it"); Jon Elster, *Justice, Truth, Peace*, 51 NOMOS 78, 86–87 (2012) (listing historical and international examples when "[j]ustice and peace have been at odds").

49. *See* Sriram, *Justice as Peace?*, *supra* note 43, at 580.

50. *See id.*

51. Albin, *supra* note 43, at 581 (noting that "both [peace and justice] are clearly needed in some sense for conflict resolution and a durable settlement").

52. Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624, 625 (2009).

53. *See* Albin, *supra* note 43, at 580 ("'[P]eace vs. justice' has become an umbrella term for a debate with many different answers: to seek peace with justice (no peace without justice), peace first and justice later (justice follows from peace), justice first and peace later (peace follows from justice), and so on.").

54. For example, political theorist Jon Elster writes that peace "includes the absence of armed conflict between and within states, the absence of violent repression of the population by the government, and social or civic peace." Elster, *supra* note 48, at 81. By contrast, political scientist Monika Nalepa discusses peace primarily in terms of reconciliation, acting as "a foundation for members of societies that were deeply torn by violence to live peacefully together." Monika Nalepa, *Reconciliation, Refugee Returns, and the Impact of International Criminal Justice: The Case of Bosnia and Herzegovina*, 51 NOMOS 316, 317 (2012).

55. Although this distinction is not unique to transitional justice, it has been extensively developed in transitional justice scholarship. *See* Dustin N. Sharp, *Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice*, 35 FORDHAM INT'L L.J. 780, 784 n.10 (2012) (describing negative peace as "the absence of direct violence" and contrasting it with the more substantive notion of positive peace, which is "the absence of both direct and indirect violence, including various forms of 'structural violence' such as poverty, hunger, and other forms of social

eliminating both physical and structural violence.[56] Rama Mani explains that "ignoring justice claims may cause discontent and frustration among disenfranchised groups, and undermine longer term sustainable peace—or what is called 'positive peace[.]' . . . Overlooking justice claims may endanger short-term negative peace as well, if unmet grievances degenerate into renewed violence. . . ."[57] Yasmin Sooka, who served on the South African and Sierra Leonean truth commissions, cautions that pursuing only negative peace "compromises the rights of victims and the opportunity to address systematic atrocities."[58]

The distinction between negative and positive peace can be used to analyze American legal debates. Reconsidering cases such as *Brown v. Board of Education* and *Cooper v. Aaron* through this prism shows how both segregationists and integrationists made claims about peace: segregationists claimed that a separation of the races was necessary to maintain tranquility and harmony, while integrationists countered that any tranquility arising from racial separation was only illusory and would give way to open conflict.[59] Ultimately, segregationists favored a negative peace gained through racial exclusion, whereas integrationists sought a positive peace grounded in racial equity, and each side urged courts to interpret the Constitution accordingly. This process of peace–justice claims-making had consequences not only for the development of legal doctrine but also for how law affects social spheres from education to housing. Understanding legal claims as claims about negative and positive peace and recognizing positive peace as the ultimate goal can inform decisionmakers about which values they should prioritize.

*The peace–justice dilemma is often resolved by compromise rather than absolutism.*—This dilemma arises precisely because "in the near term, these two goods may be at odds, even though in the long term a just and stable society requires that they be united."[60] Therefore, "[w]ise leaders will recognize that there is a balance to be struck between justice and peace" while striving "to

injustice"); Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J. TRANSITIONAL JUST. 28, 34 (2009) (similar).

56. This distinction suggests both that the achievement of negative peace may be insufficient to secure positive peace and that negative peace may be ambivalent to justice in ways that positive peace cannot be. Furthermore, some transitional justice scholars contend that achieving a durable peace requires a holistic approach that includes not only legal and political but also socioeconomic justice. *See, e.g.*, Rama Mani, *Balancing Peace with Justice in the Aftermath of Violent Conflict*, 48 DEV. 25, 27 (2005) (declaring it "necessary to address justice in a holistic and integrated manner"); Lambourne, *supra* note 55 ("peacebuilding and transitional justice involve promotion of socioeconomic and political justice, as well as [] legal justice").

57. Mani, *supra* note 56, at 28.

58. Yasmin Louise Sooka, *The Politics of Transitional Justice*, *in* PEACE VERSUS JUSTICE?, *supra* note 46, at 24.

59. *See infra* Part II.

60. CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS PEACE IN TIMES OF TRANSITION 2 (2004). *See also* Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 342 (2006) ("[A]chieving peace and obtaining justice are sometimes incompatible goals—at least in the short term.").

achieve as much of each as possible."[61]

Transitional justice theory enables us to recognize racial equality decisions as compromises and to deliberate the value of those compromises, given ethical principles and political constraints.[62] A transitional justice approach draws attention to whose interests are accounted for in the cost-benefit analysis of compromise, as well as how judicial action or inaction itself alters the calculus.[63] As we will see in *Cooper v. Aaron*, courts sometimes must balance the possibility that their equality-promoting decisions will generate a peace-disrupting backlash with the possibility that a failure to intervene will maintain and encourage injustice.[64]

*Variously positioned actors can influence peace–justice balancing*.—The distribution of power between different constituencies will often influence "how far justice is taken into account[] and whose claims are most heard."[65] Sometimes, failures to intervene for justice are influenced by "the political or economic elite who use violence to resist redistributive justice and maintain the *status quo*."[66] At other times, failures of justice result from decisionmakers "who have the means to intervene" to hold perpetrators accountable and redress victims "but lack an incentive to do so."[67]

Racial equality decisions may depend on how much "justice" those holding power would allow.[68] However, popular mobilizations can "change the wind" by bringing justice claims to the fore and changing the background conditions against which questions of justice and peace are understood.[69] In analyzing *Cooper v. Aaron*, this Article attends to the role of various actors—elite and ordinary, integrationist and segregationist—in shaping the peace–justice calculus and the incentives for pursuing particular kinds of peace and justice.[70] In the wake of the largest racial justice protests in U.S. history, it also considers how 15 to 26 million Americans marching against systemic racism might inform peace–justice balancing going forward.[71]

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61. SRIRAM, *supra* note 60.

62. *See* José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1430 (1992); Colleen Murphy, *III—On Principled Compromise: When Does a Process of Transitional Justice Qualify as Just?*, 120 PROC. ARISTOTELIAN SOC'Y 47, 49 (2020).

63. *See* Akhavan, *supra* note 52.

64. Scholars of game theory may understand this peace–justice dialectic as a three-player game, involving subjugated groups, dominant groups, and courts, in which each actor has to make strategic choices by anticipating the responses of the other actors. From this perspective, courts should pay attention to the peace–justice arguments of subjugated groups in order to better predict whether legal actions will ultimately mitigate or maintain racial strife. For an application of game theory to judicial decisionmaking, see generally Scott Baker & Pauline T. Kim, *A Dynamic Model of Doctrinal Choice*, 4 J. LEGAL ANALYSIS 329 (2012).

65. Albin, *supra* note 43, at 581.

66. *See* Mani, *supra* note 56, at 26.

67. *See* Akhavan, *supra* note 52, at 635.

68. *See* Williams & Nagy, *supra* note 47.

69. Guinier & Torres, *supra* note 14, at 2742 (quoting Jim Wallis, *The New Evangelical Leaders, Part I*, ON BEING (Nov. 29, 2007), https://onbeing.org/programs/jim-wallis-the-new-evangelical-leaders-part-i/ [https://perma.cc/H2BF-XGCN] (podcast interview with Krista Tippett)).

70. *See infra* Part II.

71. *See infra* Part IV.

*Sequencing and timing matter in the pursuit of peace and justice*.—Given the changing circumstances of transitional societies, different strategies for achieving peace and justice may be needed in the short and long term.[72] Such sequencing and temporal considerations were central to *Cooper v. Aaron*, which contemplated the postponement of racial integration for the preservation of public peace.[73] In this Article, we will see how different actors have grappled with transitional justice concerns relating to how the pursuit of peace and justice are "best timed, sequenced and combined over time."[74]

Furthermore, because transitional circumstances change, "there is no reason to assume that compromises made at the outset ought to endure permanently."[75] Current legal decisionmaking around race in the United States is cabined by damaging Supreme Court precedent, which reflects compromises forged in earlier eras.[76] The 2020 uprisings underscore the failures of these compromises and the urgent need to heed the advice of minorities on what the achievement of justice and peace should look like.[77]

In sum, transitional justice scholars consider the relationship between peace and justice to be context-dependent, influenced by the different actors, structures, and time-horizon involved.[78] However, although balancing peace with justice may involve compromise in the short term, transitional justice theory discourages compromises that endlessly delay justice for a temporary peace or trade off short-term advances for longer-term drawbacks. It further cautions that ignoring the justice claims of disenfranchised groups may both endanger short-term negative peace and undermine longer-term positive peace.

This Article adapts transitional justice theory to discuss American legal cases as sites of the peace versus justice dilemma. Traditional legal scholarship has overlooked certain peace–justice features of American law in part because it views transitional justice as something that happens abroad.[79] Meanwhile, transitional justice scholarship has missed peace versus justice issues in American law

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72. *See* Albin, *supra* note 43, at 590–91; Mani, *supra* note 56, at 28–29 ("Even if efforts to restore justice seem to threaten negative peace in the short-term, . . . they must be undertaken, albeit with caution, to consolidate positive peace and avert a relapse into hostilities further down the road.").

73. *See* 358 U.S. 1, 15–16 (1958). This transitional-justice-type attention to sequencing takes a different form than a conflict-of-laws-inflected "sequenced style of reasoning." Karen Knop & Annelise Riles, *Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the "Comfort Women" Agreement*, 102 CORNELL L. REV. 853, 922 (2017).

74. Albin, *supra* note 43, at 581.

75. SRIRAM, *supra* note 60, at 203. This is because "measures that might not be feasible during peace negotiations or initial transitional stages may become feasible as democracy becomes increasingly consolidated over time." *Id.* at 5. From this vantage point, U.S. Supreme Court jurisprudence presents something of a paradox. *Cooper v. Aaron* advanced racial justice when threats to immediate negative peace were most pronounced, yet later decisions retreated from racial justice even though threats to immediate peace were less pressing.

76. For a study of racial equality compromises throughout American history, see generally Joshi, *Racial Equality Compromises*, *supra* note 16.

77. *See id.*

78. *See* Albin, *supra* note 43, at 581.

79. *See* Joshi, *Racial Transitional Justice in the United States*, *supra* note 16 (discussing American exceptionalism in transitional justice).

due to its usual focus on paradigmatic transitions, political rather than judicial decisionmaking, and criminal accountability rather than equal protection.[80] By re-reading American cases in light of this more global theory, we can appreciate certain features and implications that have often gone unnoticed. The United States, in turn, provides a new context for exploring the peace versus justice dilemma where insights from transitional justice theory can be applied and enriched. For example, whereas transitional justice theory often focuses on mediating conflict,[81] the American experience shows that conflict can be constructive and even necessary to the achievement of a more just society.

In the next section, this Article merges insights from transitional and racial justice theories to further advance our understanding of the peace–justice nexus. This conversation is long overdue. To illustrate, although transitional justice scholars have cited Norwegian sociologist Johan Galtung for initiating discussions of negative and positive peace in the 1960s,[82] these concepts had already been discussed by American social worker and suffragette Jane Addams in the 1900s[83] and (as elaborated below) Dr. Martin Luther King, Jr. in the 1950s.[84] Then again, although these concepts have roots in American justice movements, they have been perhaps most extensively used in international transitional justice discourse.[85] Tracing linkages between transitional and racial justice reveals that the two have a lot more to say to one another than is commonly assumed.[86]

### B. RACIAL JUSTICE MOVEMENTS

Throughout American history, opponents of racial justice have cited tranquility, stability, and harmony as reasons to limit racial equality.[87] Segregationists of the

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80. For examples of these more common analyses of the peace versus justice dilemma, see generally PEACE VERSUS JUSTICE?, *supra* note 46 (focusing on African and Latin American countries) and Akhavan, *supra* note 52 (focusing on criminal accountability).

81. *See, e.g.*, Sriram, *supra* note 43 (examining the relationship between transitional justice and liberal peacebuilding).

82. *See, e.g.*, Fionnuala Ní Aoláin, *Women, Security, and the Patriarchy of Internationalized Transitional Justice*, 31 HUM. RTS. Q. 1055, 1064 (2009); Sharp, *supra* note 55, at 784 n.10 (citing Johan Galtung, *Violence, Peace, and Peace Research*, 5 J. PEACE RES. 167 (1969)).

83. *See* JANE ADDAMS, NEWER IDEALS OF PEACE 23 (1907) (critiquing a "negative peace which [philosophers] declared would be 'eternal'").

84. *See infra* text accompanying notes 91–97. Some American advocates continue to invoke Dr. King's distinction between positive and negative peace. *See, e.g.*, *Dr. Rev. William J. Barber II*, YALE L. SCH., https://law.yale.edu/centers-workshops/gruber-program-global-justice-and-womens-rights/gruber-lectures/dr-rev-william-j-barber-ii [https://perma.cc/WCC7-DE6N] (last visited Apr. 6, 2022) ("Reverend Barber quoted Martin Luther King's words from the Birmingham Jail: we must fight for a positive peace, the presence of justice, as opposed to a negative piece, the absence of tension.").

85. *See, e.g.*, Mani, *supra* note 56, at 28–29; SRIRAM, *supra* note 60, at 2–3, 5.

86. For an account of why the United States has been missing from transitional justice, and vice versa, see generally Joshi, *Racial Transitional Justice in the United States*, *supra* note 16 and Joshi, *Racial Transition*, *supra* note 16.

87. *See, e.g.*, Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1520 (2009) (observing how courts in the 1910s "avoided racial conflict through racial separation[] and maintained that both blacks and whites would benefit from the resulting racial peace"); Christopher A. Bracey, *The* Cul de Sac *of*

1950s argued that integration was a threat to *negative peace*. According to them, a separation of the races was necessary for maintaining peaceful relations, and therefore, integration would lead to unrest.[88] Ironically, segregationists made these appeals to negative peace while themselves launching an all-out war on integration.[89]

Civil rights activists responded to these segregationist plays to *negative peace* by offering their own take, arguing that without racial equity and inclusion, there would be unrest. They thus argued that racial equity was the surest path to *positive peace*: the elimination of racial inequities through integration and other measures would secure a durable peace. Although the discussion below features three figures who theorized extensively about the peace–justice nexus, other leading lights of the era (from Ella Baker to Malcolm X) also reasoned in peace–justice terms.[90]

For Dr. Martin Luther King, Jr., justice—understood as respect for human rights—was a precondition for true peace; peace that preserved injustice was illusory. In his Letter from a Birmingham Jail in 1963, for example, King called for a "transition from an obnoxious negative peace, in which the Negro passively accepted his unjust plight, to a substantive and positive peace, in which all men will respect the dignity and worth of human personality."[91]

Looking backward, King's writings and speeches described the *exclusionary* "negative peace" that had pervaded the South since the failure of Reconstruction.[92]

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*Race Preference Discourse*, 79 S. CAL. L. REV. 1231, 1241 (2006) (identifying "domestic tranquility" as an argument against race-based remedies).

88. *See infra* text accompanying notes 181–92.

89. *See infra* text accompanying notes 158–61.

90. Both moderate and militant factions of the Civil Rights Movement made peace–justice claims, with various demands of justice and various means of disrupting an oppressive peace. *See infra* note 100. For example, Ella Baker said in 1964 that "[p]eople cannot be free until they realize" that "peace is not the absence of war or struggle, it is the presence of justice[,]" including "enough work in this land to give everybody a job." Ella Baker, Address at the Hattiesburg Freedom Day Rally (Jan. 21, 1964) (transcript available at https://voicesofdemocracy.umd.edu/ella-baker-freedom-day-rally-speech-text/ [https://perma.cc/8Z8J-4AD3]). Malcolm X said that same year that having "peace and security" required eliminating police dogs, police clubs, and water hoses: "We can never have peace and security as long as one black man in this country is being bitten by a police dog." Malcolm X, Speech at the Founding Rally of the Organization of Afro-American Unity (June 28, 1964) (transcript available at https://www.blackpast.org/african-american-history/speeches-african-american-history/1964-malcolm-x-s-speech-founding-rally-organization-afro-american-unity/ [https://perma.cc/QL8G-2B7Q]). He declared in 1965: "[Y]ou can't separate peace from freedom because no one can be at peace unless he has his freedom." MALCOLM X SPEAKS: SELECTED SPEECHES AND STATEMENTS 148 (George Breitman ed., 1965). Section I.B offers an illustrative rather than exhaustive account of movement peace–justice claims to set the stage for the legal discussion that follows.

91. Martin Luther King, Jr., Letter from Birmingham Jail, (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [https://perma.cc/52DR-WKKJ]. Based on their reading of this letter, Lani Guinier and Gerald Torres argue that "substituting racial peace for racial justice is a recipe for delaying racial justice." LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 295 (2003).

92. *See, e.g.*, Telegram from Martin Luther King, Jr. to James Plemon Coleman, Governor of Miss. (Apr. 24, 1956), https://kinginstitute.stanford.edu/king-papers/documents/james-p-coleman-0 [https://perma.cc/SY7Z-L9MC] ("[P]eace is not nearly the absence of some negative force—tension, confusion, the murdering of Emmett Till, and the Reverend George Lee—but the presence of some positive force—love, justice, and goodwill.").

"So long as the Negro maintained [a] subservient attitude and accepted the 'place' assigned him, a sort of racial peace existed[,]" he observed.[93] "But it was an uneasy peace in which the Negro was forced patiently to submit to insult, injustice and exploitation."[94] Looking forward, King said, "I don't want peace" if peace means "accepting second class citizenship," "keeping my mouth shut in the midst of injustice and evil," "being complacently adjusted to a deadening status quo," and living only "to be exploited economically, dominated politically, humiliated and segregated. . . ."[95]

In addition to King's *positive peace* claims, which underscored the necessity of justice for achieving genuine social peace, he also made *negative peace* claims, indicating that absent justice, tranquility would not last. Speaking at a 1965 march from Selma to Montgomery, King declared that "we will not allow Alabama to return to normalcy" because normalcy "prevents the Negro from becoming a registered voter" and "leaves the Negro perishing on a lonely island of poverty in the midst of [a] vast ocean of material prosperity."[96] "The only normalcy that we will settle for," he said, is "the normalcy of true peace, the normalcy of justice."[97]

Bayard Rustin, an advisor to King, described racial justice as a requirement for positive *and* negative peace.[98] In a May 1965 telegram to New York City mayor Robert Wagner, Rustin characterized the previous summer's unrest—following

93. Martin Luther King, Jr., *Nonviolence and Racial Justice*, CHRISTIAN CENTURY, Feb. 6, 1957, at 165.

94. *Id. See also* Martin Luther King, Jr., *The "New Negro" of the South: Behind the Montgomery Story*, SOCIALIST CALL, June 1956, at 16–19, https://kinginstitute.stanford.edu/king-papers/documents/new-negro-south-behind-montgomery-story [https://perma.cc/D8YJ-H9HV] (criticizing the negative peace that prevailed in the South); Martin Luther King, Jr., Non-Aggression Procedures to Interracial Harmony, Address at the American Baptist Assembly and American Home Mission Agencies Conference (July 23, 1956) (transcript available at https://kinginstitute.stanford.edu/king-papers/documents/non-aggression-procedures-interracial-harmony-address-delivered-american [https://perma.cc/8A3A-X85P]) (similar); Martin Luther King, Jr., A Realistic Look at the Question of Progress in the Area of Race Relations, Address at St. Louis Freedom Rally (Apr. 10, 1957) (transcript available at https://kinginstitute.stanford.edu/king-papers/documents/realistic-look-question-progress-area-race-relations-address-delivered-st [https://perma.cc/2P8F-XFZS]) (similar).

95. Martin Luther King, Jr., When Peace Becomes Obnoxious, Sermon Delivered at Dexter Avenue Baptist Church (Mar. 18, 1956) (transcript available at https://kinginstitute.stanford.edu/king-papers/documents/when-peace-becomes-obnoxious [https://perma.cc/FP9R-DLFZ]).

96. Martin Luther King, Jr., Our God is Marching On!, Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965) [hereinafter King, *Selma to Montgomery March]* (transcript available at https://kinginstitute.stanford.edu/our-god-marching [https://perma.cc/RA46-9TZS]).

97. *Id.* King's peace–justice claims were not limited to the United States; connecting American racial strife with the Korean conflict in 1953, he said: "So long as America places 'white supremacy' first we will never have peace." He maintained that "the deep rumbling of discontent in our world today . . . is actually a revolt against . . . imperialism, economic exploitation, and colonialism," all of which "must be eliminated if we are to have peace." Martin Luther King, Jr., Radio Sermon: First Things First (Aug. 2, 1953) (transcript available at https://kinginstitute.stanford.edu/king-papers/documents/first-things-first [https://perma.cc/Y9GE-5CKB]).

98. *See* Devon W. Carbado & Donald Weise, *The Civil Rights Identity of Bayard Rustin*, 82 TEX. L. REV. 1133, 1183–87 (2004).

the police killing of James Powell[99]—as emerging from Wagner's failures to address "police brutality and economic hardship."[100] Rustin called for "a bold social and economic program" as a precondition for positive peace: "For social peace cannot exist in a vacuum; it is a by-product of justice obtained."[101] He also warned that without such social and economic justice, immediate negative peace would be imperiled: Wagner could either "creatively meet the causes of discontent in spring, or negatively face another long hot summer."[102]

A. Philip Randolph, who worked closely with King and Rustin, felt that Black people needed to disrupt an exclusionary negative peace in order to influence leaders "more concerned with easing racial tensions than enforcing racial democracy."[103] He believed that government and liberal leaders ultimately "yield to the demands of those most capable of creating maximum pressures and social discord" because these leaders "speak of justice and progress but more profoundly desire internal peace."[104] Accordingly, he insisted that Black people must "create and conduct a wide variety of actions constantly, so that social calm will not prevail until our demands have been met."[105]

Decades earlier, Randolph had put this strategy to work when he planned a march on Washington in 1941 to push President Franklin D. Roosevelt into ending discrimination in defense manufacturing plants.[106] When Roosevelt caved

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99. In July 1964, a white police lieutenant, Thomas Gilligan, shot thrice and killed a 15-year-old Black child, James Powell, whose murder precipitated a racial justice uprising in Harlem. Michael W. Flamm, Opinion, *The Original Long, Hot Summer*, N.Y. TIMES (July 15, 2014), https://www.nytimes.com/2014/07/16/opinion/16Flamm.html.

100. Telegram from Bayard Rustin, Dir. of A. Philip Randolph Inst., to Robert F. Wagner, Mayor, New York City (May 19, 1965) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001581/001581_018_1251/001581_018_1251_0001_From_1_to_50.pdf [https://perma.cc/PBB9-Z6WN].

101. *Id*. Yet, in other interviews and writings, Rustin worried about an escalation of hostilities, in which Black people become so disillusioned with the failures of government that they "believe that looting and burning have become a legitimate means for forcing social change," and white people become so frustrated with unrest that "instead of granting minor concessions like sprinklers, they will impose repression." Bayard Rustin, *Some Lessons from Watts*, 5 J. INTERGROUP RELS. 41, 43 (1966) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001581/001581_018_1251/001581_018_1251_0001_From_1_to_50.pdf [https://perma.cc/A39P-7JN8]; Morton Kondracke, *Among America's Negroes . . . Deepening Despair*, CHI. SUN TIMES (May 25, 1967), https://hv.proquest.com/pdfs/103961/103961_031_0797/103961_031_0797_From_1_to_101.pdf [https://perma.cc/98W2-JACY]. Rustin added that "[a]s you get black backlash in response to white backlash . . . the intensity of white backlash increases" such that "one backlash reinforces the other." *Id*. He warned that such escalation would have dire consequences and must be avoided through the amelioration of racial and economic despair. *Id*.

102. Rustin, Telegram, *supra* note 100.

103. A. Philip Randolph, Remarks at the March on Washington (Aug. 28, 1963) (on file with the Library of Congress) (transcript available at https://hv.proquest.com/pdfs/001473/001473_019_0528/001473_019_0528_0005_From_201_to_250.pdf [https://perma.cc/F8LA-EDZC]).

104. A. Philip Randolph, Address at the National Education for Citizenship Banquet of I.B.P.O.E.W 3. (Jan. 28, 1960) (on file with the Library of Congress) (transcript available at https://hv.proquest.com/pdfs/001608/001608_028_0893/001608_028_0893_0001_From_1_to_50.pdf [https://perma.cc/3M4L-CBWR]).

105. *Id*.

106. Harold Meyerson, *The Socialists Who Made the March on Washington*, AM. PROSPECT (Aug. 23, 2013), https://prospect.org/power/socialists-made-march-washington/ [https://perma.cc/75UL-48T5].

and signed a fair employment practices order, Randolph called off the march.[107] Randolph planned another march in 1948 to get President Harry Truman to desegregate the armed forces.[108] Here too, Truman caved and Randolph called off the march,[109] proving that Black people's mobilization could influence political leaders' peace–justice calculus.

Ultimately, both King and his contemporaries saw social unrest as a necessary step on the path to justice.[110] As King concluded: "There is probably no way, even eliminating violence, for Negroes to obtain their rights without upsetting the equanimity of white folks. All too many of them demand tranquility when they mean inequality."[111] Furthermore, civil rights leaders warned that the failure of government to secure a substantive and positive peace would fuel discontent and conflict. Their claims were echoed in the Kerner Commission Report of 1968, which diagnosed anti-Black racism as the main cause of civil unrest since 1965 and proposed antiracist action to achieve "domestic peace and social justice."[112]

Today's protests against police violence and structural racism indict the government's failures to secure a positive peace, encapsulated in chants of "No Justice! No Peace!"[113] Analyzing media reports of recent antiracism protests—in

107. *Id.*

108. *Id.*

109. *Id.*

110. The relationship between justice and peace was debated within and across racial justice movements. In particular, there were intense disagreements around whether non-violence or militancy was the most promising path to racial justice. While King and his affiliates supported primarily nonviolent social change, other Black activists and thinkers embraced and defended political violence as a path to Black liberation. *See, e.g.*, FRANTZ FANON, BLACK SKIN, WHITE MASKS (1952) (arguing for violence as a tool in the fight of the colonized against the colonizer); FRANTZ FANON, THE WRETCHED OF THE EARTH (1961) (characterizing violence as a means of liberation and historical change). For example, Malcolm X told his followers that "you should never be nonviolent unless you run into some nonviolence." Malcolm X, The Ballot or the Bullet, Speech in Cleveland, Ohio (Apr. 3, 1964) (transcript available at http://www.edchange.org/multicultural/speeches/malcolm_x_ballot.html [https://perma.cc/2AT2-SHSU]). Rustin and Randolph distanced themselves from this more militant form of activism and used Black nationalism's threat to social peace to bolster their own arguments for racial justice. As Randolph remarked in a 1960 speech: "The basic remedy for black nationalism—which can become a danger to social peace, as white nationalism is a danger to social peace—is the abolition of white nationalism. . . ." A. Philip Randolph, Address at Labor Dinner, Fifty-First Annual Convention of the National Association for the Advancement of Colored People, St. Paul, Minnesota (June 24, 1960) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001608/001608_028_0893/001608_028_0893_0002_From_51_to_64.pdf [https://perma.cc/5G86-2JAG].

111. Martin Luther King, Jr., Address Delivered to the Southern Christian Leadership Conference, Atlanta, Georgia (Aug. 1967) (transcript available at https://www.theatlantic.com/magazine/archive/2018/02/martin-luther-king-jr-the-crisis-in-americas-cities/552536/).

112. NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 4, 11 (1968) [hereinafter KERNER REPORT].

113. Today, "No Justice! No Peace!" is most closely associated with the Black Lives Matter Movement, although some opponents of that movement have tried to coopt the refrain. *See, e.g.*, Aaron Blake, *3 Takeaways from the Final Night of the Republican National Convention*, WASH. POST (Aug. 27, 2020), https://www.washingtonpost.com/politics/2020/08/27/takeaways-republican-convention-night-4/ (quoting New York City police union chief Patrick Lynch as stating: "We can have four more years of President Trump. Or you can have no safety, no justice, no peace.").

which protestors explain what they mean by using this refrain—reveals cross-generational claims that have been passed down at a grassroots level.[114]

This multigenerational quality of peace–justice claims was visible at a vigil for Eric Garner in 2014. Struggling to formulate a response to Garner's killing by New York City police in broad daylight, Kevin Goldston from Staten Island, New York, turned to the peace–justice philosophies of King, Malcolm X, and Al Sharpton.[115] Since Garner's killing had demonstrated that there was no justice, Goldston asked, "what did our Black leaders mean when they said, 'no peace'?"[116]

Following the murder of George Floyd in 2020, some protestors described the tide of police killings and the lack of accountability for them as threats to negative peace, saying that social unrest would continue until justice was served. Mavery Davis from Baltimore, Maryland, said: "[T]hese protests are about standing up and . . . saying that we're not allowing anybody to stand on the fence anymore."[117] Breona White, an organizer in Aiken, South Carolina, explained the meaning of "No Justice! No Peace!" by saying: "If we don't come together to stop [police brutality], it's not going to stop. The only way to do this is to keep protesting and making our voices heard and everybody standing together."[118] In support of White's claim, research reveals a connection between police violence and antiracism protests: one recent study found that Black Lives Matter protests were significantly more common in cities with at least one police-related death;[119] another estimated that police lethal use of force fell by 15.8% on average following Black Lives Matter protests, resulting in approximately 300 fewer police homicides between 2014 and 2019.[120]

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114. From one perspective, protests create an interest *convergence* between subjugated groups (who seek equality and promise to create unrest until they have it) and dominant groups (who seek to avoid the destabilizing effects of denying equality and accept egalitarian changes to curb unrest). Yet, from a different perspective, protests actually lead to an interest *reorientation*: subjugated groups compel dominant groups to relinquish some of their privileged status in order to have stability. *Compare* Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing the "interest convergence" thesis), *with* Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. L. REV. 149, 175 (2011) (critiquing the "interest convergence" thesis for denying agency).

115. Stephen Farrell, *Questioning a Rallying Cry*, N.Y. TIMES (Dec. 12, 2014), https://www.nytimes.com/video/nyregion/100000003278284/questioning-a-rallying-cry.html.

116. *Id.*

117. Megan Bsharah, *'No Justice, No Peace:' Demonstrators Talk About True Meaning of Protests*, WCHS (June 1, 2020), https://wchstv.com/news/local/the-true-message-behind-police-brutality-protests [https://perma.cc/PJ2M-S4SZ].

118. Larry Wood, *'No Justice! No Peace!': Peaceful Protesters March in Solidarity for George Floyd in Downtown Aiken*, AIKEN STANDARD (May 30, 2020), https://www.postandcourier.com/aikenstandard/news/no-justice-no-peace-peaceful-protesters-march-in-solidarity-for-george-floyd-in-downtown-aiken/article_5a5b2389-7e7d-5f6a-b822-7263b0bdc52c.html.

119. Vanessa Williamson, Kris-Stella Trump & Katherine Levine Einstein, *Black Lives Matter: Evidence that Police-Caused Deaths Predict Protest Activity*, 16 PERSPS. ON POL. 400, 406, 409 (2018).

120. Travis Campbell, Black Lives Matter's Effect on Police Lethal Use-of-Force 15 (May 13, 2021) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm=3767097 [https://perma.cc/U6AD-TRYA]); *see also* Evelyn Skoy, *Black Lives Matter Protests, Fatal Police Interactions,*

Such narratives contextualize racial justice uprisings as legitimate reactions to enduring violence and frustration. Michael McDowell, a local leader of Black Lives Matter, said during the 2020 protests that "Minneapolis is burning" because "[t]here are folks reacting to a violent system" and "[t]hey're not going to take it anymore."[121] He added that "I don't think that folks are being anywhere as violent as the system has been toward them,"[122] suggesting that the present unrest pales in comparison to the generations of trauma inflicted upon Black people in the United States. Similarly, an unnamed Black man guarding his store said: "We want to see peace prevail, but tensions are high right now. . . . The pain and the things people are feeling right now is rooted for years."[123]

In these accounts, antiracism protests are not disruptive departures from peace but demands to recognize the illusory nature of the tranquility that masks the injustice, frustration, and despair felt by minorities. Likewise, chants of "No Justice! No Peace!" are not necessarily threats of violence but explanations of *why* protestors engage in unrest. They are also a commitment to one another and society at-large to openly demand justice.

Today, as in previous decades, protestors pursue a broad justice agenda to secure a positive peace.[124] Some of the protestors following the murder of George Floyd echoed Rustin's call for "a bold social and economic program."[125] Theresa Bland, a retired teacher protesting in Columbus, Ohio, for example, called for a comprehensive program including "affordable housing, political justice, prison reform, the whole ball of wax."[126]

The claims and voices of protestors speak across generations about the kind of justice and peace the United States requires.[127] Excluding them from legal analysis results in an inaccurate civil rights history, erasing political perspectives and

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*and Crime*, 39 CONTEMP. ECON. POL'Y 280, 281 (2021) ("[A]n increase in the number of protests within a state is associated with a decrease in the number of Black fatalities from police encounters in the month immediately following the protests, yet there does not appear to be a longer lasting impact on the number of fatalities.").

121. Holly Bailey, Jared Goyette, Sheila Regan & Tarkor Zehn, *Chaotic Minneapolis Protests Spread Amid Emotional Calls for Justice, Peace*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/nation/2020/05/29/chaotic-minneapolis-protests-spread-amid-emotional-calls-justice-peace/.

122. *Id.*

123. *Id.* Countering depictions of racial justice uprisings as unjustified "riots," antiracist narratives situate unrest in long histories of denied justice and frustrated efforts. *See* Rinaldo Walcott, *Rinaldo Walcott on Riots, Policing, and Traditions of Black Refusal*, LITERARY HUB (May 25, 2021), https://lithub.com/rinaldo-walcott-on-riots-policing-and-traditions-of-black-refusal/ [https://perma.cc/7LFH-JXPQ].

124. *See, e.g.*, *Vision for Black Lives*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/ [https://perma.cc/67LW-SWU2] (last visited Apr. 6, 2022); *infra* note 468.

125. Telegram from Bayard Rustin to Robert F. Wagner, *supra* note 100.

126. Tom Foreman Jr., David Crary & John Leicester, *Protesters Pour into DC for City's Largest Demonstration Yet*, AP NEWS (June 6, 2020), https://apnews.com/3bf1a26081f1d89e0da1afd4fc678970 [https://perma.cc/DHZ7-NPAU].

127. This is not to suggest that the claims of the Black Lives Matter Movement are identical to the claims of earlier racial justice movements; it is to suggest that claims adopting a peace–justice logic recur over time even as the precise meanings of peace and justice evolve with political circumstances.

ignoring mobilization "from below."[128] It also perpetuates historic injustices because it "denies voice, agenda-setting power, and historical significance to the very classes of persons denied full citizenship."[129] Recovering minority peace–justice claims can be "part of repairing disenfranchisement's legacy."[130]

There are many ways to incorporate these perspectives into legal analysis.[131] We could draw on a long tradition of Black political thought when deliberating questions of justice and peace. We could recognize that ignoring chants of "No Justice! No Peace!" imperils the Constitution's mandate to "establish Justice" and "insure domestic Tranquility."[132] We could also prioritize the claims of racial minorities and racial justice movements as we reconsider the peace–justice compromises struck by courts and other decisionmakers.[133] This is the focus of the next Part. In so doing, we might narrow constitutional law's "resonance gap" and its deleterious reach into the lives of minorities.[134]

To examine how peace–justice considerations have permeated race jurisprudence, this Article now undertakes a detailed case study of *Cooper v. Aaron*.[135]

## II. PEACE–JUSTICE CLAIMS IN *COOPER V. AARON*

American courts have long faced versions of the peace versus justice dilemma without recognizing them as such. Courts have been asked to decide: *Does the advancement of racial equality facilitate or impede the achievement of racial harmony? Is the potential for social unrest and disharmony a legitimate basis for limiting equality? If racial justice and peace come into tension, which should prevail?*[136]

For much of its history, the Supreme Court prioritized quietude over justice. Decisions like *Plessy v. Ferguson* in 1896 maintained racial apartheid for "the

128. Brown-Nagin, *supra* note 22, at 2712–16, 2738–39 (explaining that to properly understand the Civil Rights Movement scholars must consider the views of "those below," a term used to describe "citizens who struggled on the ground").

129. *Id.* at 2713–14.

130. *See* Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450, 455 (2020). On some tensions that arise in such scholarly enterprise, see Jane E. Larson & Clyde Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, 12 PUB. HISTORIAN, Summer 1990, at 33, 33–34.

131. For legal scholarship in conversation with marginalized communities, see, for example, Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001); Jennifer M. Chacón, Susan Bibler Coutin, Stephen Lee, Sameer Ashar, Edelina Burciaga, & Alma Nidia Garza, *Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1 (2018); and Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

132. U.S. CONST. pmbl.

133. *See* Joshi, *Racial Equality Compromises*, *supra* note 16.

134. Constitutional law's resonance gap arises when "what typically speaks to people in political and moral decisionmaking is . . . excluded as an overt basis for constitutional decisionmaking." David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 768 (2021).

135. 358 U.S. 1 (1958)

136. *See infra* Sections II.C, III.A and III.B (discussing peace–justice issues arising in various legal cases).

preservation of the public peace and good order."[137] In 1917 in *Buchanan v. Warley*, however, the Supreme Court struck down a residential segregation ordinance in Louisville, Kentucky, that prohibited Black people from moving to a block with majority white residents.[138] "It is urged that this proposed segregation will promote the public peace by preventing race conflicts," the Court said.[139] "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."[140] However, *Buchanan* did not overturn *Plessy*'s "separate but equal" ruling and the Jim Crow apartheid system continued in its wake.[141] Forty years later, similar issues would resurface in the Little Rock Crisis of 1957. This yielded the landmark 1958 decision in *Cooper v. Aaron*, which rejected the Little Rock School Board's proposal to postpone integration in order to maintain "public peace."[142]

This Part employs *Cooper* as a case study for understanding peace–justice claims in the law. The standard account of *Cooper* suggests that, more than anything, the Court was asserting its primacy in the face of Arkansas subverting the precedent set by the Court in *Brown v. Board of Education*.[143] This Part does not aim to supplant this judicial supremacy story about *Cooper*. Instead, it tells another story—one that has been overlooked because of the usual focus on judicial supremacy—to demonstrate the peace–justice logics operative in legal and political debates. Given the enduring significance of peace–justice argumentation in American racial justice struggles, this is an important story to recover.

As a prelude to this analysis of *Cooper*, Section II.A uncovers the competing peace–justice claims in *Brown*. Section II.B traces how both integrationists and segregationists reasoned about justice and peace throughout the Little Rock Crisis. Focusing then on the *Cooper* litigation, Section II.C shows how advocates on both sides formulated the Little Rock problem as a kind of peace versus justice dilemma, which the Court settled in favor of safeguarding minority rights over vindicating white rage. However, *Cooper* was only a partial victory for minority peace–justice claims. Although the Court rejected the Little Rock School Board's claim depicting *integration as a threat to negative peace* (that enforcing integration would enrage whites), it did not affirm the NAACP's claim depicting *segregation as a threat to negative peace* (that delaying integration would frustrate minorities) or its claim depicting *integration as a path to positive peace* (that only full racial inclusion would secure enduring peace). This new reading of *Cooper* attempts to shed light on the current social unrest and its relationship to the law.

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137. 163 U.S. 537, 550 (1896). For a longer trajectory of peace–justice claims, see *supra* note 23.

138. 245 U.S. 60, 71, 82 (1917).

139. *Id.* at 81.

140. *Id; see also* Justin Driver, *The Significance of the Frontier in American Constitutional Law*, 2011 SUP. CT. REV. 345, 366–72 (2011) (arguing that "*Buchanan* . . . represented a true departure from *Plessy*").

141. For a critique of *Buchanan* along these lines, see James W. Fox Jr., *Black Progressivism and the Progressive Court*, 130 YALE L.J.F. 398, 415–16 (2021).

142. 358 U.S. 1, 16 (1958).

143. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954).

### A. *BROWN* AND THE SOUTHERN MANIFESTO

In 1954, *Brown* declared racial segregation in public education unconstitutional.[144] In light of the "massive resistance" to *Brown* and school integration, a year later the Court reaffirmed its statements in *Brown II*, adding that "the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."[145] As a matter of principle, the Court thus affirmed racial integration as the law of the land and rejected hostility to integration as a legitimate basis for constitutional decisionmaking. However, as a pragmatic matter, the Court made significant concessions in order to mitigate that hostility, which undermined the stated principles in *Brown* and *Brown II*.

Segregationists in the *Brown* litigation argued that "the public peace, harmony and the general welfare" of their communities necessitated the teaching of Black and white students in separate classrooms.[146] They further insisted that the issue of integration must be addressed incrementally and locally "to fit the conditions in the actual communities involved."[147]

Integrationists rejected such appeals to peace as illegitimate and unfounded. Some insisted that "the fact that racial segregation accords with custom and usage or is considered needful for the preservation of public peace and good order" does not render it constitutionally legitimate.[148] Sanctioning segregation on this basis would mean that "all persons shall be given the equal protection of the laws insofar as it is convenient to do so."[149] It would also show that "the Federal compact is no match for the lynch-law mob."[150] Others doubted that integration would actually result in an "immediate danger of open disturbances of the public peace."[151] These integrationists were "not so naive as to discount the possibility of some forms of resistance" to desegregation but reasoned that "the prophecy of violence has so often been shown to be without substance that it is now made with little conviction."[152] Ultimately, integrationists argued that segregation "does not promote the 'comfort' of its citizenry, and is totally irrelevant to the 'preservation of the public peace and good order.'"[153]

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144. *Id.* at 493.

145. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955).

146. Brief of John Ben Shepperd, Attorney General of Texas, Amicus Curiae at 3, *Brown II*, 349 U.S. 294 (1955) (Nos. 54-1, -2, -3, -5).

147. Brief of Harry McMullan, Attorney General of North Carolina, Amicus Curiae at 6, *Brown II*, 349 U.S. 294 (1955) (Nos. 54-1, -2, -3, -5).

148. Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 40, *Brown I*, 347 U.S. 483 (1954) (Nos. 53-1, -2, -4, -10).

149. Brief for the Congress of Industrial Organizations as *Amicus Curiae* at 12, *Brown*, 347 U.S. 483 (1954) (Nos. 53-1, -2, -4, -10).

150. Brief for Amici Curiae (American Council on Human Rights et al.) at 13, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 52-413).

151. Brief for the Congress of Industrial Organizations as Amicus Curiae, *supra* note 149.

152. Brief for Amici Curiae (American Council on Human Rights et al.), *supra* note 150 (footnote omitted).

153. Brief of American Veterans Committee, Inc. (AVC) Amicus Curiae at 14, *Brown I*, 347 U.S. 483 (1954) (No. 53-1). Instead, segregation "rests only on prejudice, a factor plainly unreasonable under the Constitution." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)).

The Supreme Court settled the peace–justice dilemma in *Brown* through a compromise.[154] While the Court ordered the end of segregation, Chief Justice Warren instructed his colleagues that the *Brown* opinion should be "above all, non-accusatory."[155] Accordingly, *Brown* did not acknowledge white people's humiliating and harmful treatment of Black children or segregation's white supremacist aims, thereby avoiding making the opinion *about* racial injustice.[156] Additionally, *Brown II* said that *Brown* shall be implemented only "with all deliberate speed," an ambiguous phrasing that enabled further resistance to integration.[157]

Despite these concessions, segregationist legislators responded to *Brown* by signing the "Southern Manifesto" of 1956, which denounced the decision as an affront to peace and justice.[158] The Manifesto alleged that *Brown* had created an "explosive and dangerous condition" by "destroying the amicable relations between the white and Negro races."[159] It further claimed that *Brown* was poised to inflict its own injustices by "threatening immediate and revolutionary changes" that would destroy the public education system in some states.[160] These segregationists depicted the South as a just and peaceful society that was being decimated by "outside agitators" like the Supreme Court and the NAACP.[161]

### B. THE LITTLE ROCK CRISIS

The Southern Manifesto was signed by all eight congressmen from Arkansas, where the peace versus justice question was reaching a tipping point.[162] As the Little Rock School Board announced a phased integration plan, local segregationist groups such as the Capital Citizens' Council and the Mothers' League of Central High School stoked fears that integration would lead to violence.[163] They

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154. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 319 (2004) (observing that "[t]he justices had conceived of gradualism partly as a peace offering to white southerners").

155. Memorandum from C.J. Earl Warren to the Members of the U.S. Sup. Ct. (May 7, 1954) (on file with the Library of Congress), https://www.loc.gov/exhibits/brown/images/br0080s.jpg [https://perma.cc/8433-W66D].

156. For critiques along these lines, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 430 n.25 (1960); Randall L. Kennedy, *Ackerman's* Brown, 123 YALE L.J. 3064, 3068 (2014); and Onwuachi-Willig, *supra* note 31.

157. 349 U.S. 294, 301 (1955).

158. *See* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1128 (2014).

159. 102 CONG. REC. 4460 (1956) [hereinafter *Southern Manifesto*] (statement of Sen. Walter George).

160. *Id.*

161. *Id.* at 4461 (statement of Sen. Strom Thurmond).

162. *See id.* at 4460 (noting as signatories John L. McLellan and J.W. Fulbright (Senators from Arkansas) as well as E.C. Gathings, Wilbur D. Mills, James W. Trimble, Oren Harris, Brooks Hats, and W.F. Norrell (House Members from Arkansas)).

163. KAREN ANDERSON, LITTLE ROCK: RACE AND RESISTANCE AT CENTRAL HIGH SCHOOL 57 (2010); Graeme Cope, *"A Thorn in the Side"? The Mothers' League of Central High School and the Little Rock Desegregation Crisis of 1957*, 57 ARK. HIST. Q. 160, 162, 177 (1998). *See generally* ELIZABETH GILLESPIE MCRAE, MOTHERS OF MASSIVE RESISTANCE: WHITE WOMEN AND THE POLITICS OF WHITE SUPREMACY 185–216 (2018) (describing the role of white women in maintaining segregation in general and efforts to entrench segregation in Little Rock in particular).

successfully directed their rabble-rousing at the Governor of Arkansas, Orval Faubus, who refused to permit the planned integration of the Little Rock Central High School.[164]

During the Little Rock Crisis, Faubus sought to maintain a negative peace which he claimed was under attack by integrationists. On September 2, 1957, Faubus declared a state of emergency due to an "imminent danger of tumult, riot and breach of the peace" if the integration of Central High School proceeded.[165] On September 4, the day the school was to be integrated, he dispatched troops of the Arkansas National Guard to prevent nine Black children from entering the school building.[166] Depicting his blockade as a peaceful action and downplaying its significance for racial justice, Faubus said that it "happened . . . to involve integration of public schools" and "could just as well have happened to prevent looting and rioting after a storm or a flood."[167] Faubus further assailed Judge Ronald Davies, who had issued a ruling requiring the integration of Central High School, as a "judge who arrived here only a few days ago" and decided "a matter in which the peace and good order of the community is involved."[168]

Disputing Faubus's account, an FBI investigation found that Faubus may have relied on "rumors, generalities or sources whose reliability was not fully established" to issue his edict.[169] Additionally, the Little Rock School Board later argued in litigation that "[t]he effect of [the Governor's action] was to harden the core of opposition to the [integration] Plan[,] . . . and from that date hostility to the Plan was increased and criticism of the officials of the School District has become more bitter and unrestrained."[170] On these accounts, Faubus not only conjured up a threat to public peace that did not yet exist, but his response to that conjured threat fueled the unrest that soon gripped Little Rock.

President Dwight D. Eisenhower responded to the Faubus blockade by sending federal troops to Arkansas to maintain order and protect Black students entering

164. *See* Johanna Miller Lewis, *History of the Alternative Desegregation Plan and the Black Community's Perspective and Reaction*, 30 U. ARK. LITTLE ROCK L. REV. 363, 373 (2008).

165. *Courts*, 2 RACE REL. L. REP. 931, 937 (1957) (reprinting Gov. Faubus's proclamation).

166. The Little Rock Nine included Minnijean Brown, Elizabeth Eckford, Ernest Green, Thelma Mothershed, Melba Patillo, Gloria Ray, Terrence Roberts, Jefferson Thomas, and Carlotta Walls. These Black children seeking an equal education with the support of NAACP organizer Daisy Bates faced terrifying abuse at the hands of white mobs. *See generally* JUDITH BLOOM FRADIN & DENNIS BRINDELL FRADIN, THE POWER OF ONE: DAISY BATES AND THE LITTLE ROCK NINE (2004) (telling the story of Daisy Bates and the Little Rock Nine); BATES, *supra* note 28 (providing Bates's own recollection of the integration of Central High School).

167. *Governor Faubus' Statement Assailing Judge Davies*, N.Y. TIMES, Sept. 10, 1957, at A24.

168. *Id.*

169. FBI, INTEGRATION IN PUBLIC SCHOOLS: LITTLE ROCK, ARKANSAS: CIVIL RIGHTS - CONTEMPT OF COURT, FBI REPORT 44-12284-2673, at A-14 (1957), https://arstudies.contentdm.oclc.org/digital/collection/p15728coll3/id/43898/rec/23 [https://perma.cc/4R4T-DPWK]. Historian Tony Freyer notes that the U.S. government never used this "400-page report indicating that Faubus's claims about violence were essentially groundless," which further emboldened Faubus. Tony A. Freyer, *Enforcing* Brown *in the Little Rock Crisis*, 6 J. APP. PRAC. & PROCESS 67, 72 (2004).

170. Cooper v. Aaron, 358 U.S. 1, 10 (1958) (internal marks omitted).

Central High School.[171] In a radio and television address on September 24, he urged compliance with federal court orders so that "the City of Little Rock will return to its normal habits of peace and order."[172] By the end of September, the Little Rock Nine were able to enter the school.[173]

As Eisenhower intervened in Little Rock, he received correspondence from both integrationists and segregationists that has never before been discussed in legal scholarship. Uncovering these narratives reveals how Americans viewed the Little Rock Crisis as a matter of peace and justice, even as they disagreed about the *kinds* of peace and justice the United States should pursue. Illuminating a wider range of peace–justice claims made by these different groups also sheds light on which claims the Supreme Court ultimately affirmed, which it denied, and which it disregarded altogether.

Supporting *inclusion*, Roy Wilkins, then executive secretary and later executive director of the NAACP, implored Eisenhower not to sacrifice the rights of Black children and their parents in order to "attain an illusory peace."[174] In a subsequent statement, Wilkins along with King, Randolph, and Lester B. Granger advised Eisenhower that "tension is an inherent element of basic social change."[175] Thus, the choice facing the nation was not between "an unjust status quo with social peace" and "integration with tension."[176] Rather, the real choice was between "a bold program which moves through tension to a democratic solution" and "evasion and compromise which purport to avoid tension, but which in reality lead the entire society toward economic, social and moral frustration."[177]

These movement leaders urged Eisenhower to choose the enduring, positive peace of addressing racism over the illusory, negative peace of avoiding the issue of racism. They told him that Black people were "frustrated and angry," and they called on him to vindicate their "unparalleled patience in the face of decades of proscription and persecution" and "unfaltering trust in the guarantees of the

171. President Dwight D. Eisenhower, Radio and Television Address to the American People on the Situation in Little Rock (Sept. 24, 1957), *in* 1957 PUB. PAPERS 689, 690.

172. *Id.* at 694.

173. *See* Lewis, *supra* note 164, at 363.

174. Telegram from Roy Wilkins, Exec. Sec'y, NAACP, to President Dwight D. Eisenhower (Sept. 13, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_002_0891/101149_002_0891_From_1_to_59.pdf [https://perma.cc/7SKC-ESPF].

175. A. PHILIP RANDOLPH, LESTER B. GRANDER, REVEREND MARTIN LUTHER KING, JR. & ROY WILKINS, NAACP, A STATEMENT TO THE PRESIDENT OF THE UNITED STATES (June 23, 1958) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001608/001608_026_0000/001608_026_0000_0001_From_1_to_50.pdf [https://perma.cc/HD44-M5NY].

176. *Id.*

177. *Id.* Along these lines, legal philosopher David Dyzenhaus contends that "peace and order without justice are not worth having, not only from the standpoint of morality but because such a peace will not work in the interests of society." David Dyzenhaus, Leviathan *as a Theory of Transitional Justice*, 51 NOMOS 180, 185 (2012). Similarly, Laurel Fletcher and her colleagues dispute the notions that "peace equals democracy" and "accountability should be second to state stability." Laurel E. Fletcher, Harvey M. Weinstein & Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 219 (2009).

Constitution and in the orderly processes of the courts."[178]

Meanwhile, other Americans also urged Eisenhower to prioritize a positive peace in Little Rock. "I feel that the Governor has the wrong idea about peace," wrote Joe H. Crosthwait, a priest with the Bishops' Committee for the Spanish Speaking in San Antonio, Texas.[179] "Peace is not merely the absence of war or strife. It is something much more positive than that. Peace means the reign of justice and law."[180]

Supporting *exclusion*, Mississippi Senator John Stennis wrote to Eisenhower that whereas segregation "has afforded generations of peaceful and harmonious cooperation among the people of the two races," integration would destroy that peace and harmony.[181] Stennis's claim to racial peace belied the racial terror of Mississippi: Emmett Till had been lynched there two years prior,[182] and Mack Charles Parker would be lynched two years later.[183] Other politicians similarly leveraged claims about normalcy and harmony to support segregation. Illinois Representative Noah Mason cautioned that "[l]aws that violate or go contrary to the customs of a community never bring about social peace and harmony."[184] Georgia State Comptroller General Zack Cravey charged that Eisenhower could "return this nation to the normalcy of peace and harmony" but had instead enabled "a catastrophe."[185] Georgia Governor Marvin Griffin surmised that Eisenhower was "more interested in the minority Negro vote than the peace of this nation."[186]

In addition to public figures, other Americans also urged Eisenhower to enforce segregation to preserve an exclusionary negative peace. A.E. Bolton of the Bolton Bagging Company in Memphis, Tennessee,[187] wrote that Eisenhower,

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178. RANDOLPH ET AL., *supra* note 175.

179. Letter from Father Joe H. Crosthwait, Bishops' Committee for the Spanish Speaking, to President Dwight D. Eisenhower (Oct. 6, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_003_0063/101149_003_0063_From_1_to_63.pdf [https://perma.cc/P7MD-KD8T].

180. *Id.*

181. Telegram from Senator John Stennis to President Dwight D. Eisenhower (Oct. 1, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_002_0776/101149_002_0776_From_1_to_56.pdf [https://perma.cc/YS62-5SJU].

182. *See* DeNeen L. Brown, *'Lynchings in Mississippi Never Stopped,'* WASH. POST (Aug. 8, 2021), https://www.washingtonpost.com/nation/2021/08/08/modern-day-mississippi-lynchings/.

183. HOWARD SMEAD, BLOOD JUSTICE: THE LYNCHING OF MACK CHARLES PARKER, at xi (1986).

184. Noah M. Mason, *"Civil Rights" Against the Constitution*, HUM. EVENTS, July 13, 1957 (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_012_0379/101149_012_0379_From_1_to_190.pdf [https://perma.cc/XDP8-AXT8].

185. Telegram from Zack D. Cravey, Ga. Comptroller Gen., to President Dwight D. Eisenhower (Sept. 5, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_012_0379/101149_012_0379_From_1_to_190.pdf [https://perma.cc/9Q7M-5DDT].

186. *See Bayonet Rule in America Hit by Georgia Leaders*, AUGUSTA COURIER, Oct. 7, 1957, at 3 (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_013_0073/101149_013_0073_0003_From_101_to_150.pdf [https://perma.cc/V89M-RTC6].

187. A person called Artie Earl Bolton was associated with the Bolton Bagging Company in Memphis, Tennessee. *See Dorothy Bolton*, MYHERITAGE, https://www.myheritage.com/names/dorothy_bolton [https://perma.cc/ARC9-RB33] (last visited Apr. 7, 2022).

"being fair and just and wanting peace,"[188] should implement a "three way system, namely, white schools where only white children can go, negro schools where only negro children can go and other schools where white and negro children who want to integrate can attend."[189] Marjorie King, a radio commentator from San Francisco, California,[190] proposed resolving the Little Rock Crisis by "leasing for 1000 years or buying [a] large unused portion of Africa and giv[ing] Negroes back their heritage," a "new country named Lincoln Land" to which "ships could carry colored people home in style."[191] King predicted that taking this step "could change our whole bitter atmosphere over-night."[192]

The peace–justice implications of the Little Rock Crisis reverberated both at home and abroad. On the international front, the crisis received coverage and criticism from around the world.[193] United States delegate George Meany told a United Nations committee that the crisis was "only one episode in a peaceful revolution,"[194] suggesting that the United States was neither as unjust nor as unpeaceful as Little Rock had made it appear to the world. Locally, segregationists diagnosed the NAACP's pursuit of racial justice as the catalyst of unrest in Little Rock. Arkansas Attorney General Bruce Bennett claimed that any "turmoil and conflict between the races can be simply reduced to the amount of activity carried on by local branches of the NAACP."[195] He filed registration and tax suits against the NAACP, arguing that minimizing their activities would bring "peace and tranquility to the people of Arkansas again."[196] For their part, the NAACP and other racial justice advocates continued to make their case to

188. Letter from A.E. Bolton to President Dwight D. Eisenhower (Sept. 26, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_013_0073/101149_013_0073_From_1_to_194.pdf [https://perma.cc/4YLX-3FXM].

189. Letter from A.E. Bolton to Sherman Adams, Asst. to the President (Oct. 15, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_013_0073/101149_013_0073_From_1_to_194.pdf [https://perma.cc/4YLX-3FXM]. In a previous letter, Bolton had pleaded with President Eisenhower to consider "how the majority of the white children feel when they have to take integration by force, such as you are putting into effect in Little Rock." Letter from A.E. Bolton to President Dwight D. Eisenhower, *supra* note 188.

190. A person called Marjorie King was supervisor for women's programming for KNBC San Francisco. King organized an initiative called "Careers Unlimited for Women," for which King received an award from *McCall's Magazine* in 1956, a year before this telegram. *See 'Careers Unlimited*,' BROAD. TELECASTING, Jan. 24, 1955, at 85; ERIC MINK, THIS IS TODAY: A WINDOW ON OUR TIMES 64 (Laurie Dolphin & Christian Brown eds., 2003).

191. Telegram from Marjorie King to President Dwight D. Eisenhower (Oct. 1, 1957) (on file with the Dwight D. Eisenhower Library), https://hv.proquest.com/pdfs/101149/101149_005_0735/101149_005_0735_From_1_to_138.pdf [https://perma.cc/QQ3F-AV66].

192. *Id.*

193. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 115–51 (2000) (describing domestic and international media coverage of the Little Rock crisis).

194. George Meany, U.S. Rep. to the Gen. Assemb., *Essentials of Social Progress*, 37 DEP'T STATE BULL. 688, 692 (1957) (statement of U.S. Rep. to the U.N. Gen. Assemb.).

195. TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION 129 (1984).

196. *Id.*

decisionmakers and the public by associating their pursuit of justice with the achievement of peace.[197]

Ultimately, these arguments surfaced in the *Cooper v. Aaron* litigation when legal advocates formulated the Little Rock problem as a kind of peace versus justice dilemma.

### C. *COOPER V. AARON*

*Cooper* arose following the turmoil of the Little Rock Crisis, as the Little Rock School Board petitioned to delay its integration plan by two-and-a-half years.[198] School superintendent Virgil T. Blossom insisted that, because segregation had lasted for centuries and become part of "local law," it only made sense to delay integration.[199] "[W]hen you look at the size of the problem involved and look at what history seems to tell us, then two and a half years looks like a very short time to me," he said.[200]

#### 1. District Court

Conversations at the district court level focused on how to sequence the pursuit of peace and justice. On June 23, 1958, Judge Lemley of the District Court for the Eastern District of Arkansas issued an opinion granting the Board's petition for delay.[201] Using a peace versus justice frame, Lemley reasoned that the *justice*-related interests of Black students "in being admitted to the public schools on a nondiscriminatory basis as soon as practicable" had to be balanced against the *justice*-related interests of all students "in having a smoothly functioning educational system" as well as the *peace*-related interests "of eliminating, or at least ameliorating, the unfortunate racial strife and tension" in Little Rock.[202] In his estimation, having "a peaceful interlude"[203] was in the interest of both white and Black students and did not "constitute a yielding to unlawful force or violence."[204] In other words, delaying integration to restore an exclusionary negative peace was an acceptable peace–justice compromise.[205]

In his decision to postpone justice, Lemley considered the timing and sequence of the pursuit of peace and justice.[206] Nevertheless, his analysis was deficient because it prioritized peace from the perspective of the segregationists and

197. *See* RANDOLPH ET AL., *supra* note 175.

198. *See* Brief for the Petitioners, Cooper v. Aaron, 358 U.S. 1 (1958) (No. 58-1), *reprinted in* 54 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 556, 566 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS].

199. *Id.* at 566–67.

200. *Id.* at 567–68.

201. Aaron v. Cooper, 163 F. Supp. 13, 27 (E.D. Ark.), *rev'd*, 257 F.2d 33 (8th Cir. 1958), *aff'd*, 358 U.S. 1 (1958).

202. *Id.*

203. *Id.* at 32.

204. *Id.* at 27.

205. Lemley reasoned that popular opposition to integration would be "as bad as, if not worse than the one under which [the Board] has labored during the past school year." *See id.* at 18.

206. Similar considerations are found in contemporary transitional justice theory. *See* Albin, *supra* note 43, at 581.

overlooked the longer-term unrest that would result from delaying and frustrating social change. In particular, Lemley's opinion did not contemplate how postponement would encourage segregationist opposition, making both justice and peace harder to achieve in the long term. Nor did it give sufficient weight to the justice-related interests of Black students and families, effectively tilting the balance toward immediate peace at their expense. This opinion warrants criticism from a transitional justice perspective, not because the court chose to balance justice with peace but because it balanced them inappropriately.

The deficiencies of Lemley's approach were brought out in roughly contemporaneous correspondence between Roy Wilkins of the NAACP and a member of the public. M. M. Martin from Los Angeles, California, wrote to Wilkins, advising him that the Black students at Central High School should "*choose*, in the interests of future unity and harmony in this community and our nation" to enroll in a different school.[207] Such a choice would convey Black people's "desire" and "fitness" to pursue integration and justice "intelligently, harmoniously and peacefully."[208] Like Lemley, Martin did not outright reject integration but proposed that it should be structured in such a way that preserves immediate peace.

In his response to Martin, John A. Morsell, Wilkins's assistant, noted that "such tactics of retreat and abandonment" would only embolden segregationists, who "do not respond to conciliation which they interpret as a confession of weakness and error."[209] Furthermore, Morsell wrote that Martin's proposal missed the essence of the justice interests at stake: "This is more than just a matter of abstract rights of Negro children: it is honestly and primarily a battle to give them the same opportunity in life's competition which other children have."[210] While Morsell admitted that some delay in integrating may be "absolutely necessary,"[211] he also acknowledged, in ways that Lemley did not, that further delay could violate rather than vindicate racial justice.

2. Court of Appeals

On August 18, 1958, the Court of Appeals for the Eighth Circuit reversed Judge Lemley's order,[212] repudiating his peace–justice analysis in important ways. First, the court of appeals correctly diagnosed segregationist tactics, as opposed to the integration of Black children, as the cause of unrest in Little Rock: "It is more accurate to state that the fires, destruction of property, bomb threats, and other acts of violence, were the direct result of popular *opposition* to the

207. Letter from M. M. Martin to Roy Wilkins, Exec. Sec'y, NAACP (Aug. 19, 1958) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001516/001516_002_0001/001516_002_0001_From_1_to_242.pdf [https://perma.cc/D6JC-JYA5].

208. *Id.*

209. Letter from John A. Morsell, Assistant to Exec. Sec'y, NAACP, to M. M. Martin (Sept. 11, 1958) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001516/001516_002_0001/001516_002_0001_From_1_to_242.pdf [https://perma.cc/D6JC-JYA5].

210. *Id.*

211. *Id.*

212. Aaron v. Cooper, 257 F.2d 33, 40 (8th Cir. 1958).

presence of the nine Negro students."[213] The court noted that removing Black students from the school in order to quell an unrest they had not caused was an inappropriate legal solution.[214] Second, the court of appeals attended to the broader consequences of delaying integration. It noted that a "'temporary delay' in Little Rock would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means"[215] and refused to incentivize this type of opposition. Ultimately, the court of appeals declared that "overt public resistance, including mob protest," could not nullify a federal court order to proceed with integration.[216] To allow this "would result in 'accession to the demands of insurrectionists or rioters,' and the withholding of rights guaranteed by the Constitution of the United States," undermining law, peace, and justice.[217]

3. Supreme Court

On August 25, 1958, the U.S. Supreme Court announced a special session to hear *Cooper v. Aaron*.[218] In various pleadings, both the Board and the NAACP framed the legal issues in the case as a sort of peace versus justice dilemma, which the Court would have to settle by either delaying or enforcing integration.[219]

For its part, the Board made a series of negative peace claims for delaying integration. It argued that peace—understood as the cessation of hostilities—was a precondition for justice.[220] Delaying integration would reduce the "present highly emotional atmosphere, which has proven conducive to violence," and enable people to "find a better understanding of the nature of the problems confronting them and, consequently, the direction in which the solutions lie."[221] Indeed, the Board argued that transferring Black students to another school would protect *their* justice- and peace-related interests because their "high school education will not be interrupted" and "they will be spared the predictable mental torment and physical danger."[222]

Blaming the Supreme Court for social unrest, the Board complained that *Brown* "pronounced a rule of law which is well in advance of the mores of the

213. *Id.* at 39.

214. *See id.*

215. *Id.* at 40.

216. *Id.*

217. *Id.* (quoting Strutwear Knitting Co. v. Olson, 13 F. Supp. 384, 391 (D. Minn. 1936); Faubus v. United States, 254 F.2d 797, 807 (8th Cir. 1958)).

218. J. SUP. CT. U.S., Oct. Term 1958, at A, available at https://www.supremecourt.gov/pdfs/journals/scannedjournals/1958_journal.pdf [https://perma.cc/5XV4-RTPQ].

219. *See* LANDMARK BRIEFS, *supra* note 198, at 553–610.

220. Brief for the Petitioners, *supra* note 198, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 585.

221. Response to Application for Vacation of Order of Court of Appeals for Eighth Circuit Staying Issuance of Its Mandate, for Stay of Order of District Court of Eastern District of Arkansas and for Such Other Orders as Petitioners May Be Entitled To, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 551.

222. Brief for the Petitioners, *supra* note 198, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 570.

people of this region and violent opposition to its principle has erupted."[223] By contrast, the Board commended Judge Lemley's opinion for its ability to "adjust and balance" rather than simply "apply" Black students' rights.[224] The Board further questioned judicial capacity to balance justice with peace in the face of fierce local opposition to integration.[225]

Representing the Black students at Central High School, the NAACP urged the Supreme Court to both *reject an exclusionary negative peace* as a reason for delaying integration and *embrace an inclusionary positive peace* as a reason for enforcing integration.[226] Although there may be a balance to strike, racial justice could not be sacrificed to preserve an oppressive peace: "Neither overt public resistance, nor the possibility of it, constitutes sufficient cause to nullify the orders of the federal court directing petitioners to proceed with their desegregation plan."[227]

The NAACP argued that delaying integration would teach the wrong lessons about peace and justice.[228] It would "teach[] children that courts of law will bow to violence," which would amount to a "complete breakdown of education" worse than any temporary disturbance of schooling.[229] As then-counsel Thurgood Marshall elaborated during oral argument: "I'm not worried about the Negro children [who have been struggling with democracy long enough] . . . I worry about the white children in Little Rock who are told as young people that the way to get your rights is to violate the law and defy the lawful authorities."[230] Delaying integration would encourage segregationists to continue blocking the execution of federal orders to pursue their objectives, which would "subvert our entire constitutional framework."[231] By contrast, enforcing integration would "restate in

223. Brief for the Petitioners, *supra* note 198, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 584.

224. Brief for the Petitioners, *supra* note 198, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 585.

225. Brief for the Petitioners, *supra* note 198, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 564. Additionally, the Board's counsel, Richard C. Butler, asked during oral arguments: "Shall the courts force private citizens and officials and general assemblies to make decisions when the area is charged with emotions?" Oral Argument at 58:50 (Aug. 28, 1958, Part 2), Cooper v. Aaron, 358 U.S. 1 (1958) (No. 58-1), https://apps.oyez.org/player/#/warren6/oral_argument_audio/15580 [https://perma.cc/5PE2-RZAM].

226. Brief for Respondents, Cooper v. Aaron, 358 U.S. 1 (1958) (No. 58-1), *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 602.

227. Brief for Respondents, *supra* note 226, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 601.

228. *See* Epperson, *supra* note 31, at 694 (describing Faubus's resistance to *Brown* as sending "the treacherous and powerful message to schoolchildren of all races that structural violence is a part of our government order").

229. Brief for Respondents, *supra* note 226, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 602.

230. Oral Argument at 29:12 (Sept. 11, 1958, Part 2), Cooper v. Aaron, 358 U.S. 1 (1958) (No. 58-1), https://apps.oyez.org/player/#/warren6/oral_argument_audio/13495 [https://perma.cc/C83T-J5U7]; *see also* Epperson, *supra* note 31, at 696 (discussing Marshall's argument).

231. Brief for Respondents, *supra* note 226, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 602.

unmistakable terms both the urgency of proceeding with desegregation and the supremacy of all constitutional rights over bigots—big and small."[232]

The United States government also urged the Court to reject an exclusionary negative peace. Solicitor General J. Lee Rankin filed the U.S. brief, arguing that "mere popular hostility" does not justify "depriving Negro children of their constitutional right."[233] Like the court of appeals' opinion, this brief highlighted that Black children had not caused unrest; rather, because they were Black, their mere presence had led others to engage in protest.[234] The U.S. brief also echoed concerns that appeasing segregationists in Little Rock "would amount to an open invitation to elements in other districts to overtly act out public opposition through violent and unlawful means."[235] This was especially dangerous given how a small number of active agitators had derailed the rights of nine Black students in Little Rock.[236]

One day after the completion of oral arguments, the Supreme Court unanimously upheld the judgment of the court of appeals.[237] The Supreme Court clarified that *Brown II* permits a district court to consider "relevant factors" that might justify delaying complete integration but stated that this analysis "of course, excludes hostility to racial desegregation."[238] It added that the district court's findings of unrest at Central High School during the 1957–1958 school year were "directly traceable" to the impermissible actions that Arkansas legislators and executive officials had taken to resist *Brown*'s implementation.[239]

Ultimately, *Cooper v. Aaron* rejected the preservation of an exclusionary negative peace as a reason to deny a constitutional right to equality. Invoking its 1917 decision in *Buchanan v. Warley*,[240] the Court concluded that although public peace and order are important, "law and order are not here to be preserved by depriving the Negro children of their constitutional rights."[241]

Seeking to persuade "moderate" Southern lawyers,[242] Justice Frankfurter's concurrence elaborated on the peace–justice stakes. Although America's transition

232. Brief for Respondents, *supra* note 226, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 603.

233. Brief for the United States as Amicus Curiae, Cooper v. Aaron, 358 U.S. 1 (1958) (No. 58-1), *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 624.

234. Brief for the United States as Amicus Curiae, *supra* note 233, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 627.

235. Brief for the United States as Amicus Curiae, *supra* note 233, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 628.

236. Brief for the United States as Amicus Curiae, *supra* note 233, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 629.

237. The Supreme Court issued a per curiam opinion on September 12, 1958, with a full opinion issued on September 29. Cooper v. Aaron, 358 U.S. 1, 4–5 & n.* (1958) (describing the sequence of events and reprinting the per curiam opinion in full).

238. *Id*. at 7.

239. *Id*. at 15.

240. 245 U.S. 60 (1917).

241. *Cooper*, 358 U.S. at 16. "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature." *Id*.

242. Justice Frankfurter advised Chief Justice Warren that "the peaceful solution of the basic [desegregation] problem largely depends on winning the support of the lawyers of the South." Tony A. Freyer, Cooper v. Aaron *(1958): A Hidden Story of Unanimity and Division*, 33 J. SUP. CT. HIST. 89, 103 (2008) (citing Letter from J. Frankfurter to C.J. Earl Warren (Sept. 11, 1958)). However, according to

from Jim Crow had stirred "[d]eep emotions," those emotions ought not to stop transition processes.[243] Delaying integration was not "a constructive use of time,"[244] he argued, because it would advance neither justice nor peace and would cause even greater strife further down the road. "The progress that has been made in respecting the constitutional rights of the Negro children . . . would have to be retraced," Frankfurter warned, "perhaps with even greater difficulty . . . against the seemingly vindicated feeling of those who actively sought to block that progress."[245]

The NAACP welcomed *Cooper v. Aaron* as a victory for peace and justice, both because Black students and their parents "sought their rights in a peaceful and lawful manner through the courts" and because the Supreme Court announced that "the basic human rights of individual citizens cannot be abridged or denied because of threats or violent acts on the part of those who uphold racial discrimination and segregation."[246] Yet, despite this warm response, *Cooper* was only a partial victory for the NAACP's peace–justice claims: although the Court dismissed the *preservation of an exclusionary negative peace* as a justification for denying racial integration, it disregarded the *promotion of an inclusionary positive peace* as a reason for securing racial integration.[247]

According to a standard account, the Supreme Court made a doctrinal commitment to racial integration but recognized that its powers of enforcement were limited.[248] Given the threat of massive resistance to integration, judges could not move to promote positive peace without the support of the Legislative and Executive Branches.[249] This story about reckoning with institutional competencies in the face of resistance has been used to explain the differences between

historian Johanna Miller Lewis, even an allegedly "moderate" lawyer for the Little Rock School Board repeatedly used the n-word in open court to refer to African Americans. Miller Lewis, *supra* note 164, at 372.

243. 358 U.S. at 25 (Frankfurter, J., concurring).

244. *See id.* Highlighting another dimension of the peace–justice stakes, Frankfurter noted that Arkansas state officials themselves had interrupted "the process of the community's accommodation to new demands of law upon it . . . [that] had peacefully and promisingly begun." *Id.* at 20.

245. *Id.* at 25–26.

246. Press Release, NAACP, NAACP Hails Court's Ruling in Little Rock School Case (Sept. 12, 1958) (on file with the Library of Congress), https://hv.proquest.com/pdfs/001516/001516_002_0001/001516_002_0001_From_1_to_242.pdf [https://perma.cc/D6JC-JYA5].

247. Commentators have said much about *Cooper*'s success on the former front yet little about its failure on the latter. *See, e.g.*, Epperson, *supra* note 31, at 697 (describing *Cooper* as a "clear disavowal of state-inspired violence as a mechanism to thwart educational opportunity"); Raymond T. Diamond, *Confrontation as Rejoinder to Compromise: Reflections on the Little Rock Desegregation Crisis*, 11 NAT'L BLACK L.J. 151, 173 (1989) (*Cooper* "recognized the obstructionist gloss that might be put on *Brown II* and sought to overcome that interpretation"); KLARMAN, *supra* note 154, at 329 ("*Cooper* was more forceful and condemnatory than *Brown* had been").

248. *See* KLARMAN, *supra* note 154, at 329 (discussing how the Supreme Court's failure to monitor the desegregation process, coupled with inaction by the executive branch, supported accommodation and gradualism); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 124–27 (2004) (discussing the lack of executive branch facilitation and enforcement following *Brown*, *Brown II*, and their progeny).

249. KLARMAN, *supra* note 154, at 324 ("[The justices] apparently decided to say no more on the subject until they had received some signal of support from the political branches.").

*Brown* and *Brown II*, as well as the Court's relative dormancy between *Brown II* and the passage of the Civil Rights Act of 1964.[250]

However, *Cooper* actually required some enforcement of integration[251] and could have gone a step further by requiring enforcement for positive peace reasons. The decision could have promoted integration not just *despite* white hostility but *due to* the importance of addressing structural violence and minority frustration. Making such an explanation explicit may have contributed to the forms of "social learning" that are "necessary to reconciliation and sustainable peace in divided societies."[252] Furthermore, had *Cooper* advanced a positive peace case for *enforcing* integration, subsequent legal strategies and decisions *limiting* integration (including *Palmer v. Thompson* and *Crawford v. Board of Education*, which are discussed below[253]) would have been harder to justify. When viewed through a peace–justice lens, we can see *Cooper* as a decision that paid more attention to white emotions and ultimately favored quietude over justice.[254]

Despite the *Cooper* litigation, Arkansas state officials continued to resist integration by appealing to negative peace. On August 26, 1958, the Arkansas General Assembly passed a law allowing the Governor to close any school when "necessary in order to maintain the peace" against violence caused by integration.[255] On September 18, Governor Faubus delivered a speech warning that "once total, or near total integration is effected, the peace, the quiet, the harmony, the pride in our schools, and even the good relations that existed heretofore between the races here, will be gone forever. . . ."[256] Nine days later, the people of Little Rock voted 19,470 to 7,561 in favor of closing public schools rather than

250. *See, e.g.*, J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 486 (1978) (criticizing how "from 1955 to 1968 the Court abandoned the field of public school desegregation," taking a "nonjurisprudential" role); *see also id.* at 502–03 (noting that even if "the Court would have risked violence and righteously stormed the barricades," it possessed nothing "with which to storm them" and "needed executive leadership and support").

251. *See* KLARMAN, *supra* note 154, at 324 (naming *Cooper* as "the sole exception" to desegregation jurisprudence immediately following the *Brown* decisions).

252. Nevin T. Aiken, *Rethinking Reconciliation in Divided Societies: A Social Learning Theory of Transitional Justice*, *in* TRANSITIONAL JUSTICE THEORIES 40, 43 (Susanne Buckley-Zistel et al. eds., 2014). On the Supreme Court's capacity to teach public lessons, see generally Justin Driver, *The Supreme Court as Bad Teacher*, 169 U. PA. L. REV. 1365 (2021) (examining the educational impact of Supreme Court opinions and using three judicial opinions to demonstrate where the Court has engaged in "bad teaching").

253. *See infra* Section III.A.

254. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 626–27 (1983) (explaining how *Cooper* preserved *Brown II*'s gradualism).

255. *Governor's School-Closing Proclamation*, 3 RACE RELS. L. REP. 869, 869 (1958); *see also Governor's Address—Arkansas*, 3 RACE RELS. L. REP. 1037–38 (reprinting both Faubus's proclamation calling the special session and the text of his address to the Arkansas General Assembly).

256. Orval E. Faubus, Governor of Ark., Speech (Sept. 18, 1958) (transcript available at https://libraries.uark.edu/specialcollections/research/lessonplans/FaubusSpeechLessonPlan.pdf [https://perma.cc/GRB5-YLRJ]).

desegregating.[257] Additionally, Arkansas Attorney General Bruce Bennett's "Southern Plan for Peace" called for "peaceful harmony between the white and Negro races" by suppressing the NAACP and other civil rights organizations.[258] The Arkansas Pupil Placement Act of 1959 also allowed school boards to consider transferring pupils based in part on "the possibility of breaches of the peace."[259]

* * *

Although the field of transitional justice emerged decades after *Cooper v. Aaron*, its insights deepen our understanding of this landmark case beyond its implications for federalism. In *Cooper*, the Warren Court heard arguments that might today be viewed as competing transitional justice demands. For example, with respect to a *peace–justice balance*,[260] the Board insisted that the justice-related interests of Black children had to be weighed against (and ultimately give way to) the justice-related interests of other students as well as the peace-related interests of local communities.[261] Meanwhile, the NAACP emphasized the peace–justice interests of *all* children in integration and the importance of a justice-based peace.[262] Likewise, with respect to *timing and sequencing*,[263] the Board claimed that postponing integration by two-and-a-half years was not a case of justice denied but merely justice delayed for the sake of immediate peace.[264] In contrast, the NAACP responded that further delays both denied justice to Black people and rendered enduring peace more difficult to achieve.[265]

These arguments are a central part of the *Cooper v. Aaron* story that has been forgotten in the usual focus on its legacy of judicial supremacy. This Article aims to trace how social movements, legal advocates, and ultimately the Supreme Court grounded their interpretations of the Constitution not only in understandings of equality and the judiciary's role, but also in racial justice and peace.

257. *Crisis Timeline: Little Rock Central High School National Historic Site*, NAT'L PARK SERV., https://www.nps.gov/chsc/learn/historyculture/timeline.htm [https://perma.cc/6PUA-DV58] (last visited Apr. 8, 2022).

258. YASUHIRO KATAGIRI, BLACK FREEDOM, WHITE RESISTANCE, AND RED MENACE: CIVIL RIGHTS AND ANTICOMMUNISM IN THE JIM CROW SOUTH 127–28 (2014). Accordingly, Act 115 of the Arkansas General Assembly forbade public employment of NAACP members. Act 115, 1959 Ark. Acts 327, 327.

259. Act 46, 1959 Ark. Acts. 1827, 1829.

260. *See* text accompanying *supra* notes 48–63.

261. *See* text accompanying *supra* notes 220–22.

262. *See* text accompanying *supra* notes 228–32.

263. *See* text accompanying *supra* notes 72–75.

264. *See* text accompanying *supra* notes 220–22; Oral Argument at 1:36:53, 1:42:57 (Aug. 28, 1958, Part 1), Cooper v. Aaron, 358 U.S. 1 (1958) (No. 58-1), https://www.oyez.org/cases/1957/1_misc [https://perma.cc/LJU4-WJ74].

265. *See* text accompanying *supra* notes 228–32. Additionally, the Board cast the *Brown* decisions as externally imposed and inappropriate to the legal and political circumstances of the South, whereas the NAACP refused to allow local customs to override racial justice. *Compare* Brief for the Petitioners, *supra* note 198, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 567–69, *with* Brief for Respondents, *supra* note 226, *reprinted in* LANDMARK BRIEFS, *supra* note 198, at 601–02. Raymond T. Diamond observes that calls to localism were ironic, given that much of the opposition took place at the state level in response to local communities which were more amenable to integration. *See* Diamond, *supra* note 247, at 165.

Subsequent decisions and briefs cited *Cooper* not only as a federalism case but also as a peace–justice case.[266] This Article's transitional-justice-inflected analysis invites us to consider the peace–justice logics that are operative in subsequent racial equality cases, which is the aim of the next Part.

Beyond filling in the historical record, the preceding account of *Cooper v. Aaron* helps make sense of the recent unrest and its relationship to the law. Decades before Donald Trump's inflated threats of "antifa"[267] and "migrant caravans,"[268] *Cooper* recognized how political leaders could effectively conjure up threats in order to sow discord and slow down equality.[269] The decision further acknowledged how a few violent white supremacists could seek to derail peaceful racial progress,[270] and it refused to vindicate those strategies.[271] Likewise, Black leaders responding to the Little Rock Crisis recognized how a retreat from racial justice in the interests of "unity and harmony" would embolden racists[272] and teach the wrong lessons about justice and peace.[273] As the Biden Administration strives for "unity" in the midst of racial unrest,[274] lessons from the Little Rock Crisis and *Cooper v. Aaron* remain salient for our present moment.

## III. PEACE–JUSTICE CLAIMS AFTER *COOPER V. AARON*

Given the historical significance of the Little Rock Crisis, it is easy to dismiss *Cooper v. Aaron* as an exceptional case in which peace–justice arguments had an outsized presence. However, although *Cooper* was an inflection point, it was also just one moment in a long history of peace–justice claims-making that preceded[275] and followed[276] the Little Rock Crisis.

What *was* perhaps exceptional about *Cooper* was that the Court used peace and justice considerations to protect, rather than restrict, minority rights.[277]

266. For discussions of some of these subsequent cases and briefs, see *infra* Sections III.A and III.B.

267. Neil MacFarquhar, Alan Feuer & Adam Goldman, *Federal Arrests Show No Sign That Antifa Plotted Protests*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/11/us/antifa-protests-george-floyd.html.

268. Jeremy W. Peters, *How Trump-Fed Conspiracy Theories About Migrant Caravan Intersect with Deadly Hatred*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/caravan-trump-shooting-elections.html.

269. *See* text accompanying *supra* notes 169–70.

270. *See* text accompanying *supra* notes 235–36.

271. *See* Aaron v. Cooper, 257 F.2d 33, 38–39 (8th Cir. 1958) (stating that the ensuing violence caused by the crisis did not justify the district court's legal conclusions); Cooper v. Aaron, 358 U.S. 1, 16 (1958) ("The constitutional rights of respondents are not to be sacrificed or yielded to . . . violence and disorder.").

272. *See* text accompanying *supra* notes 209–10.

273. *See* text accompanying *supra* notes 228–32.

274. *See* Philip Bump, *Biden's Targeting of Racist Extremism is Being Portrayed as an Attack on the Right Itself*, WASH. POST (Jan. 21, 2021, 10:36 AM), https://www.washingtonpost.com/politics/2021/01/21/bidens-targeting-racist-extremism-is-being-portrayed-an-attack-right-itself/.

275. *See supra* Section II.A.

276. *See infra* Sections III.A and III.B.

277. *Cooper* may be a controversial judicial supremacy case at least in part because the Court exercised judicial supremacy to protect the peace–justice interests of marginalized rather than dominant groups.

Discussion of subsequent racial inclusion cases—concerning integration in Section III.A and affirmative action in Section III.B—shows how the Court has otherwise used these considerations to limit minority rights.[278] Section III.C argues that Supreme Court jurisprudence has historically undervalued minority peace–justice concerns and the importance of achieving a positive peace. Part IV imagines an alternative jurisprudence that overcomes these limitations in four areas—namely, affirmative action, voting rights, the First Amendment, and the Fourth Amendment—and also identifies some non-Court-centered paths to positive peace.

### A. RACIAL INTEGRATION

*Cooper v. Aaron* did not end the dispute over racial integration, which continues to be litigated.[279] The peace versus justice question has repeatedly surfaced in cases involving integration of education, public facilities, and other social spheres. However, whereas *Cooper* and its immediate progeny rejected resistance to integration as a consideration in the peace–justice calculus, subsequent cases have found similar resistance to be significant and even determinative.[280]

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278. Although illustrative, these are far from the only cases in which peace–justice considerations have featured prominently. *See, e.g.*, Wright v. Georgia, 373 U.S. 284, 285 (1963) (holding that the arrest of six Black men for breach of the peace while playing basketball in a public park constituted a Fourteenth Amendment violation); Hunter v. Erickson, 393 U.S. 385, 392 (1969) (noting that a city council's justification of discriminatory housing laws on the grounds that it was necessary to "move slowly in the delicate area of race relations" was insufficient to survive Fourteenth Amendment scrutiny); Cox v. Louisiana, 379 U.S. 536, 536 (1965) (holding that the arrest of a civil rights leader for allegedly breaching the peace during a demonstration violated his First and Fourteenth Amendment rights); Edwards v. South Carolina, 372 U.S. 229, 229–33, 238 (1963) (holding that the arrest of 187 protestors for breach of the peace was in violation of their First and Fourteenth Amendment rights); NAACP v. Alabama, 377 U.S. 288, 289–90, 310 (1964) (holding that state court decisions regarding a restraining order barring the NAACP from operating in Alabama—including for alleged breaches of peace—were subject to federal judicial review); City of Memphis v. Greene, 451 U.S. 100, 102 (1981) (holding that closing the northern end of a street connecting a predominately white residential community with a predominately Black community was not in violation of 42 U.S.C. § 1982 or the Thirteenth Amendment); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (reversing a trial court decision to award child custody to the father to avoid the child's residence in the mother's racially mixed household, noting that "[t]he Constitution cannot control such prejudices, but neither can it tolerate them"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986) (holding that specific evidence of prior discrimination—as opposed to general social inequality—was required to justify a collective bargaining agreement's provision of preferential protection to minority personnel in the event of layoffs).

279. *See, e.g.*, Matt Dwyer, *Court Hears Arguments in Connecticut Magnet School Case*, CONN. PUB. RADIO (Jan. 27, 2021, 11:51 AM), https://www.wnpr.org/post/court-hears-arguments-connecticut-magnet-school-case [https://perma.cc/PMW4-M5KU]; Eliza Shapiro, *Lawsuit Challenging N.Y.C. School Segregation Targets Gifted Programs*, N.Y. TIMES (Oct. 15, 2021), https://www.nytimes.com/2021/03/09/nyregion/nyc-schools-segregation-lawsuit.html.

280. Sumi Cho traces a shift from "massive resistance" to "passive resistance" in which opponents of racial equality "discovered a way to repackage and rearticulate backlash as moral indignation." Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from* Brown *to* Grutter, 7 U. PA. J. CONST. L. 809, 825 (2005). *See also* Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Court's Role*, 81 N.C. L. REV. 1597, 1603–04 (2003) (discussing the role the Court could have played in combatting the "massive resistance" to *Brown*).

In 1963, only five years after *Cooper*, *Watson v. City of Memphis* declared that Memphis could not further delay desegregating its public parks and other recreational facilities.[281] The Court rejected the claim that slowing the pace of integration was necessary to prevent "turmoil" by noting that "constitutional rights may not be denied simply because of hostility to their assertion or exercise."[282] Furthermore, the Court found the asserted "fears of violence and tumult" and "inability to preserve the peace" to be merely "personal speculations or vague disquietudes of city officials."[283] Applying *Cooper*[284] as well as the earlier case of *Buchanan v. Warley*,[285] *Watson* arguably went a little further toward recognizing the value of positive peace: it concluded that "goodwill between the races . . . can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted."[286]

However, *Cooper* and *Watson* would prove to be only a temporary recalibration of the peace–justice balance. With the civil rights retrenchment and conservative appointments starting in the late 1960s, the Supreme Court soon returned to enforcing dominant groups' claims that tranquility should dominate in judicial efforts to balance rights. After *Cooper*, these claims were modified and reformulated based on *Cooper*'s disregard of a positive peace.

In 1971, *Palmer v. Thompson* held that a decision by Jackson, Mississippi, to close rather than integrate all public swimming pools did not deny equal protection to Black people.[287] Jackson argued that integrating the pools would lead to violence and that closing them was consistent with *Buchanan v. Warley* and *Cooper v. Aaron* because those decisions merely *prohibited unequal treatment* in the interest of preserving negative peace; they did not *require equitable redistribution* in the interest of promoting positive peace.[288] Jackson's reasoning illustrates how segregationists adapted their exclusionary strategies and legal arguments in response to the Supreme Court's narrow peace–justice reasoning.[289]

281. Watson v. City of Memphis, 373 U.S. 526, 528, 539 (1963).

282. *Id.* at 535.

283. *Id.* at 536.

284. *See id.* at 535 (quoting Cooper v. Aaron, 358 U.S. 1, 16 (1958)).

285. *See id.* (citing Buchanan v. Warley, 245 U.S. 60 (1917)).

286. *Id.* at 537. The Court added that "[t]he best guarantee of civil peace is adherence to, and respect for, the law." *Id.*

287. 403 U.S. 217, 226 (1971). Heather McGhee has recently coined the term "drained-pool politics" to describe how such unwillingness to share resources harms all Americans. *See* HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER 273 (2021); The Ezra Klein Show, *What "Drained-Pool" Politics Costs America*, N.Y. TIMES (Feb 16. 2021), https://www.nytimes.com/2021/02/16/opinion/ezra-klein-podcast-heather-mcghee.html (documenting a discussion with Heather McGhee).

288. Brief of Respondents at 34 n.26, Palmer v. Thompson, 403 U.S. 217 (1971) (No. 70-107).

289. For an account of how segregationists reconsidered strategies in the wake of *Cooper v. Aaron*, see ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 38–39 (2009). *See also* Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1239 (2016) (arguing that "racial discrimination *adapts* to the legal and social environment by mutating to evade . . . legal and social sanction").

*Cooper*'s failure to embrace a positive peace paradigm paved the way for backsliding in these subsequent cases.

Disputing Jackson's account, Hazel Palmer and other Black residents argued that "the only peace established during 100 years of segregation was that imposed upon blacks by the force and repression of the dominant white society."[290] They insisted that *Brown v. Board of Education* had not only rejected the exclusionary negative peace of Jim Crow but had also placed the United States on "the road to integration and equality, rather than segregation and repression, as the proper constitutional direction to ultimate racial peace."[291] Although the integration of public pools would not end racial strife, circumventing integration would maintain it, for "long-suffered repression, not freedom and equality, . . . inevitably leads to violent upheaval."[292]

A 5–4 majority (with the votes of two recent Nixon appointees) dismissed Black residents' peace–justice claims in *Palmer*.[293] Unlike in *Cooper* and *Watson*, the Court failed to interrogate the factual veracity and legal relevance of the alleged threat to social peace in Jackson.[294] Instead, by taking claims of integration's threat to peace at face value, *Palmer* enabled precisely the sort of negative peace based on racial separation that *Cooper* had rejected.

Whereas *Palmer* distinguished itself from *Cooper*, the peace–justice dimensions of *Cooper* were ignored altogether in later decades. In *Crawford v. Board of Education* in 1982, for example, the Court contemplated an amendment to the California Constitution that stripped state courts of the power to order mandatory desegregation except to remedy Fourteenth Amendment violations.[295] The text of the amendment claimed that this was necessary for "preserving harmony and tranquility in this state and its public schools."[296] In an amicus brief opposing the amendment, Margaret Tinsley and other parents of schoolchildren situated this language in historical context. Citing references to peace, safety, and good order in cases such as *Dred Scott v. Sandford* and *Plessy v. Ferguson*, they argued that "the need for racial peace and harmony has been given as the justification for every other *retrogressive* racial action throughout the history of this country."[297] They appealed to the *Buchanan–Cooper–Watson* line of cases to show that forsaking justice for the sake of an exclusionary negative peace was both morally and legally wrong.[298]

The majority opinion in *Crawford* upheld California's amendment partly on the premise that it did not embody an explicit racial classification.[299] In so doing,

290. Reply Brief for Petitioners at 4, Palmer v. Thompson, 403 U.S. 217 (1971) (No. 70-107).
291. *Id.*
292. *Id.*
293. 403 U.S. 217, 226 (1971).
294. *Compare id.*, *with* Cooper v. Aaron, 358 U.S. 1, 26 (1958), *and* Watson v. City of Memphis, 373 U.S. 526, 536 (1963).
295. *See* 458 U.S. 527, 531–35 (1982).
296. CAL. CONST. art. 1, § 7(a).
297. Brief of Amici Curiae Margaret Tinsley et al in Support of Petitioners at 10, Crawford v. Bd. of Educ., 458 U.S. 527 (1982) (No. 81-38).
298. *See id.* at 13.
299. *Crawford*, 458 U.S. at 543 n.29, 544–45.

the majority ignored the history of how racialized appeals to "harmony and tranquility" have been weaponized. By contrast, Justice Marshall's dissenting opinion said that California's amendment *did* embody a racial classification and the purported justification of "harmony and tranquility" could not sustain it.[300]

In more recent years, legal arguments against integration have evolved into appeals to harmony and fairness rather than overt opposition to racial inclusion. The 2007 decision in *Parents Involved v. Seattle*[301] illustrates how the Roberts Court has accepted these peace–justice claims to diminish, rather than safeguard, minority rights. In this case, the Court invalidated student assignment plans in Louisville and Seattle that promoted integration by taking explicit account of a student's race.[302] The petitioner, Parents Involved in Community Schools, depicted race-based integrative measures as a threat to *peace* by asserting that all classifications by race are divisive.[303] Furthermore, it deemed those measures a threat to *justice* based on asserted harms to individual students who could not attend the school of their choice, as well as an alleged stigmatization of minority students assigned to white-dominated schools.[304] Although these arguments appeared different from the overtly segregationist arguments of the Jim Crow era,[305] their purpose and effect were similar: to cast the implementation of racial integration as an unconstitutional impediment to justice and peace.

Even though the Court was presented with multiple briefs highlighting the peace–justice *benefits* of ensuring racial integration,[306] Chief Justice Roberts

300. *Id*. at 559 n.6 (Marshall, J., dissenting).

301. 551 U.S. 701 (2007).

302. *Id*. at 709–10.

303. *See* Petitioner's Reply Brief at 2–4, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915).

304. *Id*. at 1–2.

305. *See, e.g*., Cope, *supra* note 163, at 167 (discussing how the segregationist group, Mothers' League of Central High School, was "inclined to stress . . . its maternal interest in the well-being of children").

306. Several amici supported Louisville's and Seattle's plans for both negative and positive peace reasons. For example, the Anti-Defamation League argued that integration "may in the long run prove the only means we have to overcome that serious challenge [of racial and ethnic strife]," and that integrative measures are necessary to "correct a great historical wrong" and "eradicate forever the legacy that has burdened this Nation with decades of injustice, struggle, and violence." Brief *Amicus Curiae* of Anti-Defamation League in Support of Respondents at 5, 11, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915). Additionally, former Chancellors of the University of California said that "if California and the Nation are to build the social harmony and mutual respect that are central to our constitutional tradition, then voluntary efforts to create racially integrated public schools should be hailed as an affirmation, not a violation, of constitutional principle." Brief of 19 Former Chancellors of the University of California as *Amici Curiae* in Support of Respondents at 30, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915). A brief of religious organizations described "[s]ocial-science research [that] points to the value of integrated schools in fostering a sense of community and common destiny, even in communities that have experienced long, violent conflicts along religious lines." Brief of Religious Organizations and Affiliated Individuals as *Amici Curiae* in Support of Respondents at 4–5, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915). Similarly, the Leadership Conference on Civil Rights argued that "[a]ttending an ethnically diverse school may . . . prepar[e] minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." Brief for the Leadership

complained about the purported peace–justice *costs* of employing racial classifications.[307] Justice Thomas's concurrence cited instances in which integration may lead to conflict in an effort to cast doubt on whether integration contributes to racial reconciliation.[308] By contrast, Justice Breyer's dissent lamented that the Court had ignored the "law's concern to diminish and peacefully settle conflict among the Nation's people" and predicted that the majority's decision would "aggravat[e] race-related conflict."[309]

### B. AFFIRMATIVE ACTION

The peace versus justice question has perhaps most significantly influenced affirmative action law. When affirmative action first reached the Supreme Court in the 1970s, both sides of the debate employed peace–justice arguments. White litigants challenged the policy as a threat to *justice* on the belief that it was unfair to individual white applicants as well as a threat to *peace* on the basis of its alleged divisiveness.[310] In contrast, equality-seeking advocates argued that affirmative action had both negative and positive peace benefits: they urged that it would quell minority unrest as well as improve the prospects for enduring racial peace.[311] The post-*Cooper-Watson* Court not only rejected these peace–justice arguments for *expanding* affirmative action, but it also accepted certain peace–justice arguments for *limiting* affirmative action.[312]

In 1974 in *DeFunis v. Odegaard*, a lawsuit against the University of Washington Law School that was ultimately declared moot, [313] some briefs *defended* affirmative action as an antidote to both racial injustice and minority unrest. For example, an amicus brief of members of Rutgers University explained that the Rutgers Law School had adopted a minority student program not only to "eliminate the fruits of white racism from its admission policies" but also to address the "general political and social unrest that existed in the non-white communities of Newark."[314] Similarly, the brief of the American Bar Association agreed that minority underrepresentation in the legal profession posed "the

Conference on Civil Rights and the Leadership Conference on Civil Rights Education Fund as Amici Curiae in Support of Respondents at 3, *Parents Involved*, 551 U.S. 701 (2007) (Nos. 05-908 & 05-915) (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 472–73 (1982)).

307. *See Parents Involved*, 551 U.S. at 746–48.

308. For Thomas, "it [was] unclear whether increased interracial contact improves racial attitudes and relations," and some "cases reflect[ed] the fact that racial mixing does not always lead to harmony and understanding." *Id.* at 769 & n.17 (Thomas, J., concurring). *See also* Laura Kalman, *Brief Lives*, 127 YALE L.J. 1638, 1662 (2018) (book review) (tracing the argument that "integration just deepened antagonism between the races").

309. *Parents Involved*, 551 U.S. at 866 (Breyer, J., dissenting).

310. *See* text accompanying *infra* notes 321–23.

311. *See* text accompanying *infra* notes 314–20.

312. On the development of affirmative action law, see Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2513–24 (2019).

313. 416 U.S. 312, 319–20 (1974) (per curiam).

314. Brief for the Board of Governors of Rutgers the State University of New Jersey and the Student Bar Association of Rutgers School of Law at Newark as *Amici Curiae* at 41–42, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235).

serious possibility of social unrest, if not upheaval" because minorities "will continue to suffer disillusionment with and alienation from the legal system" and "will seek other means, possibly violent ones, to meet their needs."[315] These amici said that affirmative action was needed to mitigate the threats to negative peace posed by racial exclusion.

Three years later in *Regents of the University of California v. Bakke*,[316] other briefs echoed the need "to achieve a societal goal of racial peace and integration through improvement of the opportunity of a racial minority."[317] For example, the amicus brief of Howard University posited that "[t]he tranquility and stability of our society is directly tied to the equity" with which social benefits are dispensed, such that the denial of those benefits to minorities would "lead to disquiet, discord and social unrest."[318] This brief described minorities as "victims of 'time and inertia,'" pointing to how justice for minorities had been endlessly delayed to preserve the status quo.[319] It suggested that racial inclusion was urgently necessary and that delaying inclusion was itself a form of injustice.[320]

Yet, these were not the only peace–justice claims in circulation; briefs *opposing* affirmative action painted it as an affront to justice and peace. Although outright hostility to integration had become an unviable legal strategy, white litigants could challenge minority-inclusive policies as unfair and divisive.[321] Thus, whereas integration was once cast as oppressive and disruptive of white society,[322] the amicus brief for Young Americans for Freedom (signed by Marco DeFunis, the named plaintiff in *DeFunis v. Odegaard*) now characterized affirmative action as an affront to "individual liberty" and "divisive" of integrated society.[323] Yet, these forms of resistance had similar purpose and effect across time:

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315. Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 16, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235).

316. 438 U.S. 265 (1978).

317. Brief of Amicus Curiae Cleveland State University Chapter of the Black American Law Students Association at 15, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

318. Brief of Howard University as Amicus Curiae at 31, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

319. *Id.*

320. *Id.*

321. On the evolution of this resistance to racial inclusion, see generally Cho, *supra* note 280 (tracing the conflict around access to education from the 1950s to early 2000s).

322. As one segregationist anonymously complained to Little Rock school superintendent Virgil Blossom, Black people were not "working for equality but supremacy—with *your* help, they will get it." ANDERSON, *supra* note 163, at 76. Despite their fervent efforts to stop integration, at least some segregationists in Little Rock claimed to harbor no animosity toward Black people. Cope, *supra* note 163, at 170.

323. Brief of Amicus Curiae Young Americans for Freedom at 25, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811); *see also* Brief of American Jewish Committee, American Jewish Congress, Hellenic Bar Association of Illinois, Italian-American Foundation, Polish American Affairs Council, Polish American Educators Association, Ukranian Congress Committee of America (Chicago Division) and Unico National, *amici curiae* at 34, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (cautioning against the "profound and divisive implications" of affirmative action); Brief Amici Curiae for the Fraternal Order of Police, The Conference of Pennsylvania State Police Lodges of the Fraternal Order of Police, The International Conference of

to depict race-based inclusion as a threat to, rather than a vital element of, justice and peace.

Despite these claims, four Justices in *Bakke*—Justices Blackmun, Brennan, Marshall, and White—maintained fidelity to *Cooper* and voted to uphold race-based affirmative action, even if facially neutral plans were "more acceptable to the public"[324] and racial inclusion would "upset the settled expectations of non-minorities."[325] In a separate opinion that went beyond *Cooper* in advocating a positive peace, Justice Marshall cautioned that "America will forever remain a divided society" without the inclusion of Black people in public life.[326]

However, in an opinion that would prove hugely influential in constitutional law, Justice Powell took a different view. Justice Powell recalibrated the peace–justice balance by giving substantial weight to concerns that *Cooper* had deemed unworthy: the feelings of resentment arising from racial inclusion. With respect to *justice*, he warned of "the inherent unfairness of, and the perception of mistreatment that accompanies" affirmative action along racial lines.[327] With respect to *peace*, he worried that such affirmative action "may serve to exacerbate racial and ethnic antagonisms rather than alleviate them,"[328] expressing particular concern for the "deep resentment" of "innocent" white people.[329] Thus, whereas four of his colleagues saw race-based inclusion as an act of justice that was a precondition for peace, Justice Powell saw that same inclusion as a form of injustice that was a precursor for conflict.[330]

Justice Powell concluded that affirmative action should be limited and permitted only in the pursuit of a diverse student body. Justice Powell's opinion required affirmative action programs to use the racially covert and conciliatory language of "diversity" to avoid antagonizing white litigants. It also precluded a different peace–justice calculation in the future by stipulating that affirmative action was

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Police Associations and the International Association of Chiefs of Police at 3, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (cautioning against "the racial quota, with all its divisive and arbitrary effects[] . . . becom[ing] a fixed feature in our professions and occupations"); Brief of the Chamber of Commerce of the United States of America Amicus Curiae at 40, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) ("Quotas are divisive and may lead to racial antagonism.").

324. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

325. *See id.* at 363.

326. *Id.* at 396 (Marshall, J., concurring in the judgment in part and dissenting in part).

327. *Id.* at 294 n.34 (Powell, J.).

328. *Id.* at 298–99.

329. *Id.* at 294 n.34. Justice Powell emphasized that "racial preferences" threaten peace when he wrote in a footnote in *Bakke*: "*All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious." *Id.*

330. Justice Powell had long paid attention to campus unrest, as evidenced by a speech given in 1968—a decade before *Bakke* and before his appointment to the Court. *See* Lewis F. Powell, Jr., A Strategy for Campus Peace, Address to the American Association of State Colleges and Universities 20–21 (Nov. 11, 1968) (transcript available at https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1013&context=powellspeeches [https://perma.cc/JX6F-G4KQ]).

permitted *only* because of the universal benefits of diversity and *never* because of minority claims to justice.[331]

Peace–justice claims resurfaced in *Grutter v. Bollinger* in 2003, a case that endorsed Justice Powell's diversity approach in *Bakke*.[332] A brief filed by Kimberly James and other student intervenors predicted that striking down race-sensitive affirmative action would "resegregate, divide, and polarize our country" and "inevitably lead to social explosion."[333] Another brief by the Leadership Conference on Civil Rights argued that "managing our diversity, breaking down barriers, and creating leaders who understand both our similarities and our differences" were key to addressing American polarization.[334] These briefs named racial exclusion as a threat to racial peace, and they advanced diversity as a means to promote integration and ameliorate divisions.

*Grutter v. Bollinger* offered a more racially inclusive peace–justice analysis than *Bakke*. In relation to *justice*, Justice O'Connor acknowledged that "[b]y virtue of our Nation's struggle with racial inequality, [minority] students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."[335] In relation to *peace*, she recognized that affirmative action could "promote[] 'cross-racial understanding,' help[] to break down racial stereotypes, and 'enable[] [students] to better understand persons of different races.'"[336] In contrast to *Bakke*, *Grutter* more readily saw racial inclusion as a path to harmony. Even so, *Grutter* stopped short of fully embracing affirmative action as a means of tackling systemic racism as opposed to merely a means of mitigating racial conflict.[337]

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331. Justice Powell allowed limited use of "racial preferences" in the pursuit of a diverse student body, so long as such use satisfied strict scrutiny. However, he rejected both the use of "racial quotas" designed to increase minority enrollment as well as policies that proposed to remedy the underrepresentation and societal mistreatment of minorities. *See Bakke*, 438 U.S. at 306–12; Joshi, *supra* note 312, at 2513–16.

332. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

333. Brief for Respondents Kimberly James, et al. at 8, 37, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). Referring to bans on affirmative action in California and Texas, the student intervenors reasoned that "giv[ing] special preferences 'to the children of alumni, to the affluent . . ., the famous, and the powerful,' while denying opportunities to the majority of young people who reside in these[] states, breed[s] understandable anger and resentment." *Id.* at 37.

334. Brief of the Leadership Conference on Civil Rights and the LCCR Education Fund as Amici Curiae in Support of Respondents at 12–13, Grutter v. Bollinger, 539 U.S. 306 (2003) & Gratz v. Bollinger, 539 U.S. 244 (2003) (Nos. 02-241, 02-516).

335. *Grutter*, 539 U.S. at 338.

336. *Id.* at 330. According to Justice O'Connor, affirmative action could also "cultivate a set of leaders with legitimacy in the eyes of the citizenry" by ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332.

337. Other (dissenting) opinions have better understood affirmative action as a means to achieve positive peace. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) ("The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital." (citation omitted)); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part) ("It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to

The 2016 affirmative action case, *Fisher v. University of Texas*,[338] reached the Court during a year marked by intense racial tension across America's universities, with minority students recounting experiences of racism and isolation and calling for race-sensitive responses to these problems.[339] Justice Kennedy, who had dissented in *Grutter*, seemed unwilling to further fuel racial tensions by ending all consideration of race in admissions. His majority opinion in *Fisher* maintained the peace–justice balance of *Grutter* while reminding universities that racial classifications "used in a divisive manner" could undermine cross-racial understanding and harmony.[340] Yet, the tensions that plagued college campuses at the time of *Fisher* stemmed not from the use of racial classifications but from the lack of racial equity.[341] As in *Grutter*, the Court in *Fisher* refrained from acknowledging these justice-related stakes.

### C. PEACE–JUSTICE IMBALANCE

So far, this Article has shown how peace–justice claims have permeated racial equality debates and how courts have interpreted those claims. It has also shown that legal peace–justice arguments have both international parallels and American antecedents. Although today's chants of "No Justice! No Peace!" appear only tenuously connected to legal cases, they are part of a longer history of claims that minorities have made both before and beyond courts. How would we reconsider legal doctrine if we recognized the peace–justice claims of Black Americans from the Civil Rights Era (or even earlier) up to the present day?[342] This Part closes by critiquing the Supreme Court's approach to peace and justice before reimagining the pursuit of these values through courts and other segments of society.

*The Supreme Court has legitimated white resentments while disregarding minority frustrations*.—Decisions like *Bakke* and *Parents Involved* have entrenched

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race in making decisions about who will hold the positions of influence, affluence, and prestige in America."). For a critique of *Grutter* along these lines, see Cho, *supra* note 280, at 829–30.

338. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

339. *See, e.g.*, Anemona Hartocollis & Jess Bidgood, *Racial Discrimination Protests Ignite at Colleges Across the U.S.*, N.Y. TIMES (Nov. 11, 2015), https://www.nytimes.com/2015/11/12/us/racial-discrimination-protests-ignite-at-colleges-across-the-us.html; Katherine Long, *What It's Like to Be Black on Campus: Isolated, Exhausted, Calling for Change*, SEATTLE TIMES (Apr. 11, 2016, 12:02 PM), http://www.seattletimes.com/seattle-news/education/what-its-like-to-be-black-on-campus-isolating-exhausting-calling-for-change.

340. *Fisher II*, 136 S. Ct. at 2210.

341. *See generally* Chrystal A. George Mwangi, Barbara Thelamour, Ijeoma Ezeofor & Ashley Carpenter, *"Black Elephant in the Room": Black Students Contextualizing Campus Racial Climate Within US Racial Climate*, 59 J. COLL. STUDENT DEV. 456 (2018) (contextualizing the campus racial climate within broader racial injustice and tensions in the United States); Steven W. Bender, *Campus Racial Unrest and the Diversity Bargain*, 5 IND. J.L. & SOC. EQUAL. 47 (2016) (noting racial inequities as source of campus unrest).

342. On how legal understandings emerge from interactions between the public and the judiciary, see generally Guinier & Torres, *supra* note 14 (arguing that "social movements of the Civil Rights Era were actually sources of law"); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (using cases from the 2002 Supreme Court Term to illustrate the relationship between constitutional law and the beliefs and values of nonjudicial actors).

resentment arising from integration as a legally acceptable impediment to addressing structural inequalities.[343] Essentially, such decisions have elevated the grievances of groups that benefited under racial apartheid into governing principles for a multiracial democracy.[344] Through depicting integration as unjust and unpeaceful, its opponents have perpetuated the persistence of racial exclusion, inequities, and disempowerment in new forms. By restricting integration because it appears unfair and divisive to its opponents, the Court has allowed white supremacy to persist *not only through structural inequality but also the power to define justice or peace itself*. Court decisions inscribing that power into law have transformed a transition toward racial justice into one toward "colorblindness."[345]

As the Court has legitimated white resistance, it has ignored minority frustrations. Minorities have long argued, inside and outside courts, that the United States needs to address racial stratification in order to alleviate racial strife, yet these narratives are mostly absent from the Court's decisions. Instead, when restricting race-sensitive policies, several Justices have treated white resentments as more democratically legitimate[346] than minority frustrations.[347] Although individual Justices may have done so to broach compromise, their approaches neither

343. Political theorist Mihaela Mihai argues that although courts may not be "the only, or the best, institutions for the task of engaging negative emotions[,]" they can "have an important impact on the emotional circumstances of justice in transition." MIHAELA MIHAI, NEGATIVE EMOTIONS AND TRANSITIONAL JUSTICE 77–78 (2016). American legal scholars have increasingly examined the role of emotions in constitutional decisionmaking. *See, e.g.*, Kathryn Abrams, *Exploring the Affective Constitution*, 59 CASE W. RSRV. L. REV. 571 (2009).

344. For example, in order to mitigate white resentment, *Bakke* forced affirmative action advocates to make their claims using the conciliatory language of "educational diversity," 438 U.S. 265, 320 (1978), rather than the emancipatory language of racial justice. Meanwhile, affirmative action opponents continue to present a full range of peace–justice arguments against race-based inclusion.

345. Critical race scholars reject "colorblind" racial ideology on the grounds that colorblindness dehistoricizes race and divorces it from social meaning, obscures and legitimizes practices that maintain racial inequalities, and actively undermines rather than vindicates constitutional commitments to equality. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337 (1988) (describing "a formalistic, color-blind view of civil rights that had developed in the neoconservative 'think tanks' during the 1970's" and "calls for the repeal of affirmative action and other race-specific remedial policies" (citation omitted)); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2 (1991) (arguing that the "United States Supreme Court's use of color-blind constitutionalism—a collection of legal themes functioning as a racial ideology—fosters white racial domination"); Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) (describing "reactionary colorblindness" as "an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility").

346. *See* MIHAI, *supra* note 343, at 9 (distinguishing between democratically legitimate and illegitimate emotions).

347. In *Bakke*, as we saw, Justice Powell limited race-sensitive affirmative action as a means to mitigate the "deep resentment" likely to be felt by "innocent persons" who bear the cost of affirmative action. *See supra* notes 327–31 and accompanying text. In addition (or instead), Powell could have invoked the peace–justice concerns of racial minorities—concerns that counsel in favor of more direct reliance on race and *against* de-emphasizing race. *See* Joshi, *supra* note 312, at 2544–45.

grapple with nor resolve the sources of minority frustration—effectively treating them as insignificant.[348]

*The Supreme Court has enabled an oppressive negative peace while impeding a positive peace*.—Current legal doctrine both restricts remedies that directly address race and permits oppressive laws and practices so long as no explicit reference to race is made.[349] Even where the law permits limited steps toward racial inclusion (for example, with affirmative action programs and disparate impact liability), Black people are expected to make peace with a white-dominated status quo.[350] Meanwhile, white people's sense of entitlement and victimhood remains unchallenged and even sacrosanct.[351] In these and other ways, the Supreme Court enables an oppressive negative peace in which de jure discrimination is prohibited yet de facto inequality is both permissible and pervasive.

While enabling an oppressive negative peace, the Court also impedes a positive peace based in the absence of structural violence and the presence of social justice. Positive peace cannot be secured with the mere elimination of overtly

348. In this vein, Reva Siegel argues that the Court exercises "empathy" with white plaintiffs in affirmative action cases in ways that it does not with minorities subjected to racial profiling, leading to a "divided" implementation of equal protection law. *See* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 4 (2013). White Justices and their predominantly white law clerks may be less attuned to minority concerns. *See* Joshi, *supra* note 312, at 2547.

349. *Compare* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65, 270 (1977) (facially neutral state action is subject to rational basis review absent evidence of discriminatory intent (citing *Washington v. Davis*, 426 U.S. 229 (1976))), *with* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (racial classifications designed to benefit minorities "are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

350. As recent law school graduate Hannah Taylor reflected in the wake of George Floyd's killing: "*Grutter*'s promise that diversity alone could cure racism meant that my pain has always served as a steppingstone for the education of my white classmates." Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, SLATE (June 12, 2020, 1:50 PM), https://slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html [https://perma.cc/A89A-9T53].

351. *See generally* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci: *Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 85 (2010) (arguing that *Ricci v. DeStefano* advances an "ideological realignment of antidiscrimination law to center on . . . whites"); Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 288 (2015) (discussing how "[t]he end result of the *Fisher* [*I*] majority opinion was the reinforcement and fortification of white privilege"); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 453 (2014) (discussing how the diversity rationale for affirmative action supports white privilege and inhibits the development of white antiracist identity formation); L. Taylor Phillips & Brian S. Lowery, *The Hard-Knock Life? Whites Claim Hardships in Response to Racial Inequity*, 61 J. EXPERIMENTAL SOC. PSYCH. 12, 16 (2015) (finding that "Whites claim increased life hardships when exposed to evidence of racial privilege, that these claims are motivated by threat to self, and that these claims help Whites deny that racial privilege extends to themselves"); Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS. ON PSYCH. SCI. 215, 217 (2011) (finding that "not only do Whites think more progress has been made toward equality than do Blacks, but Whites also now believe that this progress is linked to a new inequality—at their expense"); Clara L. Wilkins & Cheryl R. Kaiser, *Racial Progress as Threat to the Status Hierarchy: Implications for Perceptions of Anti-White Bias*, 25 PSYCH. SCI. 439, 444 (2014) (finding that "racial progress causes Whites who view the status hierarchy as fair to react by perceiving more anti-White bias").

racist laws but instead requires getting to the deeper roots of systemic racism.[352] Accordingly, racial justice advocates have urged the Court to move from avoiding racial conflict to affirming racial equity as the proper basis for peace.[353] Yet, even *Cooper v. Aaron*, which was a peak of inclusionary peace–justice reasoning at the Court, neglected the positive peace claims that were made widely both before and beyond the Court.[354] Post-*Cooper* decisions have actively impeded the systemic actions needed for securing a positive peace, making it all the more difficult to achieve through courts.[355]

Earlier Supreme Court decisions such as *Plessy v. Ferguson* maintained racial apartheid for "the preservation of the public peace and good order."[356] Although *Cooper v. Aaron* said that "law and order are not . . . to be preserved by depriving the Negro children of their constitutional rights,"[357] subsequent cases again cited tranquility, stability, and harmony as valid reasons to limit racial equality.[358] Considering this longer historical trajectory reveals that the Supreme Court prioritizes quietude over justice. Meanwhile, decisions such as *Buchanan v. Warley*, *Cooper v. Aaron*, and *Watson v. City of Memphis* remain outliers in giving even partial recognition to the peace–justice claims of marginalized groups.[359]

*Law should attend to the causes and consequences of social unrest, recognizing some sources of unrest as more legitimate than others*.—Unrest may stem from both illegitimate and legitimate negative emotions.[360] In enforcing school integration in *Cooper v. Aaron*, for example, the court of appeals opinion

352. For a discussion of positive peace, *see supra* notes 55–58 and accompanying text.

353. *See supra* Sections II.C (discussing peace–justice claims in *Cooper v. Aaron*), III.A (same in subsequent integration cases), and III.B (same in subsequent affirmative action cases). Along these lines, Darren Lenard Hutchinson charges that "[t]he Court appears to believe that social cohesion is more important than racial justice." Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 7 (2015).

354. *See supra* Part II (discussing peace–justice claims from *Brown v. Board of Education* to *Cooper v. Aaron*).

355. For example, decisions have disregarded systemic disadvantage by striking down policies designed to address both residential and educational segregation patterns. *See* Joshi, *Racial Transition*, *supra* note 16, at 1206–07.

356. Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

357. Cooper v. Aaron, 358 U.S. 1, 16 (1958).

358. *See* text accompanying *supra* notes 287–300.

359. *See supra* Part III.

360. Mihaela Mihai differentiates between "legitimate and illegitimate manifestations of public outrage," observing:

> Our outraged sense of justice can be misguided—oversensitive, lacking proof or solid arguments, or pushing us to perpetuate cycles of violence. . . . While negative emotions can be powerful forces of social change, they can also serve undemocratic purposes. However, if motivated by a concern with what is owed to everyone as an equal member of the political community and expressed in ways that do not push societies further down a spiral of abuse, they can stimulate important debates and catalyze institutional redress.

MIHAI, *supra* note 343, at 9. On how racialized experiences may shape negative emotions, see, for example, Joanne M. Kaufman, Cesar J. Rebellon, Sherod Thaxton & Robert Agnew, *A General Strain Theory of Racial Differences in Criminal Offending*, 41 AUSTL. & N.Z. J. CRIMINOLOGY 421, 424–31 (2008).

emphasized that unrest was "the direct result of popular *opposition* to the presence of the nine Negro students,"[361] and the Supreme Court opinion similarly traced the unrest to "drastic opposing action on the part of the Governor of Arkansas."[362] Justice Frankfurter's concurrence warned against vindicating such illegitimate negative emotions.[363] By delaying integration, "the seemingly vindicated feeling of those who actively sought to block . . . progress" would beget further obstruction.[364] By enforcing integration, those "feelings will yield, gradually though this be, to law and education."[365] In this case, unrest precipitated by *white resistance* to integration was not deemed worthy of deference because it ran contrary to the demands of law and justice. Vindicating this resistance would make both peace and justice more difficult to achieve.

In contrast, the Kerner Commission Report, released in the wake of the 1967 racial unrest,[366] indicated that unrest stemming from *minority frustration* was worthy of deference because it reflected legitimate negative emotions consistent with the demands of law and justice.[367] The Report observed that "[f]rustrated hopes are the residue of the unfulfilled expectations aroused by the great judicial and legislative victories of the civil rights movement" and fueled "by white terrorism directed against nonviolent protest" and "by the open defiance of law and Federal authority by state and local officials resisting desegregation."[368] Ultimately, the Kerner Report held that "[w]hite racism" was "essentially responsible for the explosive mixture which has been accumulating in our cities,"[369] and it called for social and legal reforms to "change the system of failure and frustration that now dominates the ghetto and weakens our society."[370]

Comparing these sources suggests that unrest in response to racial inequities is more democratically legitimate than unrest arising from white racism and protectionism. The former is aimed at fundamental democratic goods such as equality, representation, and accountability, moving the United States toward becoming a full democracy.[371] Accordingly, antiracist chants of "No Justice! No Peace!" are democratically legitimate in ways that white nationalist chants of "You will not

361. Aaron v. Cooper, 257 F.2d 33, 39 (8th Cir. 1958).

362. Cooper v. Aaron, 358 U.S. 1, 9 (1958).

363. *See id.* at 25 (Frankfurter, J., concurring).

364. *Id.* at 26.

365. *Id.* at 25; *see also* MIHAI, *supra* note 343, at 77 ("By constructively and dialogically engaging with illegitimately resentful and indignant citizens, courts can hope to woo their support and thus broaden the support for democracy."); Karl N. Llewellyn, *What Law Cannot Do for Inter-Racial Peace*, 3 VILL. L. REV. 30, 31 (1957) ("[T]he machinery of law-government can be built . . . to set up ideals still far from full attainment, to set up tension, steady or sudden, in the direction of those ideals, and in some degree to block off or to beat down obstruction.").

366. Clyde Haberman, *The 1968 Kerner Commission Report Still Echoes Across America*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/2020/06/23/us/kerner-commission-report.html.

367. *See* KERNER REPORT, *supra* note 112, at 1.

368. *Id.* at 5.

369. *Id.*

370. *Id.* at 2.

371. Rep. John Lewis famously called this "good trouble, necessary trouble" to "redeem the soul of America." John Lewis, Opinion, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html.

replace us!"[372] are not. Similarly, cross-racial protests in solidarity with Black lives are legitimate in ways that a white supremacist insurrection to overturn an election is not.[373] However, certain legal and political responses to unrest have treated antiracist speech and protest as more dangerous than white supremacy.[374] A legal system truly aimed at equality would distinguish between forms of social unrest based on the legitimacy of their causes and demands. Additionally, it would consider the government's failure to redress structural inequalities and the frustrations arising from those inequalities more pressing than the resentments stemming from a loss of privileged status.[375]

*Law should strive for the elimination of structural violence to truly mitigate social conflict in the long run.*—A better legal system would appreciate how ignoring the justice claims of disenfranchised groups may both undermine longer-term positive peace and endanger short-term negative peace. Faced with competing peace–justice claims, decisionmakers would choose the legal path that better facilitates "the removal of the root causes of violence and the pursuit of structural changes."[376] This does not necessarily mean that the justice claims of subordinated groups would prevail to their fullest extent on each occasion; both racial and transitional justice perspectives recognize the possibility of "principled" compromises.[377] However, even if a compromise on equality were considered necessary in the short term, political leaders and judges would not forge any compromise that would impede positive peace in the longer term.[378]

372. *See* Farah Peterson, *Foreword*, 104 VA. L. REV. ONLINE 1, 4 (2018) (discussing the white supremacist rally in Charlottesville, Virginia, in August 2017).

373. *See* Baynard Woods, *Trump's Mob at the Capitol Was Following an Old White Supremacist Playbook*, WASH. POST (Jan. 7, 2021, 1:56 PM), https://www.washingtonpost.com/outlook/2021/01/07/trump-mob-capitol-red-shirts/; Hakeem Jefferson, *Storming the U.S. Capitol Was About Maintaining White Power in America*, FIVETHIRTYEIGHT (Jan. 8, 2021, 11:56 AM), https://fivethirtyeight.com/features/storming-the-u-s-capitol-was-about-maintaining-white-power-in-america/ [https://perma.cc/PY9U-J3YB].

374. *See* Reid J. Epstein & Patricia Mazzei, *G.O.P. Bills Target Protesters (and Absolve Motorists Who Hit Them)*, N.Y. TIMES (June 16, 2021), https://www.nytimes.com/2021/04/21/us/politics/republican-anti-protest-laws.html; Charles M. Blow, Opinion, *Rittenhouse and the Right's White Vigilante Heroes*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/opinion/kyle-rittenhouse-not-guilty-vigilantes.html; Kimberlé Crenshaw, *The Panic Over Critical Race Theory Is an Attempt to Whitewash U.S. History*, WASH. POST (July 2, 2021), https://www.washingtonpost.com/outlook/critical-race-theory-history/2021/07/02/e90bc94a-da75-11eb-9bbb-37c30dcf9363_story.html.

375. On the complexities of white privilege, see Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 482 (2019).

376. Lynn Davies, The Power of a Transitional Justice Approach to Education: Post-Conflict Education Reconstruction and Transitional Justice 1 (Mar. 2017), https://www.ictj.org/sites/default/files/Transitional_justice_edudcation_Davies.pdf [https://perma.cc/R787-KDHB] (describing the requirements of positive peace).

377. *See* Joshi, *Racial Equality Compromises*, *supra* note 16.

378. For example, Jack Balkin and Reva Siegel observe that "[l]aws dismantling status hierarchies cannot redistribute opportunities to subordinate groups too transparently" because they provoke backlash from dominant groups unwilling to relinquish their privileged status. Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, *in* THE CONSTITUTION IN 2020 93, 98 (Jack M. Balkin & Reva B. Siegel eds., 2009). On the other hand, Kimberlé Crenshaw notes that "there are limits to the degree that racial justice can be finessed . . . at some point the rubber meets the road and the specific

Precisely because the pursuit of positive peace is a long-term endeavor, these leaders and judges would prepare Americans for racial reckoning instead of professing that brief implementation of discrete measures has resolved centuries of racial subordination.[379]

## IV. BETTER JURISPRUDENCE AND NON-COURT-CENTERED PATHS

Once we recognize that peace–justice considerations arise across cases and bodies of law, we can begin to imagine a jurisprudence that does not hinge on majoritarian peace–justice claims or the preservation of an oppressive negative peace. This Part offers recommendations for how the Supreme Court should recognize peace–justice claims made by Black activists and the importance of a justice-based peace in four areas of law.[380] Because current jurisprudence falls short of this approach and because it is unlikely to improve with the current Roberts Court, this Part also highlights some non-Court-centered paths to positive peace.

### A. AFFIRMATIVE ACTION

Edward Blum, an anti-civil-rights activist who orchestrated cases like *Shelby County v. Holder* and *Fisher v. University of Texas*,[381] is currently challenging affirmative action plans across the country,[382] using the college admission of Asian-Americans as a wedge issue where convenient.[383] In September 2019, a federal judge upheld Harvard College's admissions program for reasons steeped in

burdens of race must be addressed." Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1346 (2011).

379. *See* Joshi, *Racial Transition*, *supra* note 16, at 1231.

380. *See generally* Daniel S. Harawa, *Black Redemption*, 48 FORDHAM URB. L.J. 701 (2021) (proposing an overhaul of Eighth Amendment jurisprudence to reflect antiracist values).

381. Yuvraj Joshi, *Why the Affirmative Action Case Against Harvard Isn't Actually About Fair Treatment for Minority Students*, TEEN VOGUE (Oct. 16, 2018), https://www.teenvogue.com/story/why-harvard-affirmative-action-lawsuit-isnt-about-fair-treatment-for-minorities [https://perma.cc/VHY6-ACQ] (discussing Blum's "history of challenging laws designed to protect racial minorities, notably in the 2013 case *Shelby County v. Holder* that struck down vital provisions of the Voting Rights Act"); Joshi, *supra* note 312, at 2520, 2557–58 (noting Blum's previous involvement in anti-civil-rights cases).

382. *Our Cases*, STUDENTS FOR FAIR ADMISSIONS, https://studentsforfairadmissions.org/our-cases/ [https://perma.cc/P9BP-28J5] (last visited Apr. 13, 2022).

383. *See* Petition for Writ of Certiorari at 12, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (Feb. 25, 2021) (arguing that Harvard's admissions policies discriminate against Asian-Americans). Transitional justice scholars Rodrigo Uprimny and Maria Paula Saffon distinguish between "manipulative" transitional justice, which "serves to preserve the unequal power relationships prevalent in the extant regime," and "democratic" transitional justice, which "takes the rights of victims seriously and seeks to constrain the political process by the imperative to protect and satisfy these rights." RODRIGO UPRIMNY & MARIA PAULA SAFFON, USES AND ABUSES OF TRANSITIONAL JUSTICE DISCOURSE IN COLOMBIA (June 2007), https://www.prio.org/download/publicationfile/158/Uprimny%20and%20Saffon%20(2007)%20Uses%20and%20Abuses%20of%20Transitional%20Justice%20Discourse%20in%20Colombia%20(PRIO%20Policy%20Brief%206-07).pdf [https://perma.cc/8BQC-FCUU]. Applied to the U.S. Supreme Court, this distinction suggests that some peace–justice claims in affirmative action cases may be "manipulative" rather than "democratic," designed to legitimize and entrench racial hierarchies. For example, we should query whether Edward Blum's arguments on behalf of Asian-American plaintiffs are made in bad faith and designed to entrench white supremacy given his longstanding and ongoing efforts to challenge protections for Black Americans on behalf of white plaintiffs. *See generally* Nancy Leong, *The Misuse of Asian Americans in the Affirmative*

transitional concerns.[384] "The rich diversity at Harvard and other colleges and universities . . . will foster the tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete," Judge Allison D. Burroughs wrote.[385] The First Circuit upheld this opinion in November 2020[386] and Blum filed a certiorari petition in February 2021.[387] That petition was granted in January 2022.[388]

When the Court rules on *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*, it might ground its arguments about affirmative action in the need to ameliorate racial divisions. However, the main threat to racial peace in the United States is not, as the Court maintained in *Parents Involved*, that state actors sometimes differentiate based on race.[389] Instead, it is the rising tide of white supremacist violence[390] and the racial discrimination and disparities that continue to structure everyday life even without government categorization.[391]

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*Action Debate*, 64 UCLA L. REV. DISCOURSE 90 (2016) (arguing that conservative concern for Asian-Americans in affirmative action cases comes from a desire to preserve the racial status quo).

384. *See* Yuvraj Joshi, *What the Harvard Decision Gets Right About Affirmative Action*, INT'L J. CONST. L. BLOG (Oct. 11, 2019), http://www.iconnectblog.com/2019/10/what-the-harvard-decision-gets-right-about-affirmative-action/ [https://perma.cc/3Y5B-MC4X].

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

386. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 164 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 20-1199).

387. Petition for Writ of Certiorari, Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, *supra* note 383.

388. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 142 S. Ct. 895 (2022) (granting cert petition); Ian Millhiser, *The Supreme Court Will Hear Two Cases that Are Likely to End Affirmative Action*, VOX (Jan. 24, 2022, 9:32 AM), https://www.vox.com/2022/1/24/22526151/supreme-court-affirmative-action-harvard [https://perma.cc/8LU8-X76S].

389. *Parents Involved*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."); *see also* Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 197–203 (2017) (arguing that the Court's equal protection jurisprudence "require[s] state actors . . . to conceal legitimate race conscious purposes beneath facially neutral decisional criteria").

390. Zolan Kanno-Youngs & David E. Sanger, *Extremists Emboldened by Capitol Attack Pose Rising Threat, Homeland Security Says*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/01/27/us/politics/homeland-security-threat.html; Zolan Kanno-Youngs & Peter Baker, *Biden, Calling on Americans to 'Take on the Haters,' Condemns Racist Rhetoric After Buffalo Massacre*, N.Y. TIMES (May 17, 2022), https://www.nytimes.com/2022/05/17/us/politics/biden-buffalo-ny-visit.html. On the racialized construction of a "terrorist" threat in the United States, see Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1337 (2019).

391. *See, e.g.*, Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 740–41 (2020) (finding racial disparities in police stops); Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22399, 2018), https://www.nber.org/system/files/working_papers/w22399/w22399.pdf [https://perma.cc/398D-3JXM] (same in police use of force); Gia M. Badolato, Meleah D. Boyle, Robert McCarter, April M. Zeoli, William Terrill & Monika K. Goyal, *Racial and Ethnic Disparities in Firearm-Related Pediatric Deaths Related to Legal Intervention*, 146 PEDIATRICS 1, 1 (2020) (same in firearm-related police killings of children); David S. Kirk, *The Neighborhood Context of Racial and*

If the Supreme Court is committed to achieving a truly "substantive and positive peace,"[392] it should address the harms of racial stratification and inequality of opportunity.[393] In this context, these inequities are evident in the fact that eliminating affirmative action at Harvard would decrease the enrollment of Black and Latinx applicants—and increase the enrollment of white applicants—more than any other group.[394] The Court should appreciate that in an American society where race matters, promoting colorblindness maintains only "an obnoxious negative peace."[395] Furthermore, limiting affirmative action would threaten racial peace by rewarding a legal strategy predicated on stoking racial resentments.[396] By advancing measures that achieve racial equity, the Court should reorient affirmative action law away from white citizens' complaints about loss of privilege and toward restorative justice, distributive justice, reparations, and representation.[397]

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*Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 73–74 (2008) (same in arrests); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1213–38 (2018) (same in plea bargaining); Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 657 (2020) (same in court-ordered evictions); Andreea A. Creanga, Carla Syverson, Kristi Seed & William M. Callaghan, *Pregnancy-Related Mortality in the United States, 2011–2013*, 130 OBSTETRICS & GYNECOLOGY 366, 372 (2017) (same in pregnancy-related mortality ratio); RUSSELL J. SKIBA, MARIELLA I. ARREDONDO & M. KAREGA RAUSCH, NEW AND DEVELOPING RESEARCH ON DISPARITIES IN DISCIPLINE 2 (2014), https://www.njjn.org/uploads/digital-library/OSF_Discipline-Disparities_Disparity_NewResearch_3.18.14.pdf [https://perma.cc/ZY9B-4UKE] (same in school discipline); Adam Voight, Thomas Hanson, Meagan O'Malley & Latifah Adekanye, *The Racial School Climate Gap: Within-School Disparities in Students' Experiences of Safety, Support, and Connectedness*, 56 AM. J. CMTY. PSYCH. 252, 263 (2015) (same in student experiences of safety, connectedness, relationships with adults, and opportunities for participation).

392. King, Jr., *supra* note 91.

393. Instead of treating affirmative action as a singular solution to America's racism—and one that has already served its purpose—the Court should uphold affirmative action as one tool in America's continuing struggle with white supremacy. *See* Joshi, *Affirmative Action as Transitional Justice*, *supra* note 16, at 45–46.

394. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 180 (1st Cir. 2020) ("[E]liminating race as a factor in admissions, without taking any remedial measures, would reduce African-American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%."). Because ending affirmative action would also do little to address any possible bias against Asian-Americans that might exist, the district court considered antibias training for admissions officers a more responsive remedy. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 204 (D. Mass. 2019); *see also* Joshi, *supra* note 312, at 2558–59 (suggesting antibias training as a more responsive alternative to Students for Fair Admissions' requested remedy).

395. King, Jr., *supra* note 91. On the implausibility of implementing colorblind policies, see Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146–47 (2008).

396. Reflecting a legal strategy founded on racial resentments, Edward Blum said of his Harvard litigation: "I needed Asian plaintiffs . . . so I started . . . HarvardNotFair.org." Brief for *Amicus Curiae* Walter Dellinger in Support of Defendant-Appellee on the Issue of Standing at 11, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020) (No. 1:14-cv-14176-ADB).

397. Paige Arthur argues in support of transitional justice measures that "make state and/or social institutions more representative of the society they serve." Paige Arthur, *"Fear of the Future, Lived Through the Past": Pursuing Transitional Justice in the Wake of Ethnic Conflict*, *in* IDENTITIES IN

### B. VOTING RIGHTS

The 2020 election and its aftermath have shown minority disenfranchisement to be an enduring feature of American democracy.[398] Voter suppression and dilution tactics threaten both negative and positive peace by preventing minorities from democratically voicing their discontent and pursuing political change through elections. Voter protections are needed to move toward an inclusive democracy.

However, Supreme Court jurisprudence proceeds as if minority disenfranchisement has been eliminated from the United States such that voter protections are no longer necessary. In 2013, the Court in *Shelby County v. Holder* struck down the coverage formula under Section 4 of the Voting Rights Act[399] on the premise that it was justified only in the "exceptional conditions"[400] of the past and did not reflect "current needs."[401] Chief Justice Roberts declared that voting discrimination today—which he acknowledged "still exists"[402]—was less evil and more ordinary than the "extraordinary problem" of the past.[403] Whereas Dr. King had said that "we will not allow Alabama to return to normalcy" because it is normalcy that "prevents the Negro from becoming a registered voter,"[404] Chief Justice Roberts was ready for Alabama to return to normalcy *despite* persistent voting discrimination. This unhesitating acceptance of voting discrimination as part of ordinary conditions was one of the most striking features of the judgment, suggesting the Court's satisfaction with an oppressive negative peace and its dismissal of positive peace as an unworthy pursuit.

Recently, the Supreme Court in *Brnovich v. Democratic National Committee* held that two Arizona laws—each eliminating procedures that are disproportionately used by minorities to exercise their right to vote—did not violate Section 2 of the Voting Rights Act.[405] While the Court did not strike down the results test

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TRANSITION: CHALLENGES FOR TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 271, 300 (Paige Arthur ed., 2011).

398. For a summary of recent voting rights litigation, see *Voting Rights Litigation Tracker*, BRENNAN CTR. FOR JUST. (Apr. 4, 2022), https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021 [https://perma.cc/LFS8-GXHL] (tracking restrictive voting measures by state). For a history of disenfranchisement from Reconstruction to the present day, see CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 1–44 (2018).

399. Section 4(b) of the Voting Rights Act contained the "coverage formula" to determine which states would be subject to federal oversight of laws that allow racial discrimination. While the Court did not strike down Section 5's "preclearance requirement"—which requires particular state and local governments with a history of discriminatory voter suppression to secure federal approval before changing election laws—it effectively nullified the law pending new Congressional coverage legislation. *See* Elspeth Reeve, *Supreme Court Strikes Down Section 4 of the Voting Rights Act*, ATLANTIC (June 25, 2013), https://www.theatlantic.com/politics/archive/2013/06/supreme-court-voting-rights-act-ruling/313921/.

400. 570 U.S. 529, 557 (2013).

401. *Id.* at 553.

402. *Id.* at 536.

403. *Id.* at 534.

404. King, *Selma to Montgomery March*, *supra* note 96.

405. 141 S. Ct. 2321, 2350 (2021). Section 2's results test prohibits any law that has the purpose or effect of abridging racial minorities' right to vote. *See Section 2 of the Voting Rights Act: Vote Dilution*

under Section 2, it made that test exceedingly difficult to satisfy.[406]

In deciding *Brnovich*, the Court should have remembered Justice Marshall's warning in an earlier Section 2 case. In *City of Mobile v. Bolden* in 1980, the Court upheld the legitimacy of at-large elections of city commissioners in Mobile, Alabama, even though the city's electoral system diluted the voting strength of Black citizens.[407] Justice Marshall's dissent in that case criticized the Court for maintaining an unjust peace.[408] Marshall warned that the "superficial tranquility" of ignoring discrimination "can be but short-lived" because the Court "cannot expect the victims of discrimination to respect political channels of seeking redress."[409] Although the plurality opinion dismissed Marshall's dissent as "political theory," not law,[410] Congress superseded the *Mobile* decision with an amendment to the Voting Rights Act.[411] However, the *Brnovich* decision further dilutes the Voting Rights Act instead of upholding and enforcing voter protections as the only path forward to positive peace.[412]

### C. FIRST AMENDMENT

Racial justice protestors' rights to gather, speak, and demand justice may be curtailed by claims characterizing such protests as violent or otherwise not peaceful.[413] Following the 2020 uprisings, a number of states introduced legislation expanding penalties for unlawful assembly or civil unrest.[414] Echoing 1950s segregationist

*and Vote Deprivation*, SCOTUSBLOG, https://www.scotusblog.com/election-law-explainers/section-2-of-the-voting-rights-act-vote-dilution-and-vote-deprivation/ [https://perma.cc/63WL-ASQE] (last visited Apr. 13, 2022).

406. *See* Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Court's Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021), https://www.theatlantic.com/ideas/archive/2021/07/brnovich-vra-scotus-decision-arizona-voting-right/619330/; Richard L. Hasen, Guest Essay, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html. On the problems with such limitation on voting rights, see generally Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93 (2018).

407. 446 U.S. 55, 58, 60–61 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, *as recognized in* Thornburg v. Gingles, 478 U.S. 30 (1986).

408. *See Bolden*, 336 U.S. at 141 (Marshall, J., dissenting).

409. *Id.*

410. *Id.* at 75–76 (plurality opinion of Stewart, J.).

411. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

412. *See* Joshi, *Racial Equality Compromises*, *supra* note 16. Meanwhile, in the wake of the 2020 election, some states have redoubled their voter suppression efforts. *See, e.g.*, Michael Wines, *After Record Turnout, Republicans Are Trying to Make It Harder to Vote*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/2021/01/30/us/republicans-voting-georgia-arizona.html.

413. On the international human rights violations arising from suppressive and violent responses to Black Lives Matter protests, see Letter from ACLU Pennsylvania & Drexel Univ. Stern Cmty. Lawyering Clinic to the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Dec. 1, 2020), https://www.aclupa.org/sites/default/files/field_documents/2020.11.23.un_submission_on_police_violence_in_philadelphia_final.pdf. On the different standards applied to white insurrectionists, see Karen J. Pita Loor, *Of Course the Mob That Stormed the Capitol Wasn't Afraid*, WBUR: COGNOSCENTI (Jan. 11, 2021), https://www.wbur.org/cognoscenti/2021/01/11/mob-capitol-far-right-police-protesters-karen-j-pita-loor [https://perma.cc/HX78-YP33].

414. Meg O'Connor, *Republican Lawmakers Are Using the Capitol Riot to Fuel Anti-BLM Backlash*, APPEAL (Jan. 19, 2021), https://theappeal.org/capitol-insurrection-anti-black-lives-matter-legislation/ [https://perma.cc/9SCP-SQMZ].

complaints about Southern peace being decimated by "outside agitators" like the NAACP,[415] Florida Governor Ron DeSantis said that anti-Black Lives Matter laws were needed to stop the "professional agitators bent on sowing disorder and causing mayhem in our cities."[416] Some lawmakers later cited the white supremacist insurrection at the United States Capitol as a reason to criminalize actions associated with Black Lives Matter protests, such as blocking streets and camping outside state capitols.[417] Given that the 2020 protests were overwhelmingly peaceful,[418] these laws seem aimed not at preventing violence but at preventing antiracism protests from disrupting an oppressive negative peace.[419]

Recent antiprotest laws cast the First Amendment issues already before courts into sharper relief. In *Doe v. Mckesson*, an unnamed police officer injured during a Black Lives Matter demonstration sued organizer DeRay Mckesson on the basis that Mckesson "knew or should have known" that the demonstration would result in violence.[420] When the Fifth Circuit held that the First Amendment did not shield Mckesson from civil liability,[421] the NAACP argued that its opinion "invites harassment and silencing of today's civil-rights activists and leaders."[422] In a per curiam opinion issued in November 2020, the Supreme Court vacated the Fifth Circuit decision without addressing whether the First Amendment protects Mckesson.[423] In March 2022, the Louisiana Supreme Court held that *state* law

415. *Southern Manifesto*, *supra* note 159.

416. O'Connor, *supra* note 414.

417. *See id.*

418. Chenoweth & Pressman, *supra* note 6.

419. Derrick Bell has argued that for many white people living through the Civil Rights Era, "there really were no peaceful, nondisruptive civil rights protests," for each protest "represented a most threatening challenge" to white supremacy. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 555 (5th ed. 2004). *See also* Etienne C. Toussaint, Essay, *Blackness as Fighting Words*, 106 VA. L. REV. ONLINE 124, 129 (2020) (arguing that in response to both traditional violent crime and peaceful protest, seemingly neutral First Amendment constructs rationalize aggressive penal measures that serve to reinforce white social control).

420. 945 F.3d 818, 826 (5th Cir. 2019).

421. *Id.* at 834.

422. Brief Amicus Curiae of National Association for the Advancement of Colored People in Support of Petitioner at 3, Mckesson v. Doe, 141 S. Ct. 48 (2020) (No. 19-1108).

423. Mckesson v. Doe, 141 S. Ct. 48, 51 (2020) (per curiam). In another First Amendment context, a number of universities have adopted campus speech codes designed to advance positive peace by regulating hate speech against people of color, among others. *See, e.g.*, Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 CASE W. RSRV. L. REV. 275, 276 (2018); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434. However, courts have often rejected these codes on First Amendment grounds, treating conflict through the vigorous exchange of ideas as valuable even when that conflict may threaten or denigrate racial minorities. *See, e.g.*, Corry v. Stanford Univ., No. 740309, slip op. at 41 (Cal. Super. Ct. Feb. 27, 1995), https://perma.cc/J4DC-KYRD; Doe v. Univ. of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989). In fact, courts tend to protect this robust dialogue unless there is a danger of significant disruption, such as a breach of the negative peace. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992); Virginia v. Black, 538 U.S. 343, 363 (2003). Troublingly, some universities have denied First Amendment protections to their own students peacefully protesting against racial injustices. Charles Lawrence points to an example of Stanford University "prosecuting students engaged in a peaceful sit-in . . . [while] the racist behavior the students were protesting went unpunished." Lawrence III, *supra* at 467.

permits the suit against Mckesson to move forward,[424] as a lone dissenter noted the decision's "chilling effect on political protests."[425]

In addition to antiprotest laws, laws banning critical race theory and other so-called "divisive concepts" from public schools and workplaces appeal to civic peace: one legislation is literally called the PEACE Act.[426] In matters like these, the Supreme Court faces a choice: it can weaken the rights guaranteed under the First Amendment in order to maintain an oppressive negative peace, or it can defend democratic processes—like antiracism protests and education—which fight for a positive peace.[427] If First Amendment jurisprudence is to support the latter, it should not only repudiate efforts to limit racial justice activity in the name of civic peace but also recognize the unique democratic necessity of protest and speech challenging racial oppression.[428]

### D. FOURTH AMENDMENT

The 2020 uprisings foregrounded police abuse of minorities as a leading source of racial strife in the United States.[429] Decades of "tough on crime" policies have produced only a racialized negative peace, in which white feelings of safety are dependent upon the over-policing of Black and Brown neighborhoods.[430]

Despite the harms of policing for minority communities, the Supreme Court has authorized police power and eased constitutional checks on it.[431] In *Terry v. Ohio* in 1968, the Court allowed the police to conduct a "stop and frisk" based on reasonable suspicion as opposed to the higher standard of probable cause.[432] *Terry* recognized "the degree of community resentment" aroused by stop and

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424. Doe v. McKesson, No. 2021-CQ-00929 (La. Mar. 25, 2022).

425. *Id.* at 36.

426. Jennifer Schuessler, *Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html; Press Release, Sen. Marco Rubio, Rubio, Cramer, Braun Introduce Legislation to Prohibit Federal Funding of Critical Race Theory in American History and Civics Education (Aug. 9, 2021), https://www.rubio.senate.gov/public/index.cfm/2021/8/rubio-cramer-braun-introduce-legislation-to-prohibit-federal-funding-of-critical-race-theory-in-american-history-and-civics-education.

427. Derrick Bell observed that "courts seem more alarmed at the disruptive potential of a relatively peaceful protest by blacks than they are with all but the most shocking acts of intentional violence perpetrated by whites as a means of denying the civil rights of blacks." BELL, *supra* note 419, at 539; *see also* Lewis M. Steel, *A Critic's View of the Warren Court: Nine Men in Black Who Think White*, N.Y. TIMES, Oct. 13, 1968, at 56 (discussing the role of the Court in perpetuating racial inequality).

428. *See* Patrisse Cullors, Opinion, *Without the Right to Protest, America Is Doomed to Fail*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/opinion/international-world/protest-black-america.html (explaining the significance of protests led by Black Americans).

429. *See supra* Section I.B.

430. *See* Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 754–55 (2020); Daniel S. Harawa, *The Black Male: A Dangerous Double-Minority*, *in* TRAYVON MARTIN, RACE, AND AMERICAN JUSTICE: WRITING WRONG 57, 57 (Kenneth J. Fasching-Varner et al. eds., 2014).

431. *See* Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2139–43 (2017); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884–85 (2015).

432. 392 U.S. 1, 30–31 (1968).

frisk as a relevant legal consideration.[433] It openly acknowledged "[t]he wholesale harassment" by police of which Black Americans "frequently complain."[434] Yet, these minority concerns did not ultimately move the Court to limit policing.

Forty-five years later in *Floyd v. City of New York*, a federal judge found pervasive unconstitutional racial profiling and stops being conducted by New York City police.[435] Judge Shira A. Scheindlin rejected the argument that stop and frisk was necessary to preserve a negative peace—understood as the absence of crime—both because "the stopped population is overwhelmingly innocent"[436] and because "each stop is also a demeaning and humiliating experience" with a "human toll."[437] This was an important judicial vindication of minority communities' claims to peace (which is disrupted by constant police surveillance and harassment) and justice (which is denied when police systematically target minorities).

Although *Floyd* charted a path for other courts to follow, the Supreme Court continues to undervalue minority concerns. In *Utah v. Strieff* in 2016, the Court weakened the prohibition against the use of illegally obtained police evidence.[438] Justice Sotomayor's dissent explained that legitimizing police misconduct signals to minorities that "you are not a citizen of a democracy but the subject of a carceral state" and treats them as "second-class citizens."[439] Ultimately, the legal sanctioning of police misconduct not only maintains the oppressive negative peace of a carceral state but also prevents the positive peace of a genuine democracy from emerging.

The Supreme Court should confront these troubling implications of its Fourth Amendment jurisprudence. For example, although there have been calls to hold the police responsible for killing Black people,[440] the Court's "qualified immunity" doctrine has impeded accountability for police misconduct.[441] In the immediate aftermath of George Floyd's killing by Minneapolis police, the Court declined to hear several qualified immunity related challenges.[442] While congressional action

433. *Id.* at 17 n.14.

434. *Id.* at 14 (footnote omitted). *Terry* cited a 1967 Task Force Report of the President's Commission on Law Enforcement and the Administration of Justice, which included accounts of Black people and communities facing abusive stop and frisk practices. *See id.* at 14 n.11. These accounts made clear how prevailing modes of "law and order" denied a peaceful and just existence to minorities. PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 146–49 (1967). For critiques of *Terry*, see David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 308–09 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 368–69 (1998); Carbado, *supra* note 431, at 149.

435. 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

436. *Id.* at 560.

437. *Id.* at 557.

438. 136 S. Ct. 2056, 2059 (2016).

439. *Id.* at 2069–71 (Sotomayor, J., dissenting).

440. *Vision for Black Lives*, *supra* note 124.

441. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (arguing that qualified immunity enables police officers to disregard the law without consequence).

442. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020).

remains under consideration,[443] the Court should take steps to remove impediments to accountability, especially those it created.[444]

### E. NON-COURT-CENTERED PATHS

Despite these and other openings for the Supreme Court, it strains belief that the Roberts Court will recognize minority claims for justice.[445] This Article earlier drew connections between the peace–justice strategies of the Civil Rights Era and those of today.[446] However, there are also important differences. In the Civil Rights Era, some racial justice advocates pursued and legitimized their visions through the jurisprudence of the Supreme Court. "[W]e are not wrong in what we are doing," Dr. King said amid the Montgomery Bus Boycott of December 1955, because "[i]f we are wrong, the Supreme Court of this nation is wrong."[447] This was a moment when the Court showed signs of rejecting an oppressive negative peace[448] even if it did not give weight to more comprehensive and structural peace–justice concerns.[449]

In contrast, recent antiracism protestors directed their peace–justice claims at political decisionmakers and the general public, but not at the courts. Indeed, many Americans protested precisely because they believed that courts do not

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443. *See* Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020).

444. There are also important connections between the different areas of law discussed here. For example, Karen Pita Loor explains how Fourth Amendment doctrine enables police brutality in response to antiracism protests, which in turn curtails protestors' First Amendment rights. *See* Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 837–47 (2020). Likewise, felony convictions against protestors impede not only their First Amendment rights but potentially also their right to vote in places like Tennessee. *See* Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT'G PROJECT (July 28, 2021), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https://perma.cc/W4GP-VQR6].

445. Political science scholarship suggests that the Court is representative of its times, constrained by the political climate of a moment. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 260 (Sanford Levinson rev., 5th ed. 2010) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."). Along these lines, it could be argued that the Court should recognize 15 to 26 million Americans marching against systemic racism as a sign of deep disaffection with some of its doctrines and take corrective steps. *See* Buchanan et al., *supra* note 3.

446. *See supra* Section I.B.

447. Martin Luther King, Jr., Speech at the Montgomery Bus Boycott (Dec. 5, 1955) (transcript available at https://www.digitalhistory.uh.edu/disp_textbook_print.cfm?smtid=3&psid=3625 [https://perma.cc/JT5Z-CF5N]). However, civil rights advocates like Lewis Steel questioned the faith placed in the Court to advance racial equality. *See* Steel, *supra* note 427.

448. On law's capacity to entertain claims of the marginalized, see generally Dylan C. Penningroth, *Law as Redemption: A Historical Comparison of the Ways Marginalized People Use Courts*, 40 L. & SOC. INQUIRY 793 (2015) (drawing connections between second-century Roman Egypt, colonial Ghana, and the United States regarding the ability of victims of violence to seek redress); and Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008) (highlighting the role of courts in minimizing democratic harms).

449. On a long history of Black Americans' engagement with courts, see, for example, Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (tracing the interaction of race, sex, and estate law in the antebellum and postbellum South); and KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012) (providing a collective biography of Black lawyers who worked to end segregation).

deliver justice and are themselves a source of injustice.[450] Today, there is a chasm between the peace–justice approach of the Roberts Court, which enforces dominant groups' claims and sees even modestly ameliorative policies as threats to fairness and harmony, and chants of "No Justice! No Peace!" which demand systemic changes necessary for a more equitable and peaceful United States.[451] Reflecting "legal estrangement,"[452] these chants repudiate the lawful perpetuation of racial oppression and reimagine justice and peace for American society.

Even with an antagonistic Roberts Court,[453] there are legal paths available for a justice-based peace. This Article has situated the Supreme Court as one node in a broader network of agents working toward particular visions of justice and peace. Focusing their efforts on city councils, state legislatures and courts, Congress, and other democratic decisionmaking bodies, reformers can steer American law and legal institutions toward positive peace, including by:

> enacting laws that promote justice and accountability, including the For the People Act,[454] the John Lewis Voting Rights Advancement Act,[455] and the George Floyd Justice in Policing Act;[456]
>
> advocating for and implementing policies that promote equity, including school integration and investment plans,[457] affirmative action programs,[458] and disparate impact assessments;[459]

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450. Some Americans consider the killers of Black Americans having their "day in court" to be sufficient justice: "This is justice. Let it play out, and it will prevail," they say. Ray Kolander, *LETTER: Protesters Chant, "No Justice, No Peace,"* LAS VEGAS REV.-J. (June 9, 2020, 9:00 PM), https://www.reviewjournal.com/opinion/letters/letter-protesters-chant-no-justice-no-peace-2049459/ [https://perma.cc/XDL4-SVGB]. However, this view misses that many Americans chanting "No Justice! No Peace!" are demanding systemic changes *because* of the judicial perpetuation of injustice. Academic and activist Melina Abdullah makes this point in reflecting on the protests following the acquittal of George Zimmerman, who killed 17-year-old child Trayvon Martin. "Zimmerman had no right to steal his life, regardless of what a court says," Abdullah writes. "[T]he system of American policing was designed to produce these outcomes. . . . Only by transforming the way that we vision justice can we realise peace." Melina Abdullah, *Black Lives Matter is a Revolutionary Peace Movement*, CONVERSATION (Oct. 11, 2017, 9:18 PM), https://theconversation.com/black-lives-matter-is-a-revolutionary-peace-movement-85449 [https://perma.cc/TU5L-SPP3].

451. *See supra* Section I.B (discussing invocations of "No Justice! No Peace!").

452. Bell, *supra* note 431, at 2083 (defining "legal estrangement" as "a marginal and ambivalent relationship with society, the law, and predominant social norms that emanates from institutional and legal failure"); *see also* Christopher Muller & Daniel Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 152 (2014) (documenting distrust of legal institutions among Black Americans).

453. *See generally* Joshi, *Racial Transition*, *supra* note 16 (discussing the Roberts Court's racial equality jurisprudence).

454. H.R. 1, 117th Cong. (2021).

455. S. 4263, 116th Cong. (2020).

456. H.R. 7120, 116th Cong. (2020).

457. On racially inequitable school funding, see Sarah Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? $23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html.

pursuing universal policies aimed at redistribution, creation of opportunities, and cancellation of debts that may help to address embedded inequities;[460]

establishing a U.S. Commission on Truth, Racial Healing, and Transformation[461] and other transitional justice measures[462] to begin grappling with the legacy and threat of white supremacy; and

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458. On the transitional necessity and future of affirmative action, see Joshi, *Affirmative Action as Transitional Justice*, *supra* note 16 and Joshi, *supra* note 312, at 2562–67.

459. On the future of disparate impact, see generally Reva B. Siegel, *The Constitutionalization of Disparate Impact—Court-Centered and Popular Pathways: A Comment on Owen Fiss's Brennan Lecture*, 106 CALIF. L. REV. 2001 (2018) (considering the history and future of disparate impact analysis and how courts may interpret the Equal Protection Clause to limit or prohibit the consideration of disparate impact review).

460. *See, e.g.*, Mehrsa Baradaran, *Closing the Racial Wealth Gap*, 95 N.Y.U. L. REV. ONLINE 57, 60 (2020) (proposing a housing grant to close the racial wealth gap); Naomi Zewde & Darrick Hamilton, Opinion, *What Canceling Student Debt Would Do for the Racial Wealth Gap*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/opinion/student-debt-cancellation-biden.html.

461. In June 2020, Rep. Barbara Lee called for a U.S. Commission on Truth, Racial Healing, and Transformation. Press Release, Rep. Barbara Lee, In the Wake of COVID-19 and Murder of George Floyd, Congresswoman Barbara Lee Calls for Formation of Truth, Racial Healing, and Transformation Commission (June 1, 2020), https://lee.house.gov/news/press-releases/in-the-wake-of-covid-19-and-murder-of-george-floyd-congresswoman-barbara-lee-calls-for-formation-of-truth-racial-healing-and-transformation-commission [https://perma.cc/H374-BWE2]. In December 2020, Sen. Cory Booker introduced a companion to Rep. Lee's resolution. Press Release, Sen. Cory Booker, Booker Introduces Companion to Rep. Lee Resolution Calling for First United States Commission on Truth, Racial Healing, and Transformation (Dec. 3, 2020), https://www.booker.senate.gov/news/press/booker-introduces-companion-to-rep-lee-resolution-calling-for-first-united-states-commission-on-truth-racial-healing-and-transformation [https://perma.cc/N2FD-UUDM].

462. In recent years and especially since the 2020 uprisings, transitional justice measures have been contemplated in the United States. Memorials and museums dedicated to the histories of racial violence have been created. Some U.S. cities and states have initiated truth, justice, and reconciliation processes as well as reparations programs. Universities and theological seminaries have offered limited reparations to the descendants of enslaved people from whom they profited. *See, e.g.*, GREENSBORO TRUTH & RECONCILIATION COMM'N, GREENSBORO TRUTH & RECONCILIATION COMMISSION REPORT: EXECUTIVE SUMMARY 2 (May 25, 2006), http://www.greensborotrc.org/exec_summary.pdf [https://perma.cc/VCF2-QXYB]; *TIRC Decisions*, ILL.: TORTURE INQUIRY & RELIEF COMM'N, https://tirc.illinois.gov/tirc-decisions.html [https://perma.cc/67TT-UY5E] (last visited Apr. 15, 2022); Nicholas Creary, Opinion, *Md. Lynching Commission Offers Chance to Investigate, Atone*, BALT. SUN (Apr. 29, 2019, 10:55 AM), https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0430-lynching-commission-20190429-story.html; Andy Fies, *Evanston, Illinois, Finds Innovative Solution to Funding Reparations: Marijuana Sales Taxes*, ABC NEWS (July 19, 2020, 11:03 AM), https://abcnews.go.com/US/evanston-illinois-finds-innovative-solution-funding-reparations-marijuana/story?id=71826707 [https://perma.cc/8HMC-LVMN]; Ovetta Wiggins, *Landmark Commission Begins Tackling 'Unconfronted Truth' of Racially Motivated Lynchings in Md.*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/local/md-politics/maryland-lynching-report/2020/09/18/ba8655e8-f8fa-11ea-a275-1a2c2d36e1f1_story.html; Jesús A. Rodríguez, *This Could Be the First Slavery Reparations Policy in America*, POLITICO MAG. (Apr. 9, 2019), http://politi.co/2UsZjo7 [https://perma.cc/9FQM-S72Z]; Neil Vigdor, *North Carolina City Approves Reparations for Black Residents*, N.Y. TIMES (July 16, 2020), https://www.nytimes.com/2020/07/16/us/reparations-asheville-nc.html. However, attempts to secure broader reparations for slavery, Jim Crow practices, and ongoing discrimination have stalled. *See, e.g.*, Juana Summers, *A Bill to Study Reparations for Slavery Had Momentum in Congress, but Still No Vote*, NPR (Nov. 12, 2021, 5:00 AM), https://www.npr.org/2021/11/12/1054889820/a-bill-to-study-reparations-for-slavery-had-momentum-in-congress-but-still-no-vo [https://perma.cc/FNU5-YN7E].

> restructuring institutions that are responsible for maintaining stratification and impeding equity—from democratic[463] and criminal legal systems[464] to the judiciary itself.[465]

Although the Biden Administration appears sympathetic to some of these actions, A. Phillip Randolph warned that liberal leaders "yield to the demands of those most capable of creating maximum pressures and social discord."[466] Vernon Jordan, Jr., found during the Carter years that "even an administration sympathetic to our needs and in harmony with our aspirations needs sustained pressure."[467] Moving forward, the United States government will need such sustained pressure (including mass protests) for it to prioritize a genuine positive peace agenda over superficial reforms.[468] Ultimately, the mobilization of American people remains crucial to making the peace–justice claims of marginalized communities cognizable by law.

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463. *See, e.g.*, Roge Karma, *To Achieve Racial Justice, America's Broken Democracy Must Be Fixed*, VOX (Sept. 21, 2020, 10:45 AM), https://www.vox.com/21446880/just-democracy-reform-gun-violence-police-brutality-climate-change [https://perma.cc/B7UA-4HL9]; NAACP LEGAL DEF. FUND, DEMOCRACY DEFENDED: EXECUTIVE SUMMARY (Mar. 2021), https://naacpldf.org/wp-content/uploads/LDF_02102021_DemocracyDefendedPreview-11.pdf [https://perma.cc/4FT9-C5GG].

464. For instance, movements to end mass incarceration have been called transitional justice efforts. *See* Desmond S. King & Jennifer M. Page, *Towards Transitional Justice? Black Reparations and the End of Mass Incarceration*, 41 ETHNIC & RACIAL STUD. 739, 739 (2018).

465. As the Supreme Court impedes America's transition to a multiracial democracy, Supreme Court structural reform may itself be understood as a transitional justice measure. On the relationship between judicial reform and transitional justice, see MUNA B. NDULO & ROGER DUTHIE, THE ROLE OF JUDICIAL REFORM IN DEVELOPMENT AND TRANSITIONAL JUSTICE (July 2009), https://www.ictj.org/publication/role-judicial-reform-development-and-transitional-justice [https://perma.cc/WC9U-MTUE]. On the prospect of Supreme Court structural reform, see generally Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2020).

466. Randolph, *supra* note 103.

467. VERNON E. JORDAN, JR. & LEE A. DANIELS, MAKE IT PLAIN: STANDING UP AND SPEAKING OUT 54 (2009).

468. Transitional justice theory tells us that securing positive peace requires addressing deeper structural violence underlying conflicts. Davies, *supra* note 376. As the Biden Administration proposes reforms aimed at racial justice, it is necessary to assess proposals based on their capacity to address the deeper structural violence of white supremacy. For example, Amna Akbar contrasts the Movement for Black Lives' policy platform, *A Vision for Black Lives*, with the more traditional reforms presented in the Obama Department of Justice's Ferguson and Baltimore reports. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409–10 (2018). Akbar identifies "[t]he core disagreement between the [Department] and the Movement is over whether policing can be divorced from its entanglements with anti-Black racism." *Id.* at 424. She describes, for example, how the Department's Ferguson report documented numerous troubling incidents of officers "shoving, arresting, charging, and tasing students" and recommended better training so that the "school police program 'can be used as a way to build positive relationships with youth from a young age.'" *Id.* at 463–64. By contrast, the Movement calls for police to be removed from schools altogether. *See Vision for Black Lives*, *supra* note 124. Applying insights from transitional justice, inasmuch as the Movement's policy platform better comprehends and responds to the structural violence of policing, surveillance, and mass incarceration, its proposals may represent a more promising path to achieving long-term positive peace in the United States.

## CONCLUSION

*"No Justice, No Peace"*

The Preamble to the United States Constitution attests to the nation's aspirations to "establish Justice" and "insure domestic Tranquility."[469] Yet, laws and legal processes may have continually kept justice and tranquility out of reach by prioritizing an illusory negative peace over an enduring positive peace. In her inaugural poem, poet Amanda Gorman recited the reasons why this approach has been flawed: "We've learned that quiet isn't always peace, and the norms and notions of what 'just' is, isn't always justice."[470]

In the wake of the largest racial justice protests in America's history, how will leaders and judges respond? Will they finally begin ameliorating racial stratification in order to alleviate racial strife or will they choose to "face another long, hot summer"[471]? As the United States continues to struggle with the perpetuation of systemic racism, courts and other institutions will face versions of the peace versus justice dilemma as well as competing peace–justice claims in various contexts. Recurring antiracism protests should lead them toward prioritizing minority concerns and a justice-based peace.

469. U.S. CONST. pmbl.
470. AMANDA GORMAN, THE HILL WE CLIMB: AN INAUGURAL POEM FOR THE COUNTRY (2021).
471. Telegram from Bayard Rustin, *supra* note 100.