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Racial Transition

The United States is a nation in transition, striving to move beyond its racist past. This transitional imperative underpins the Supreme Court's racial equality jurisprudence. Justices across the political spectrum ground arguments in the circumstances and needs of a society in transition. However, because traditional legal scholarship treats the U.S. as non-transitional, it underappreciates how transitional dynamics and debates shape racial equality cases. This Article demonstrates how "racial transition" has shaped the Court's racial equality opinions since Civil Rights era.

First, this Article reconceptualizes the U.S. as a society in transition, rebutting the presumption that it is non-transitional. It reviews racial transition from slavery to the present day, raises questions about the time frame within which transition is defined, and explains the value of viewing American history and law from a transitional perspective.

Second, this Article examines the Supreme Court's racial equality opinions in four areas: school desegregation, voting rights, affirmative action, and disparate impact. These opinions directly engage the process of transition, forming a transitional jurisprudence of race. The Article analyzes the opinions' understanding of the racial past from which the nation is transitioning, the racial future toward which it should transition, and the form and trajectory that transition should take. This analysis reveals that the Court's transitional reasoning has evolved significantly and that conservative justices embrace theories of racial transition as much as their liberal colleagues. Transition will be a dominant framework through which the Roberts Court reorients racial equality law—revising, if not repudiating, previous understandings of transition.

Third, this Article evaluates the Supreme Court's transitional jurisprudence against insights from transitional justice, a field that examines how societies move beyond histories of oppression and violence toward a more just and peaceful order. Transitional justice theory illuminates the concerns that have (and have not) shaped racial equality opinions and how the Court has balanced those concerns. The field helps us recognize disagreements between conservative and liberal justices as struggles over ownership of the racial transition process. It also helps us to evaluate the competing transitional approaches emanating from the Court—and to decide which claims about transition should have purchase.

Finally, this Article considers the role of the Supreme Court, the other branches of government, and the American public in the continuing pursuit of racial transition. It points to how a transitional framework can bring racial equality law more closely in touch with both international human rights norms and the American civil rights tradition.