



*RECKONING WITH U.S.
BLACK VOTER
SUPPRESSION*

Utilizing Transitional Justice Truth Processes to Combat
American Exceptionalism & Denialism

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Summer 2021*

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

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Table of Contents

***ABSTRACT*..... 2**

I. INTRODUCTION 3

II. LEGAL FRAMEWORK..... 3

A. THE 15TH AMENDMENT & THE VOTING RIGHTS ACT 3

B. SHELBY V HOLDER (2013)..... 5

C. RUCHO V COMMON CAUSE (2019)..... 6

D. BRNOVICH & PROSPERITY; AMERICANS FOR PROSPERITY V. BONTA (2021) 6

E. APARTHEID IN INTERNATIONAL LAW..... 7

F. TRANSITIONAL JUSTICE PRINCIPLES 8

III. HISTORY OF U.S. BLACK VOTER RIGHTS & SUPPRESSION 9

G. THE FIRST RECONSTRUCTION: 13TH, 14TH, & 15TH AMENDMENTS 9

H. JIM CROW, ANTEBELLUM, SOUTHERN STRATEGY, & APARTHEID 10

I. CIVIL RIGHTS ERA & THE 2ND RECONSTRUCTION 12

IV. CURRENT CHALLENGES..... 13

J. AMERICAN EXCEPTIONALISM 15

K. DENIALISM 17

V. TRANSITIONAL JUSTICE FOR U.S. BLACK VOTER SUPPRESSION 19

L. SYSTEMS & TRUTH TELLING 19

M. RECONCILIATION 22

VI. CONCLUSION 23

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

Abstract

In many ways the United States operates contrary to fundamental notions of Transitional Justice and Human Rights. The delusion of “American Exceptionalism” enabled the U.S. to violate human rights and to explain those violations away as isolated incidents and “un-American” rather than systemic issues deeply rooted in American beliefs and practices.

Black people have been oppressed for hundreds of years in the U.S., with two reconstructions but seeing very little voluntary systemic change. At the heart of a democracy is voting: the people’s voice. The U.S. has a long history of disenfranchising the voices which those in power do not want to hear – predominantly People of Color, and especially Black people.

Without resolving the root of the issues and “transitioning” a society forward, atrocities will only continue. We see that in the U.S. today. This year, Georgia passed some of the most restrictive and racially disenfranchising voting laws since the time of Jim Crow.¹ Transitional Justice (theories and practices of national reconciliation, peace, justice, healing, forgiveness, and truth) urges us to face the truth of past atrocities, reckon with them, and draw a line between who we were and who we will now be.²

This paper will explore the complexities of Black voter suppression in the U.S. and how the principles of Transitional Justice can be used to up-end the long, dark legacy of racism in this country. We must address Black voter suppression in the U.S. urgently and with an honesty that is long overdue. There is no path forward without looking back.

¹ Brennan Center, *Voting Laws Roundup: July 2021*, Brennan Center for Justice, <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker-2021> (last accessed Aug 18, 2021).

² Phil Clark, *Establishing a Conceptual Framework: Six Key Transitional Justice Themes*, *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwandan and Beyond*, 191-207 (2008).

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

I. Introduction

The United States is marked by pervasive structural inequality manifested by relative political authoritarianism with Black disenfranchisement and white ethnic domination of the political, social, and economic systems.³ The U.S. has been a fundamentally oppressive state predicated on the economic, legal, and physical repression of groups deemed inferior or outside the body politic.⁴ Today, Black Americans remain the most segregated group of people in America.⁵

There is no greater good in a democracy than the right to vote and the public must know that their voting rights will be protected by their governments.⁶ A growing share of the electorate favors the Democrats, and in response Republican leaders are making it harder for low-income minority citizens to vote.⁷ We must stop this be seeing it for what it is.

II. Legal Framework

A. The 15th Amendment & The Voting Rights Act

The Fifteenth Amendment was ratified in 1870 in the wake of the Civil War and provides that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” and it gives Congress the “power to enforce this article by appropriate legislation.”⁸

³ Michael Goodhart, *HUMAN RIGHTS: POLITICS AND PRACTICE*, 3rd E, Oxford (2016)

⁴ Zinaida Miller, *Transitional Justice, Race, and the United States*, Just Security, June 30 2020, <https://www.justsecurity.org/71040/transitional-justice-race-and-the-united-states/>

⁵ Brianne McGonigle Leyh, *No Justice, No Peace: The United States of America Needs Transitional Justice*, OpinioJuris, May 6 2020, <http://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/>

⁶ John P. Pelissero, *Defending the Integrity of Our Voting Systems*, Markkula Center for Applied Ethics at Santa Clara University, Oct 27 2020, <https://www.scu.edu/ethics/all-about-ethics/defending-the-integrity-of-our-voting-systems/defending-the-integrity-of-our-voting-systems.html>

⁷ Steven Levitsky & Daniel Ziblatt, *HOW DEMOCRACIES DIE*, 169,183 Broadway Books, (2018)

⁸ U.S. Const. amend. XV

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

The Fifteenth Amendment, ratified in 1870, represented a sweeping expansion of federal power for the sake of equality, announcing that “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”⁹ Voting rights used to be the domain of the states, to be granted (or restricted) as the states desired, however now were supposedly guaranteed by the national government.¹⁰

The Voting Rights Act made a significant impact in transforming the culture of racist voter suppression that characterized parts of this country for over a century. Blacks in the U.S. were effectively disenfranchised until the Voting Rights Act was passed in 1965.¹¹ From slavery through early 1970s, authoritarianism existed in the Deep South with restrictions almost exclusively based on ethnicity.¹² The 1965 Voting Rights Act, not only enforced the Fifteenth Amendment’s protections against racial discrimination in voting but also placed jurisdictions with a history of discriminatory voting measures under federal supervision to keep those barriers from being reimposed.¹³

The Voting Rights Act of 1965 (VRA), a landmark achievement of the civil rights movement, is known as one of the most effective civil rights laws in American history.¹⁴ The Supreme Court has upheld the constitutionality of the Voting Rights Act on at least four separate occasions.¹⁵ The Act was described by then-Chair of the House Judiciary Committee, as one of the most extensive considerations, of any piece of legislation, that the United States Congress has dealt with in the 27 years that he had served as a Member of the body.¹⁶

⁹ Jamalle Bouie, *Which Constitution is Amy Coney Barrett Talking About?*, The New York Times, Oct 16 2020, <https://www.nytimes.com/2020/10/16/opinion/amy-coney-barrett-originalism.html>

¹⁰ Bouie, *supra* note 9.

¹¹ Goodhart, *supra* note 4.

¹² *Id.*

¹³ Adam Serwer, *The Supreme Court is Helping Republicans Rig Elections*, The Atlantic, Oct 22 2020, <https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808/>

¹⁴ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 34 (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

¹⁵ *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013)

¹⁶ H.R. REP. 109-478, H.R. Rep. No. 478, 109TH Cong., 2ND Sess. 2006, 2006 WL 1403199, 2006 U.S.C.C.A.N. 618 (Leg.Hist.)

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

The Act enshrined our most fundamental values by guaranteeing to all of our citizens, the right to vote.¹⁷ With the VRA, Congress embarked on a mission to realize the purpose and promise of the Fifteenth Amendment.¹⁸ The provisions of the Act are considered by Congress to be an efficient and effective mechanism for detecting and redressing, the many forms of discrimination, that continue to taint our democratic process. The Voting Rights Act swept away poll taxes, literacy tests, understanding clauses, pauper exclusions, and good character provisions increasing the size of the electorate by 20 million.¹⁹

B. Shelby v Holder (2013)

In 2013, the Supreme Court defanged the Voting Rights Act in the tragic decision of *Shelby v Holder*.²⁰ In 2013, Chief Justice John Roberts gutted a key section of the Voting Rights Act by deploying a dubious legal doctrine with no textual roots in the Constitution, arguing that racism was a thing of the past.²¹ Chief Justice Roberts infamously wrote “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²²

Roberts’s opinion doesn’t actually say what part of the Constitution the formula that Congress developed for enforcing the Voting Rights Act violated. Instead, he declares it a “dramatic departure from the principle that all States enjoy equal sovereignty.”²³ This principle does not appear in the text of the Constitution, but it was the basis for several other infamous decisions, including the 1857 *Dred Scott* ruling, in which Chief Justice Roger Taney declared that Black Americans could not be U.S. citizens.²⁴ For that reason, the legal scholars James

¹⁷ Voting Rights Act of 1965, Pub.L. 89–110, Aug. 6, 1965, 79 Stat. 437 Short title, see 52 USCA § 10101

¹⁸ *Shelby*, *supra* note 16.

¹⁹ Wilfred Codrington III, *The United States Needs a Third Reconstruction*, The Atlantic, July 20 2020, <https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-third-reconstruction/614293/>

²⁰ *Shelby*, *supra* note 16.

²¹ Adam Serwer, *Democratic Leaders Are Betraying Black Voters*, The Atlantic, July 27 2021, <https://www.theatlantic.com/ideas/archive/2021/07/democrats-are-betraying-black-voters/619573/>

²² Richard L. Hansen, *The Chief Justice’s Long Game*, The New York Times, June 25 2013, <https://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html>

²³ Adam Serwer, *The Supreme Court is Helping Republicans Rig Elections*, The Atlantic, Oct 22 2020, <https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808/>

²⁴ *Id.*.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

Blacksher and Lani Guinier wrote in 2014 that Roberts’s rationale in *Shelby County* was “based on the jurisprudence of slavery.”²⁵ Instead of citing *Dred Scott*, Roberts chose a few minor cases and an opinion he had written in 2009, which had invoked the concept of equal sovereignty for the first time in decades.²⁶ Roberts knew which knife he wanted to use to gut the Voting Rights Act, but he had to wipe Taney’s fingerprints from the handle first.²⁷

C. Rucho v Common Cause (2019)

The Supreme Court decision in *Rucho v. Common Cause* purports to take federal courts out of the business of policing partisan gerrymanders and leave the issue for states to handle.²⁸ In reality, in 2019, after a flood of partisan voting laws targeting Democratic constituencies, the conservatives on the Court gave their blessing to partisan gerrymandering, in effect granting Republicans permission to discriminate on the basis of race so long as they argued that they were targeting voters because they were Democrats, not because they were Black.²⁹

D. Brnovich & Prosperity; Americans for Prosperity v. Bonta (2021)

In 2021 with *Brnovich v. Democratic National Committee*, the Court continued its effort to read the Fifteenth Amendment out of the Constitution, finding that concrete proof of intent to discriminate is required for discriminatory restrictions to run afoul of the Voting Rights Act.³⁰ As long as plausible deniability is maintained, any discriminatory act is okay.³¹

The major significance of *Brnovich* is what the court says about how VRA’s Section 2 applies to suppressive voting rules. Rather than focus on whether a law has a disparate impact on minority voters, a state can now assert an interest in preventing fraud to justify a law without

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Richard L. Hasen, *The Gerrymandering Decision Drags the Supreme Court Further into the Mud*, The New York Times, June 27 2019, <https://www.nytimes.com/2019/06/27/opinion/gerrymandering-rucho-supreme-court.html>

²⁹ Adam Serwer, *Democratic Leaders Are Betraying Black Voters*, The Atlantic, July 27 2021, <https://www.theatlantic.com/ideas/archive/2021/07/democrats-are-betraying-black-voters/619573/>

³⁰ *Id.*

³¹ *Id.*

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

proving that fraud is actually a serious risk and at the same time, minority voters have a high burden: they must show that the state has imposed more than the “usual burdens of voting.”³²

In *Americans for Prosperity v. Bonta*, the court laid the groundwork for lower courts to strike down campaign finance disclosure laws and laws that limit campaign contributions to federal, state and local candidates.³³ The majority opinion, by Chief Justice John Roberts, is troubling. He redefined the “exacting scrutiny” standard to judge the constitutionality of disclosure laws so that the government must show its law is “narrowly tailored” to an important government interest.³⁴ This makes it more like strict scrutiny and more likely that disclosure laws will be struck down.³⁵

If you put the *Brnovich* and *Americans for Prosperity* cases together, the court is making it easier for states to pass repressive voting laws and easier for undisclosed donors and big money to influence election outcomes.³⁶

E. Apartheid in International Law

The central aspect of apartheid is race.³⁷ Racial apartheid is an institutionalized regime of racial segregation and systematic oppression, as seen in South Africa for the purpose of depriving the majority Black population of basic rights and securing the white minority's power over the country's government, economy, and resources.³⁸ The international community universally condemned the Black apartheid system.³⁹

Any system of institutionalized racial discrimination inherently conflicts with the non-discrimination clause contained in Article 2 of the Universal Declaration of Human Rights.

³² Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, The New York Times, July 1 2021, <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html>

³³ Serwer, *supra* note 21.

³⁴ Hasen, *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Miller, *supra* note 5.

³⁸ Susan H. Farbstain, *Perspectives from A Practitioner: Lessons Learned from the Apartheid Litigation*, 61 Harv. Int'l L.J. 451, 454–55 (2020)

³⁹ Farbstain, *supra* note 38.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

Further, the first instrument of international law expressly to proscribe the practice of apartheid was the International Convention for the Elimination of All Forms of Racial Discrimination.⁴⁰ Article 3 lays down an obligation for the signatories to oppose and eliminate apartheid: States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.⁴¹

F. Transitional Justice Principles

In any Transitional Justice situation, all we can hope for is recognition, reparations, and reconciliation between individuals; justice, truth and reform in institutions; and a nation at peace, and with democracy and human rights.⁴² Traditional institutional Transitional Justice measures like trials, truth commissions, reparations, amnesty, and lustration and vetting clearly serve objectives such as truth and justice.⁴³ However, the Transitional Justice process for any state will require a customized set and ordering of measures, further customized to balance and support the Realpolitik and other restraints of the situation.

Transitional Justice will always need multiple policies, customized ordering and application, and one can never expect any final closure.⁴⁴ There is also plenty of debate and controversy, as well as dependency, on Realpolitik and other constraints. Transitional Justice is contingent on local buy-in, elite political will, and rectification of the underlying drivers of conflict.⁴⁵

Transitional Justice exists between backward and forward-looking pursuits, with both retrospective and prospective measures and goals.⁴⁶ The process must both maintain order and

⁴⁰ John Dugard and John Reynolds, *Apartheid, International Law, and the Occupied Palestinian Territory*, EJIL, Vol. 24 No. 3, 867–913 (2013)

⁴¹ Dugard, *supra* note 40.

⁴² Olivera Simic, AN INTRODUCTION TO TRANSITIONAL JUSTICE, 2nd Ed., Routledge (2021)

⁴³ Simic, *supra* note 34.

⁴⁴ Elizabeth Jelin, *Public Memorialization in Perspective: Truth, Justice, and Memory of Past Repression in the Southern Cone of South America*, IJTJ, Vol 1, 138-156 (2007).

⁴⁵ Mneesha Gellman, *The Politics of Memory: What Future for Transitional Justice?*, Latin American Research Review, 54(2), 524-531 (2019).

⁴⁶ Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, Human Rights Quarterly 31(2), 321-367 (2009).

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

enable transformation.⁴⁷ Measures like establishing educational history curriculum, or creating memorials, is not just work to settle accounts with the past, but also to create a temporal distance between past and present.⁴⁸ History is a physical truth that is written about but also a collection of numerous narratives.⁴⁹ The past has to be clarified, perpetrators punished, victims recognized, and legacies conveyed to future generations.⁵⁰ As such, memory is a political battleground to be navigated in the process of reweaving social connections and institutional politics after periods of violence.⁵¹ As Peter Winn said, “the politics of memory reflects the memory of politics.”⁵²

Transitional Justice scholar Colleen Murphy argues that while the United States is already an established a democracy, that transitional justice is still needed here as it was in Apartheid South Africa.⁵³ Murphy argues both countries share several key features: pervasive structural inequality, normalized political wrongdoing, and serious existential uncertainty.⁵⁴

III. History of U.S. Black Voter Rights & Suppression

G. The First Reconstruction: 13th, 14th, & 15th Amendments

The Constitution of 1787 established a white republic in which the right to property meant the right to total domination of other human beings.⁵⁵ From 1619 to 1863, the U.S. legal system enacted “slave codes” outlining limitations on slaves, and what masters and others could do to slaves.⁵⁶ On June 19, 1865, Major General Gordon Granger arrived in Galveston, TX, and

⁴⁷ Arthur, *supra* note 46.

⁴⁸ Jelin, *supra* note 44.

⁴⁹ Gellman, *note supra* 45.

⁵⁰ Jelin, *supra* note 44.

⁵¹ Gellman, *supra* note 45.

⁵² *Id.*

⁵³ Colleen Murphy, *Transitional Justice in the United States*, Just Security, July 16 2020, <https://www.justsecurity.org/71236/transitional-justice-in-the-united-states/>

⁵⁴ Murphy, *supra* note 53.

⁵⁵ Bouie, *supra* note 9.

⁵⁶ Goodhart, *supra* note 4.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

announced the end of the Civil War and the end of slavery.⁵⁷ Although the Emancipation Proclamation came two and half years earlier on January 1, 1863, many enslavers continued to hold enslaved Black people captive after the announcement, so Juneteenth became a symbolic date.⁵⁸

The Americans who drafted, fought for and ratified the Thirteenth, Fourteenth and Fifteenth Amendments did nothing less than rewrite the Constitution with an eye toward a more free and equal country.⁵⁹ “So profound were these changes,” the historian Eric Foner writes that the amendments should not be seen simply as an alteration of an existing structure but as a “second founding,” a “constitutional revolution.”⁶⁰ The Reconstruction Constitution established a biracial democracy that made the federal government what Charles Sumner called the “custodian of freedom” and a caretaker of equal rights.⁶¹ Some historians have termed the ratification of the 15th amendment, “America’s second founding.”⁶²

H. Jim Crow, Antebellum, Southern Strategy, & Apartheid

However, when the 15th amendment came out in 1870, there were people who said right away, this will be easy to evade. And it was. As President Johnson explained: In many places in this country, men and women were kept from voting simply because they are Black and every device, of which human ingenuity is capable, has been used to deny their rights.⁶³ Following the abolition of slavery after the Civil War, “black codes” were created to criminalize offenses as minor as a Black person not having a job.⁶⁴ From 1876 through the 1970s, the U.S. established

⁵⁷ Erin M. Smith, *Juneteenth: Fact Sheet*, Congressional Research Service, June 21 2021

⁵⁸ Smith, *supra* note 57.

⁵⁹ Bouie, *supra* note 9.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Wilfred Codrington III, *The United States Needs a Third Reconstruction*, The Atlantic, July 20 2020, <https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-third-reconstruction/614293/>

⁶³ President Lyndon Johnson, *Special Message to the Congress: The American Promise*, March 15, 1965, <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise>

⁶⁴ Brianne McGonigle Leyh, *No Justice, No Peace: The United States of America Needs Transitional Justice*, OpinioJuris, May 6 2020, <http://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/>

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

Jim Crow laws to separate blacks and whites throughout almost all dimensions of public and private life.⁶⁵ The entire system of Jim Crow was built and maintained on the foundation of voter suppression: apartheid.⁶⁶

States, the laboratories of democracy—or, in this case, its suppression—experimented with different methods that would disenfranchise Black voters while being superficially race-neutral enough to pass under the blind eye of the justices on the Supreme Court, who were willing to countenance the most blatant forms of discrimination so long as they did not announce their obvious purpose.⁶⁷ There were grandfather clauses, which exempted those who had been able to vote prior to the Civil War and their descendants from the new, onerous voting requirements.⁶⁸ There were poll taxes and property requirements, which dispossessed Black men could not afford. There were literacy tests, which could take the form of unanswerable questions in the event that a prospective Black voter knew how to read.⁶⁹ All of these provisions were aimed at disenfranchising Black voters, but technically such measures didn't mention race at all.⁷⁰

Years of struggle for the right to vote culminated in Bloody Sunday, the infamous day in 1965 when civil rights advocates, including U.S. Rep. John Lewis, were brutally beaten as they marched across the Edmund Pettus Bridge in Selma, Alabama, to demand equal access to the ballot box — a pivotal moment in the campaign for civil rights that led to the enactment of the VRA months later.⁷¹ Television cameras captured the entire assault, and the world witnessed the Southern states' disturbing brutality against African-Americans.⁷² The events in Selma galvanized public opinion, and mobilized Congress to pass the Voting Rights Act.⁷³ After the

⁶⁵ Goodhart, *supra* note 4.

⁶⁶ Jabari Simama, *Voter Suppression and the Specter of a New American Apartheid*, *Governing*, March 19 2021, <https://www.governing.com/now/voter-suppression-and-the-specter-of-a-new-american-apartheid.html>

⁶⁷ Adam Serwer, *The Supreme Court is Helping Republicans Rig Elections*, *The Atlantic*, Oct 22 2020, <https://www.theatlantic.com/ideas/archive/2020/10/dont-let-supreme-court-choose-its-own-electorate/616808/>

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* 34 (2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf

⁷² Jon Meacham, *THE SOUL OF AMERICA: THE BATTLE FOR OUR BETTER ANGELS*, Random House, 236-244 (2019)

⁷³ *Shelby*, *supra* note 16.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

effects of Bloody Sunday rippled through the chambers of Congress, and after, nearly one hundred years of many Southern states' blatant disregard of the 15th amendment, Congress then employed its considerable power to begin the work of eradicating discrimination in the voting process.⁷⁴

The decades before the Civil War and 1861 were called the antebellum era (Latin for “before the war”), but plenty of Americans began to mythologize the 1940s and 1950s as “their own lamented antebellum era.”⁷⁵ The Republican Party “Southern Strategy was” to turn Southern Democrats into Republicans via the “race problem.”⁷⁶ Democrats embraced a violent politics of white identity in order to splinter any potential class alliances between poor whites and Blacks. “The leaders of the movement resorted to an intensive propaganda of white supremacy, Negrophobia, and race chauvinism.”⁷⁷ U.S. Southern Senators even opposed ratification of the genocide treaty worrying that Jim Crow laws could constitute genocide under the Convention.⁷⁸

I. Civil Rights Era & the 2nd Reconstruction

The Civil Rights movement democratized the South by enfranchising Blacks and ending single-party rule, and accelerated a long-run party system realignment.⁷⁹ The “1965 realignment” established liberal democrats and conservative republicans.⁸⁰ The Democratic Party become the primary representative of minority and first- and second-generation immigrant voters, while GOP voters remained overwhelmingly white.⁸¹ The Civil Rights Act defined Democrats as the party of civil rights and Republicans as the party of racial status quo.⁸²

⁷⁴ Meacham, *supra* note 72.

⁷⁵ Anderson, *FANTASYLAND: HOW AMERICA WENT HAYWIRE*, 252-3 Random House, (2017)

⁷⁶ *Id.*

⁷⁷ Meacham, *supra* note 72.

⁷⁸ Goodhart, *supra* note 4.

⁷⁹ Steven Levitsky & Daniel Ziblatt, *HOW DEMOCRACIES DIE*, 169,183 Broadway Books, (2018)

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

The second Reconstruction began in the 1950s and 1960s with the Supreme Court’s 1954 *Brown v Board of Education* decision, President Johnson’s signing the Civil Rights Act of 1964 and the 1965 Voting Rights Act.⁸³ The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States.⁸⁴ The VRA became the nation’s most effective defense against racially discriminatory voting policies.⁸⁵

While the VRA was a great achievement, voting discrimination is not a thing of the past.⁸⁶ Although the Act resulted in great strides forward from “Jim Crow era” disenfranchisement; jurisdictions today are still attempting to re-strict the ability of minority voters to exercise their right to vote. For example, a federal court in 1986 stated that “[f]rom the late 1800’s through the present, [Alabama] has consistently erected barriers to keep Black persons from full and equal participation in the social, economic, and political life of the state.”⁸⁷

The 2013 decision in *Shelby County v. Holder*—when the court’s conservative majority ruled that states like Georgia and Mississippi, with a history of discrimination, no longer needed to clear their voting changes with the federal government—had an impact similar to Hayes’ decision to withdraw federal troops from the South in 1877. The federal government, it was clear, had abandoned its commitment to enforce the Reconstruction Amendments to the Constitution.⁸⁸

IV. Current Challenges

The second Reconstruction culminated in 2020, when Black voters turned out in record numbers to elect Georgia’s first Black and Jewish U.S. senators.⁸⁹ But the vicious white backlash that has followed those victories—an attempt to overturn the election, an insurrection at the US

⁸³ Codrington, *supra* note 62.

⁸⁴ *Shelby*, *supra* note 16.

⁸⁵ LaShawn Webber, Voting discrimination is getting worse, not better, SCOTUS Blog, Feb 18 2021 <https://www.scotusblog.com/2021/02/voting-discrimination-is-getting-worse-not-better/>

⁸⁶ *Shelby*, *supra* note 16.

⁸⁷ *Id.*

⁸⁸ Ari Berman, *Facing Down Jim Crow. Again.*, Mother Jones, <https://apple.news/AcpNSAgDIRlaW3-QXsxExNA>

⁸⁹ *Id.*

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

Capitol, a record number of bills to restrict voting rights—has all the makings of a concerted attempt to end the second Reconstruction.⁹⁰ The U.S. elected Georgia’s first African American and Jewish senator, and, hours later, the Capitol was assaulted,” Warnock told his colleagues. “We see in just a few precious hours the tension very much alive in the soul of America.”⁹¹

There’s recently been a surge in voter suppression efforts. Dozens of federal judges have ruled recently that states and municipalities have diluted, disenfranchised, or otherwise devised illegal, unconstitutional schemes to deny minorities their rightful electoral power.⁹² This year, the Brennan Center for Justice found a wave of new bills with restrictive voting provisions on track to far exceed recent periods of significant voter suppression.⁹³ It’s not far-fetched to view current voter suppression efforts as signaling a desire to return to a form of American apartheid aimed at permanently instituting minority rule.⁹⁴ In fact, many believe the country has been on the verge of becoming an authoritarian state.⁹⁵

The GOP’s attack on voting rights is increasing pressure on Democrats in the U.S. Congress to pass bills protecting voting rights (i.e., the *For the People Act* and the *John Lewis Voting Rights Act*).⁹⁶ “Republicans unchecked are creating an existential crisis for democracy,” says Abrams.⁹⁷ “We have to ensure that Republicans cannot deny eligible voters their ability to engage in democracy.”⁹⁸ Indeed, much effort and imagination continues to be invested in preventing Black people from voting. To the extent that current laws play at neutrality while

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Janai S. Nelson, *Transitional Justice: DOJ in the Era of Trump*, HuffPost, January 30 2017, https://www.huffpost.com/entry/transitional-justice_b_14498156

⁹³ Rebecca Beitsch, *Department of Justice Sues Georgia over Voting Law*, The Hill, May 25 2021, <https://thehill.com/homenews/administration/560229-department-of-justice-sues-georgia-over-voting-law>; Brennan Center for Justice, *Voting Laws Roundup: May 2021*, May 28 2021, <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>

⁹⁴ Jabari Simama, *Voter Suppression and the Specter of a New American Apartheid*, *Governing*, March 19 2021, <https://www.governing.com/now/voter-suppression-and-the-specter-of-a-new-american-apartheid.html>

⁹⁵ Simama, *supra* note 95.

⁹⁶ Ari Berman, *Georgia Republicans Pass the Most Restrictive Voting Laws Since Jim Crow*, *Mother Jones*, March 8 2021, <https://www.motherjones.com/politics/2021/03/georgia-republicans-pass-the-most-restrictive-voting-laws-since-jim-crow/>

⁹⁷ *Id.*

⁹⁸ *Id.*

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

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placing burdens on specific groups of voters on a partisan (and inescapably racial) basis, it is, at least, Jim Crow-adjacent.⁹⁹

In March 2021, Georgia legislators passed legislation that significantly curtailed the right to vote in the state.¹⁰⁰ Collectively, these bills represent the most sustained effort to roll back access to the ballot in Georgia since the Jim Crow era.¹⁰¹ The same is true nationally, where Republicans have introduced 253 bills in 43 states in the first two months of this year to make it harder to vote.¹⁰² “We are seeing again and again this version of Jim Crow in a suit and tie,” Stacey Abrams said, “because it is designed explicitly for the same reason as Jim Crow did, to block communities of color from active participation in choosing the leadership that will guide their democracy.”¹⁰³

Following Donald Trump’s defeat in the 2020 election, Republican-led states have engaged in a massive campaign to narrow voting access, spurred on by the falsehood that Trump’s loss was the result of widespread voter fraud.¹⁰⁴ Republicans have insisted that these restrictions are needed to fight voter fraud, but over a period of decades Republican prosecutors have failed to produce anything in the same galaxy as widespread voter fraud.¹⁰⁵

J. American Exceptionalism

A contextual blockage that prevents us from grappling with our past, and the present that is informed by it is "American exceptionalism," the "not us" idea.¹⁰⁶ "This is America and it can't happen here."¹⁰⁷ American exceptionalism views wrongdoings as “un-American,” which obscure

⁹⁹ Jamelle Bouie, *If It's Not Jim Crow, What Is It?*, The New York Times, April 6 2021, <https://www.nytimes.com/2021/04/06/opinion/georgia-voting-law.html>

¹⁰⁰ Berman, *supra* note 96.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Adam Serwer, *Democratic Leaders Are Betraying Black Voters*, The Atlantic, July 27 2021, <https://www.theatlantic.com/ideas/archive/2021/07/democrats-are-betraying-black-voters/619573/>

¹⁰⁵ Serwer, *supra* note 104.

¹⁰⁶ David Masciotra, *Could genocide really happen here? Leading scholar says America is on "high alert"*, Salon, July 11 2021, https://apple.news/ATvrHigc5TDC10-FO0_e4wQ

¹⁰⁷ Masciotra, *supra* note 106.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

American failures and the need for American change.¹⁰⁸ We must correct our twisted historical narrative. Recent politics have seen literal denial of facts, interpretive denial, and implicatory denial, along with ideological racism.¹⁰⁹ American exceptionalism keeps us stuck in cycles of injustice. The U.S. tends to interpret racial violence as sporadic or sudden, which obscures the historical, economic, and legal roots of racially unequal mobility and mortality.¹¹⁰

A genocide-driven revisionist look at the United States, leads us through settler colonialism and the connection between the need for land and need for labor, which sets everything in motion.¹¹¹ U.S. atrocity crimes include Hiroshima and Nagasaki, the Indian Exclusion Act, what happens when we push Native Americans further and further west and, of course, systemic white supremacy.¹¹²

The United States is "simmering at a low boil," and shows every risk indicator for widespread mass atrocity crimes.¹¹³ White supremacist organizations and armed militias are mobilized for political action, the Republican Party has declared war on multiracial democracy and right-wing voters have become increasingly radical and hostile, falling into the personality cult of Donald Trump and the apocalyptic cult of QAnon.¹¹⁴

Black Lives Matter demands accountability for police violence and for generations of racial injustice, from slavery to the present day.¹¹⁵ The current protests have a deep history and are inseparable from enslavement, dispossession, and disenfranchisement over centuries of Black Americans through law, politics, and economy.¹¹⁶

The United States struggles with racism in part because government agencies and institutes, including the Supreme Court, believes that brief implementations of discrete measures

¹⁰⁸ Colleen Murphy, *How Nations Heal*, Boston Review, January 21 2021, <https://bostonreview.net/politics-law-justice/colleen-murphy-how-nations-heal>

¹⁰⁹ Murphy, *supra* note 108.

¹¹⁰ Miller, *supra* note 5.

¹¹¹ Masciotra, *supra* note 106.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Murphy, *supra* note 108.

¹¹⁶ Miller, *supra* note 5.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

resolved centuries of racial subordination, when transitional justice is a generational process requiring holistic approaches.¹¹⁷

American Exceptionalism can also be seen in the U.S.’ approach towards international law, which can also infect the U.S.’ view of Transitional Justice.. “Provincialism” are rules and doctrines created by U.S. Supreme Court which purposefully or effectively minimize the role of international law in U.S. courts.¹¹⁸ These rules and doctrines include standing requirements, subject matter and personal jurisdiction, political question doctrine, “lis alibi pendens” (dispute elsewhere pending) doctrine, foreign sovereign immunity, “forum non conveniens,” non-self-executing treaties, congressional law superseding pre-existing treaties and customary international law, and the act of state doctrine, to name a few.¹¹⁹ U.S. courts may also refuse to hear international law cases, refuse to apply international rules to cases they do hear, or treat international issues as if it were domestic issues.¹²⁰ International law cannot provide the rule for a decision unless the U.S. courts allow the international rule to be recognized in domestic courts.¹²¹

K. Denialism

U.S. history is often taught and popularly understood through the eyes of its great men, who are seen as either heroic or tragic figures in a global struggle for human freedom.¹²² The 1619 Project, named for the date of the first arrival of Africans on American soil, sought to place “the consequences of slavery and the contributions of Black Americans at the very center of our national narrative.”¹²³ Viewed from the perspective of those historically denied the rights

¹¹⁷ Yurraj Joshi, *Does Transitional Justice Belong in the United States*, Just Security, July 13 2020, <https://www.justsecurity.org/71372/does-transitional-justice-belong-in-the-united-states/>

¹¹⁸ Patrick M. McFadden, *Provincialism in United States Courts*, 81 Cornell L. Rev 4 (Nov 1995) [Hereinafter: *Provincialism in United States Courts*]

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, The Atlantic, Dec 23 2019, <https://apple.news/ARmaByMxqSwyqhEMa9lnPcg>

¹²³ *Id.*

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

enumerated in America's founding documents, the story of the country's great men necessarily looks very different.¹²⁴

The 1619 Project, and Hannah-Jones's introductory essay in particular, offer a darker vision of the nation, in which Americans have made less progress than they think, and in which Black people continue to struggle indefinitely for rights they may never fully realize. Inherent in that vision is a kind of pessimism, not about Black struggle but about the sincerity and viability of white anti-racism.¹²⁵ It is a harsh verdict; Americans want to believe that, as Martin Luther King Jr. said, the arc of history bends toward justice, and they are rarely kind to those who question whether it does.¹²⁶

Most Americans still learn very little about the lives of the enslaved, or how the struggle over slavery shaped a young nation.¹²⁷ "The biggest obstacle to teaching slavery effectively in America is the deep, abiding American need to conceive of and understand our history as 'progress,' as the story of a people and a nation that always sought the improvement of mankind, the advancement of liberty and justice, the broadening of pursuits of happiness for all."¹²⁸

Denialism is seen in many superficial and ineffective Democratic responses to Black voter suppression. This year, President Biden warned that the Republican's current voter suppression efforts are the "most significant test of our democracy since the Civil War."¹²⁹ However, White House officials expressed confidence that it is possible to "out-organize voter suppression."¹³⁰ While Biden recognized the issue, he dismissed the reach, and thus also the cause.

Denialism was also ever present in the *Shelby v Holder* decision. Ginsberg dissented, "volumes of evidence supported Congress' determination that the prospect of retrogression was real; throwing out preclearance when it has worked and is continuing to work to stop

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Katie Rogers and Nick Corasaniti, *Democrats' Divide on Voting Rights Widens as Biden Faces Pressure*, *The New York Times*, July 22 2021, <https://www.nytimes.com/2021/07/22/us/politics/biden-voting-rights.html>

¹³⁰ Rogers, *supra* note 129.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”¹³¹

V. Transitional Justice for U.S. Black Voter Suppression

Transitional Justice involves many topics: justice for mass atrocities, rebuilding societies after mass violence, international justice frameworks, human rights, comparative political science, and historical studies of political “transitions.” Transitional Justice seems to be a new, distinct field of study while also consisting of no single theory and having no fixed meaning.¹³² The field is as anomalous and unpredictable as the topic of transitions it studies. Transitional Justice was built on a comparative knowledge base – comparing national experiences and looking for patterns and lessons, but never grasping, let alone starting with, an ideal process. In any Transitional Justice situation, all we can hope for is recognition, reparations, and reconciliation between individuals; justice, truth and reform in institutions; and a nation at peace, and with democracy and human rights. It is simply the route and measures taken to progress towards those objectives that will change. Depending on the circumstances of each situation, additional measures may need to be pursued, and some may be expected to arise organically.

Transitional Justices, especially Truth-telling, are not a new concept for Black voter suppression in America. John Lewis’ vision was to dramatize the injustice of segregation and to call America to redemption “not through violence, but through witness.”¹³³ The “preclearance” requirement of the Voting Rights Act prevented public officials from using discriminatory voting practices on a continuous basis, which supported transition by sustaining democratic rule.¹³⁴

L. Systems & Truth Telling

¹³¹ *Shelby*, *supra* note 16.

¹³² Paige Arthur, *How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice*, *Human Rights Quarterly* 31(2), 321-367 (2009).

¹³³ Meacham, *supra* note 72.

¹³⁴ Joshi, *supra* note 117.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

One of the lessons of the South after Reconstruction is that democratic life can flourish and then erode, expand and then contract. Democracy is not a solid state, and we should be wary of politicians who would undermine any part of it for partisan advantage.¹³⁵ It took three decades of struggle, and violence, before Southern elites could reclaim dominance over Southern politics.¹³⁶ No particular restriction was decisive. The process was halting, contingent and contested, consolidating in different places at different times.¹³⁷ It was only when the final pieces fell into place that the full picture of what took place was clear. Put a little differently, the thing about Jim Crow is that it wasn't "Jim Crow" until, one day, it was.¹³⁸

In 2021, the United Nations Human Rights Chief released a statement in response to global racism, noting the death of George Floyd specifically, requesting action. She called for States to adopt a "transformative agenda to uproot systemic racism."¹³⁹ She said, "Systemic racism needs a systemic response. There needs to be a comprehensive rather than piecemeal approach to dismantling systems entrenched in centuries of discrimination and violence."¹⁴⁰ Toni Morrison explained many year ago that the importance in "shifting attention away from assertions of power to the instrument through which that power is exercised."¹⁴¹

Moving forward requires looking back. Truth and Reconciliation Commissions hold perpetrators accountable while concurrently providing a forum for victims to recount the abuses they suffered.¹⁴² Truth Commissions are official bodies set up to investigate the past, look at the big picture instead of focusing on a specific event, are temporary, and are vested with some sort of authority.¹⁴³ Commissions can investigate violations by the military, government, armed opposition forces, militias, international actors, or focus on the stories of how victims were

¹³⁵ Bouie, *supra* note 99.

¹³⁶ *Id.*.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ UN Human Rights, *UN Human Rights Chief urges immediate, transformative action to uproot systemic racism*, June 28 2021, <https://www.ohchr.org/EN/NewsEvents/Pages/Media.aspx?IsMediaPage=true>

¹⁴⁰ UN Human Rights, *supra* note 140.

¹⁴¹ Masciotra, *supra* note 106.

¹⁴² Sarah Souli, *Does America Need a Truth and Reconciliation Commission?*, Politico, 16 Aug 2020.

¹⁴³ Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, *Human Rights Quarterly* 16, 597-655 (1994).

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

impacted by the government.¹⁴⁴ There have been Truth Commissions in at least 46 countries over the past fifty years.¹⁴⁵

The expressed intent of most Truth Commissions is to lessen the likelihood of human rights atrocities reoccurring in the future.¹⁴⁶ Commissions try to break the cycle of violence, facilitate healing and reconciliation, and provide a national catharsis.¹⁴⁷ Commissions are often created at a point of political transition within a country: to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and to obtain or sustain political legitimacy.¹⁴⁸ They can help societies begin to move beyond otherwise impossible challenges including dictatorships, genocide, civil war, ethnic conflict, and revolution.¹⁴⁹

Commissions are used to “acknowledge the truth,” and to establish an accurate and fair record of a country's history.¹⁵⁰ Leaving an honest account of the violence prevents history from being lost or re-written, and allows a society to learn from its past in order to prevent a repetition of such violence in the future.¹⁵¹ A commission can help reduce the likelihood of future abuses simply by publishing an accurate record of the violence, with the hope that a more knowledgeable citizenry will recognize and resist any sign of return to repressive rule.¹⁵² At the very least, official acknowledgement begins to heal the wounds.¹⁵³

While Truth Commissions share some common features, each is unique, reflecting contextual differences of each situation.¹⁵⁴ Each Commission should be context-specific,

¹⁴⁴ *Id.*; Eduardo Gonzales, *Drafting a Truth Commission Mandate: A Practical Tool*, International Center for Transitional Justice (2013).

¹⁴⁵ Souli, *supra* note 138.

¹⁴⁶ Hayner, *supra* note 139.

¹⁴⁷ Alpha Sesay, *To Compete or to Complement? Assessing the Relationship between the Sierra Leone Special Court and the Truth and Reconciliation*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY* 481-501 (Charles Chernor Jalloh ed., 2015).

¹⁴⁸ Hayner, *supra* note 143.

¹⁴⁹ Souli, *supra* note 141.

¹⁵⁰ Hayner, *supra* note 143.

¹⁵¹ *Id.*

¹⁵² Hayner, *supra* note 143.

¹⁵³ *Id.*

¹⁵⁴ *What is a Truth Commission*, U.S. Department of State (16 May 2016), <https://2009-2017.state.gov/j/gcj/transitional/257567.htm>

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

reflecting local culture, needs, strengths, and opportunities.¹⁵⁵ Truth Commissions do not operate in a vacuum. Every commission works under political constraints, and many of these political constraints or contextual challenges cannot necessarily be avoided.¹⁵⁶

Consultations with the public and the thoughtful choosing of a sponsor enable legitimacy and credibility.¹⁵⁷ Obtaining sponsorship from an international organization may have benefits such as neutrality in a highly polarized environment.¹⁵⁸ However, the national character of a country and its attitude towards international involvement in its internal affairs is critical to determining whether an international commission is appropriate.¹⁵⁹ Some countries, like the U.S., may reject the suggestion of an international commission, citing national sovereignty concerns.¹⁶⁰

In the light of transitional justice, we can see periods of major racial change as regime changes. One historian has referred to the Civil Rights era as a regime change that was “woefully incomplete, and therefore unjust.”¹⁶¹ Johnson’s Kerner Commission examined the Black uprisings in the 1960s to find their causes. The report issued in 1968 recommended a national effort to dismantle segregation and structural racism across American institutions.¹⁶² Richard Nixon was voted in shortly after and shelved the proposal.¹⁶³

M. Reconciliation

Truth Commissions can help us reframe how we talk about U.S. racism as state sponsored and even tolerated forms of political repression of an ethnic minority that have

¹⁵⁵ *Id.*

¹⁵⁶ Hayner, *supra* note 143.

¹⁵⁷ *Truth and Reconciliation Commissions: Core Elements*, Public International Law & Policy Group (May 2013).

¹⁵⁸ Hayner, *supra* note 143.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Joshi, *supra* note 117.

¹⁶² National Advisory Commission on Civil Disorders, *The Kerner Commission Report* (1968), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015000225410>

¹⁶³ Leyh, *supra* note 5.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

violated international law.¹⁶⁴ They also set the record straight: raising awareness and attention to how to understand centuries of violent racial repression as systemic inequalities deeply embedded into our social, political, and economic systems and not merely isolated acts by racist individuals.¹⁶⁵

Transitional Justice understands that the healing of communities can only occur if we first understand what is damaged, and damage can only be repaired if it is truly acknowledged and addressed.¹⁶⁶ To help prevent the reoccurrence of atrocities, we need to draw a line between that was accepted in the past and what will be acceptable in the future by accurate understanding the root problems with relationships among members of society.¹⁶⁷

James Madison wrote, “the power is in the people over the Government, and not in the Government over the people.”¹⁶⁸ Free and fair and periodic elections are the key to that vision. The people get to choose their representatives and then they get to decide, at regular intervals, whether to keep them.¹⁶⁹

VI. Conclusion

We must de-exceptionalize the United States. Applying Transitional Justice and international law to anti-Black racism in the U.S. will help to expose and clarify the legal and political structuring of white supremacy, connect it to global structural inequality, open up narratives of American suppression and repression, and link today’s racialized inequality and violence with their long histories.¹⁷⁰

The centuries long oppression of Black Americans is precisely the kind of massive human rights violation that necessitates systemic and ongoing redress.¹⁷¹ Transitional Justice will

¹⁶⁴ Lisa LaPlante, *This National Reckoning is Overdue*, The Hill, June 27 2020, <https://thehill.com/opinion/civil-rights/503246-this-national-reckoning-is-overdue>

¹⁶⁵ *Id.*

¹⁶⁶ Murphy, *supra* note 108.

¹⁶⁷ *Id.*

¹⁶⁸ *Rucho v Common Cause*, 139 S. Ct. 2484 (2019).

¹⁶⁹ *Id.*

¹⁷⁰ Miller, *supra* note 4.

¹⁷¹ Joshi, *supra* note 117.

Reckoning with U.S. Black Voter Suppression

Summer 2021 Oxford Program Term Paper

Professor Catherine J. K. Sandoval | Ashley Gjovik, J.D. Candidate 2022

be one of the tools needed in this process, but Truth measures should be prioritized and expediated to build the foundation for the rest. We must urgently look back and fully reckon, before we can move forward.