

## The Whiteness of *Brown*. The Failed Constitutive Rhetoric of *Brown v. Board*

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*In the **Brown v. Board of Education** decision, the Supreme Court crafted an argument for the importance of a unified American identity which, they argued, is protected by the Fourteenth Amendment. The opinion was a constitutive argument utilizing the importance of education in modern America and the identity that results from the normative experience of that education. However, it was a failed piece of constitutive rhetoric, as the opinion failed to create any space for Black identity. This paper argues that **Brown's** failure rests in its assumption of normative identity. The **Brown** opinion speaks from a place of "color-blindness" which, in actuality, perpetuates White dominance.*

When Earl Warren of the Supreme Court of the United States (SCOTUS) penned the *Brown v. Board of Education of Topeka, Kansas* decision in 1954, he knew he was writing an opinion that would be one of the most important and influential of his tenure. The opinion called for radical change and restructuring a way of life that had been rigidly codified along the lines of race, leading to unabashed subjugation of one group to another. The Court crafted an argument for the importance of a unified American identity which, they argued, is protected by the Fourteenth Amendment. While the final opinion did not specifically define what it meant to be "American," it did argue that the American experience—our very identity and citizenship—was protected constitutionally.

The *Brown* opinion posited that a shared educational experience helped fashion a unified national identity, and as such it was inestimably important—so important that segregated education was a violation of the Fourteenth Amendment. However, as scholars have since pointed out, it is problematic to claim any kind of monolithic

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American identity. The notion of a unified identity fails to acknowledge the different experiences of our diverse nation. Race scholars, such as Derrick Bell and Kimberlé Williams Crenshaw argue that assuming an American identity without acknowledging the multi-faceted nature of that identity, privileges Whiteness. Warren's opinion, though progressive in its intent, argued that all students should be able to share in a singular American identity that they would learn in integrated schools. Education, Warren wrote, was where students learned the cultural values that awakened them to the very nature of democracy. It was a unifying experience. The result, however, was not a broader comprehension of the many ways of understanding what it means to be American but the idea that Black children should have the opportunity to take part in, and perhaps assimilate to, White America. The *Brown* decision's assumption of unified cultural norms is part of a tradition of "color-blind" law, which actually privileges Whiteness.

This essay interrogates the relationship between Whiteness and legal reasoning. In this project I will describe constitutive theory and show how the *Brown v. Board* opinion is constitutive rhetoric, that it favors Whiteness, by means of color-blindness, in its attempts to connect the educational experience to a unified American experience. This color-blind approach indicates a lack of acknowledgement of the experiences of People of Color in the law and creates an environment in which true integration is impossible.

Whiteness is entrenched in our law and our educational system. With Whiteness legally fixed into such foundational institutions in our nation, People of Color face enormous difficulties in fighting systemic racism. Whiteness is written into the codes that define our lives, including the case law that was supposed to eradicate segregation. Movements such as #BLM that ask us to examine our Whiteness, then, are facing not just discursive and psychological resistance, but legal and systemic resistance as well.

### **James Boyd White and Constitutive Rhetoric**

Constitutive rhetoric is the capability of language, or other communicative symbols, to create a collective identity for an audience. This happens through literature, politics, law, public narrative, and a variety of other discursive practices. Critics often turn to Maurice Charland's (1987) historical piece on the *Peuple Quebecois* for theory on

constitutive rhetoric. In that essay Charland (1987) describes the process of rhetoric in which subjects are interpellated in a narrative, calling an identity into being. Charland's legacy is that critics have the opportunity to engage in an analysis of textual interiors, particularly on narrative structures, which warrant interpretive claims regarding presumed discursive effects that emphasize identity constitution. In this tradition, the text positions the person (Jasinski and Mercieca, 2010, p. 316-318).

Though this perspective has some similarities to the less popular constitutive, but original, approach articulated by James Boyd White (1985), Jasinski and Mercieca (2010) have argued that Charland's (1987) theory deviates from White's (1985 & 1990). White's understanding of discursive action is more dialogic than Charland's (Jasinski and Mercieca, 2010, p. 317). For White, the reader/speaker/writer is self-conscious and has agency. Ultimately, White's version encourages critics to move beyond just the textual interiors and to think about reception and circulation (Jasinski and Mercieca, 2010, p. 318). It is because of this that White's understanding of constitutive rhetoric is more appropriate for a study of the law. Not only did White himself write specifically about the law as a constitutive rhetoric but he also argued that the law is a rhetoric in which rhetors had agency. The reception of the law was an important part of the constitutive process. The law is written intentionally and can be assessed as a text that creates a relationship between text and audience which purposefully shapes identity.

Current trends in constitutive rhetoric have focused on the work of Maurice Charland, Kenneth Burke, Michael McGee, and to some extent Edwin Black. For example, Theon E. Hill's (2016) work on Christian identity and race as biology focuses on Burke's (1969) notion of identification and Charland's (1987) notion of constitutive rhetoric and how they examine the "intersections of ideology, collective identity and unity" (p. 31). This emphasis on Charland, with its roots in Althusser, leads to a Structuralist understanding of identity formation. This may be why Rahul Mitra (2016) claims that there are holes in such an approach (p. 272). Mitra (2016) notes that one such hole is that Charland's approach "does not explain how these intersections among text, subject, and action might occur" (p. 272). I contend that returning to the originator of the theory of constitutive rhetoric, White, attends to some of these weaknesses. White

(1985), who coined the phrase constitutive rhetoric, provides an approach that allows for a more agent and text driven theory. My work notes what the rhetor articulates and the effect that has on audiences. Paul Miniffee (2014) utilizes the work of James Jasinski and Perelman Olbrechts-Tyteca, which notes the tension between constitutive and instrumental rhetoric (though Leff and Utley (2004) argue rhetoric can be both instrumental and constitutive (37-52)). Miniffee (2014) depends on the work of James Jasinski to argue that there is rhetoric of self-constitution, but also rhetoric that shapes collective identity and culture and political existence, as well. Miniffee's (2014) work, while not dependent on White, moves the conversation away from Charland (1987) and provides a multifaceted theory of constitutive rhetoric, creating room for White to re-enter the conversation.

The law is never at stasis. White (1990) writes that the law is constitutive because it gives life to old texts by placing them in new contexts. He states that the law is written in the language of its time and has to be translated to the language of the present. The job of the judiciary—the process of the law itself—is translating authoritative texts into the present context (White, 1990, p. 240-246). It is rhetoric that constructs and helps us understand how we construct the world in which we live. The language that we use is constructed, and our language makes us. In this case, the language of the law is directly speaking to us about how we are made.

The law at large, then, is constitutive. But the *Brown* opinion is especially deserving of critical attention in terms of its constitutive power. Warren's opinion placed the Fourteenth Amendment in a new context, extending it to protect American identity. It is certainly true that dreams of an integrated America remain unfulfilled. The nation is still stratified along racial lines at all levels of measurement. But the opinion addressed more than just physical bodies in the schools. The opinion is written to highlight that separate educations create a schism in national identity and citizenship. But because the opinion assumes that simply adding Black students into the White population will solve this rhetorical problem, it fails to truly argue for any kind of integrated identity. The opinion explicitly states that Black children are being left out of the means to understand

cultural values and democracy. The Warren opinion simply calls for Black students to be able to partake in what White children already did.

### **Whiteness**

Communication scholars have attended to Whiteness with varying regularity since the '80s, but Whiteness really became a part of the conversation in rhetorical studies with Nakayama's and Krizek's (1995) germinal "Whiteness: A Strategic Rhetoric," which discussed the way participants in a study viewed their own understandings of their Whiteness and what that means. However, since then, rhetoricians' commentary on Whiteness often speaks to blatant White supremacy, such as that manifested by the *Turner Diaries* or the Alt-Right (Goehring & Dionisopoulos, 2013; Hartzell, 2018). Goehring and Dionisopoulos (2013) focus on the virulent racism of the *Turner Diaries* in their construction of Whiteness as opposed to the more muted, but still oppressive systemic structures like color-blindness that are built into the law and our education system. In a cultural climate in which there are groups calling for White dominance or White nationalism in mainstream public discourse, a critique of color-blindness may seem milquetoast. But as Hartzell (2018) notes, color-blindness enables race inequities while creating a situation in which those who point to those inequities can be accused of "playing the race card" (p. 13). Rhetorical scholars need to interrogate this kind of Whiteness, as this is the kind of racial rhetoric that may not lead to hate speech in the streets but does lead to the mindset that "All lives matter" is an appropriate response to "Black lives matter." Responses such as this, imbued with color-blindness, act to erase Blackness from the equation. This study, then, is an important part of the conversation on race and Whiteness in the current political climate because it addresses the underpinnings of systemic Whiteness. While the clearest example of Whiteness may be White men carrying torches in the streets of Charlottesville, it is equally important to address well-meaning White people whose response to Activists of Color is to neutralize markers of race.

The history of "race" is fraught with debate over what precisely "race" is. People have argued that it is biological, ethnic, and socially constructed. But it is also, quite realistically, a legal construction. The law has been connected to race in a variety of ways

for some time. Gotanda (1991) observes that “Both in constitutional discourse and in larger society, race is considered a legitimate and proper means of classifying Americans” (p. 23). One need only look at cases like *Scott v. Sandford* or *Plessy v. Ferguson* to see how race and the law are inextricably linked. And the law does more than just legalize race; it defines “the spectrum of domination and subordination that constitutes race relations” (Lopez, 1996, p.10). When the law constructs race, it constructs the hierarchies that define race relationships in America, and it has had a heavy hand in crafting America’s understanding of race and racial relations.

Race-blindness, or color-blindness, does little to help race relations. If anything, “race-blindness ironically targets not the harmful effects of racism, but the efforts to ameliorate such harms” (Lopez, 1996, p.178). It imposes a blanket identity on a group of people, which inevitably marginalizes those who do not conform to that identity. The idea behind such blindness is that race should have no real significance. It ignores the culture (and the problems) of a group of people and assimilates them all into one category, which is inevitably the majority (Gotanda 1991, p.59). In other words, it eliminates the means to effectively battle racism by ignoring that racism exists. In this way, race-blindness, or color-blindness, exacerbates the hegemony of White culture (Gotanda,1991, p.60-62). The essential defect of any color-blind theory of racial discrimination is that it pre-supposes some utopia where race is inconsequential. It simultaneously declares race irrelevant while it prevents any step to achieve racial irrelevance (Freeman, 1978, p. 1074). As Gotanda (1991) argues, color-blindness only serves to advance White interests (26-27).

Understanding Whiteness and the law, then is crucial. Whiteness itself is self-evident and omnipresent (Lopez, 1996, p.157). Grover (1997) posits that Whiteness is, itself, American and dominant (p. 34). In other words, it is interchangeable with the idea of “American” and is the cultural yardstick for national identity. Whiteness is the norm, and is therefore an invisible identity (Martin, Krizek, Nakayama, and Bradford, 1996). It provides for a constructed set of norms by which one can understand “deviance.” Condit and Lucaites (1993) argue that the political success of early America came from the construction of themselves as a singular people, but that construction left out Black

Americans. That shared identity was Christian and European (p. 59-60). America's success depended on understanding itself as White; Whiteness provided a unified front. This is what the *Brown* opinion extends to Black Americans by means of de-segregating schools. The *Brown* opinion may desegregate, but it does not create a situation in which Black and White school children are on equal footing.

### **The *Brown* Decision as Constitutive Rhetoric**

The literature covering *Brown v. Board of Education* comes from a variety of disciplines, from education to legal studies. Jack M. Balkin's (2001) *What "Brown v. Board of Education" Should Have Said* presents a collection of essays in which legal experts address the decision and how it might have been communicated or decided differently. It is a provocative look at the perceived strengths and weaknesses of the Warren argument and, with the exception of one opinion, presents different arguments for how the Court might have achieved the same result via different a different rhetorical pathway. Some of the essays argue that using the 14<sup>th</sup> Amendment as the crux of the argument was a mistake on the part of Court, and imply that the decision has legal and rhetorical weaknesses. Paul Wilson (1995), in *A Time to Lose*, attempts to contextualize the argument and explain it from a legal standpoint. Wilson, a lawyer that represented the Topeka Board of Education in the case before the Supreme Court, has a perspective that is largely missing from other works. Wilson's understanding of the case at the time was that it was a very simple legal matter - the laws concerning separate but equal had been tested and those he represented were not breaking them. Ultimately he is not displeased that he lost; he found the racism of some of his supporters frankly embarrassing, but he felt the case was swayed by extra-legal argumentation, as echoed in many of the essays in Jack Balkin's collection. Clarke Rountree (2004) provides a specifically rhetorically oriented collection in "*Brown v. Board of Education*" at *Fifty: A Rhetorical Perspective* which looks at the rhetoric of race during and since the case. Rountree's collection applies rhetorical theories to the cases that challenged, sustained, and ultimately eliminated segregation. In "Achieving Unanimity in *Brown v. Board*," Martin A. Bartness (1996) also takes a rhetorical approach, but his interest is the way in which the justices used disparate philosophies to come to a unanimous decision. He

argues that rhetorical collaboration led to the unanimous decision that added to the power and credibility of the Court's opinion. However, the work does little analysis of the opinion as a piece of rhetoric in and of itself.

Most works, however, focus on either the history of the case or the long term repercussions. With the exceptions of Balkin's (2001) collection, which seeks to address perceived legal weaknesses in the decision, and Rountree's (2004), which is a rhetorical analysis of the case and its aftermath, the works dealing with this landmark decision are not rhetorical studies. Some, such as Danielle S. Allen's (2004) *Talking to Strangers: Anxieties of Citizenship since "Brown v. Board of Education,"* touch on issues of national identity, but it, like most others, is a study of the nation's reaction to the case, not the case itself. But most works dealing with *Brown v. Board* are historical accounts that then aim to come to terms with the decades that followed.<sup>1</sup>

Daniel Mangis (2005) writes in Clark Rountree's *Brown v. Board of Education at Fifty* that John Marshall Harlan's dissent in *Plessy v. Ferguson* may not have been law, but it was prophecy. He contextualizes *Brown v. Board* by analyzing the dissent that preceded it. The *Plessy* case, which established separate but equal, is inextricably linked to *Brown*, as it is the *Brown* case that overturns *Plessy*. It is useful, then, to consider the outlier opinion that rejected *Plessy* initially, as it is the legal predecessor of the *Brown* opinion. Harlan framed his opinion with the metaphor of the color-blind Constitution, and, according to Mangis, it is this metaphor that continues to hold sway in legal reasoning (Rountree, 2005, p.24). Mangis notes that even Harlan assumed that Whites would dominate culture, business, and society in general if the law were color-blind. Color-blind legal reasoning was not the same a racial justice (p.32). Mangis (2005) concludes that this brand of color-blindness legitimates White control (p.38). It is this legacy of color-blindness that *Brown v. Board* is born into. While Warren does not directly invoke Harlan's metaphor, his insistence on a singular American identity indicates a reliance on a normative, un-diversified understanding of American that relies on color-blindness.

The *Brown* decision was color-blind in the way it did not acknowledge its own privileged beginning premise of Whiteness. It assumed that equality meant "sameness," not diversity, and therefore sought to impose the norms of White society on Black school

children. There was an undercurrent of thought that, as Gunnar Myrdal claimed, Black people were just “White men [sic] with Black skins” (Droge, 2005, p.100). This was the version of American identity that the opinion was striving to constitute. The opinion did not argue that it would impose Whiteness upon Black communities because Whiteness is assumed as omnipresent. *Brown* implicitly argues that it is only the minority that can claim to be de-raced, while it is the majority’s racial features that constitute society’s norms (Brown, 1997, p.644-645).

The basic events of *Brown v. Board* itself are not particularly complicated. In 1950, the Topeka, KS branch of the National Association for the Advancement of Colored People (NAACP) set out to construct a legal challenge to an 1879 law that segregated elementary schools. NAACP lawyers knew they needed to create a class action suit and not focus on just one family, so they gathered 13 different families with 20 children among them. The NAACP encouraged these families to try to enroll their children in “White” schools, and as they anticipated, all of these attempts were denied. Accordingly, as the case made it through the legal system and eventually came before the Supreme Court, the Court chose to consolidate a number of other cases dealing with similar issues under the Kansas case.<sup>2</sup> In February 1951, the Topeka NAACP officially filed their case, naming it after plaintiff Oliver Brown.

The political and material results of the *Brown* case were mixed. Segregation in education was declared unconstitutional, but it was years before schools across the South were desegregated, and in one case, this even required military enforcement. This is partially due to the effect of *Brown II* (the follow-up case in which some schools were requesting relief) which in some ways offered White America a “reprieve” from the staggering effect *Brown v. Board* could have had (Browne-Marshall, 2007, p. 30). *Brown II* was supposed to establish the means by which to carry out the decision of the original *Brown v. Board* case. It provided a list of criteria for schools to follow in order to be in compliance with the Court’s order, but did not establish a time-frame. This gave segregated schools the opportunity to resist desegregation by simply dragging their feet.

The *Brown* opinion is fairly simple and forthright and was written to be short, accessible, and non-accusatory (Balkin, 2001, p.35). It was specifically constructed to

address the “separate” nature of segregation, not the “unequal” nature of so many segregated school districts that the *Plessy* decision established as doctrine. In other words, Warren’s opinion addresses the intangibles. It operates from the assumption that the physical and measurable aspects of education were equal, or were in the process of being equalized. What is left, then, is the “separate” nature of education itself. Part of that untouchable but essential component of education is the normative, civic function of education. Education, the opinion posits, teaches children how to be young Americans. White students were learning one version of American identity in their schools, while Black students were learning a different understanding of “American.”

Earl Warren's opinion argues that segregation, which “was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment,” was, indeed, a constitutional violation (*Brown*, 1954, para. 6). The Fourteenth Amendment was the lynchpin in the opinion, and his attention to it was meticulous. At the time of *Brown* there was no legal precedent for including education under “equal protection,” so creating an argument based on the Fourteenth Amendment required a re-definition of certain terms. As James Boyd White noted, a judicial opinion will translate the law from an older context into a newer one; here, that is precisely what the Court did. It assessed the Fourteenth Amendment as it related to education in terms of the Amendment’s ratification and in terms of the status of education in 1954 America. Warren turns to the history of public education in the United States to argue that it is American norms that are at stake in a segregated school system. Public education had gone from being an afterthought to being central to understanding American life, and so the law had to be re-imagined to reflect that change. Black children, by being educated separately, were learning a flawed version of American citizenship.

Warren describes the state of public education at the time of the Fourteenth Amendment as abysmal by present-day (1954) standards, with a curriculum that “was usually rudimentary” and “ungraded schools” that “were common in rural” areas and a school term that “was but three months a year in many states;” with “virtually unknown” compulsory school attendance. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment in relation to its intended effect

on public education (*Brown*, 1954, para 9). So, he reasons, it follows that there was no notion of the Fourteenth Amendment applying to education. Education was, for all intents and purposes, a non-issue for half of the country. There would not have been any notion of "equal protection" for access to education because education was not a part of American life in any standardized, state-enforced, or mandated fashion.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools supported by general taxation had not yet taken hold. Education of White children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states.... Even in the North, the conditions of public education did not approximate those existing today. (*Brown*, 1954, para 9)

Warren's history of education is not simply nostalgic musing but important background information for his ultimate reasoning. But there are multiple reasons for mandating education. Public education provides not just basic reading and math skills, but a civic education as well.

In two clear concise paragraphs the Court brings all of the components of the case together in a stunning statement on the nature of American identity:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. (*Brown v Board*, 1954, para. 13)

The Court has proclaimed that education is not simply a privilege, but an essential responsibility of the government because it unifies Americans in their understanding of national identity. Warren feels he can make such a claim because we provide the proof of our value of education with attendance requirements and the amount of money spent on education at the state and local levels. It is not just a matter of private concern anymore, but as a nation, Warren claims, we have decided that education is essential to our democracy. Education is where American identity, as undefined as it is in the *Brown* opinion, is normalized. It is, he claims, the primary place where children learn shared cultural values:

It [education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. (*Brown v. Board*, 1954, para. 13)

Education, he continues, is not just valued in an abstract sense, but it is absolutely necessary for the American experience. Education creates a bond among us of normative, cultural values, and prepares a child to grow up and take part in the American experience. Education helps us to adapt to our particular American environment, and helps us maintain it as well. It is not just the tangibles that equalize education; it is the social experience of education that weaves a whole society. So, a child who does not have access to the same education as her or his peers is denied the opportunity to succeed in general. It “must be made available to all on equal terms.” Warren has equated education to cultural norms, success, and the American experience at large. This leads the Court to the question before them:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?

The SCOTUS answers unwaveringly, “We believe that it does” (*Brown v. Board*, 1954, para. 14).

Education, according to Warren, was where American children learned the fundamentals of being an American. Having separate educations means having separate understandings of citizenship. Segregation was not unconstitutional because schools were unequal, but because separating children by race meant that Black children did not have the opportunity to learn those fundamentals. And, he claims, it is specifically the minority group that is in danger. Integration means bringing the minority group into the fold of the majority so they may learn the same notions of American identity and citizenship. Education provided the “cultural values” that unified America. Separate educations meant that groups were receiving different understandings of “cultural values.” Integrating education, specifically by giving the minority groups access to what the majority had, would unify the nation.

Warren admits that he cannot turn back the clock to 1868 or 1898; he can only assess the case in front of him. But, he states adamantly, the Court "must consider public education in the light of its full development and its present place in American life" (para 7). Again, this echoes White as it is the job of the Court to take the law and translate it into present tense. He argues one cannot leave education out of the Fourteenth Amendment simply because it was not as important in 1868 as it is in 1954. The Court, he claims, is free to assess not just the past and precedent, but the present state of education. Only then can the Court determine if separation by race deprived a group of their constitutionally guaranteed equal protection of the laws. Education, he reasoned, was a part of establishing a normative, American experience. As Eugene Garver explains, education had become central to being an American, and so integration was ethically necessary (p. 78). And that, Warren argues, is protected by the Fourteenth Amendment. To separate education by race denies Black children of their opportunity to understand what it means to be "American," and this is in direct opposition to "Equal Protection."

This understanding of Whiteness enshrined into the desegregation case played itself out in the practice of integration for generations to come, as integration as it was enforced through the United States operated to protect Whiteness. As Stokely Carmichael observed in the 1960s, integration was largely a practice of Black bodies being moved in White spaces (1966). White bodies were protected from being moved or made to dislocate. White bodies were able to maintain their space as much as possible and were never asked to enter Black spaces. Blackness was dispersed while Whiteness remained whole if penetrated. Integration in that way protected Whiteness by allowing White people to maintain their comfortable spaces but demanding that Black folks leave their space and acclimatize to new norms.

### **Conclusion**

It is important to clarify that the goal of this essay is not to mar the overall historical significance of *Brown v. Board*. The decision was the morally and ethically right one, and the effect it had on America was profound and good. Desegregation was, and is, an admirable goal. A 2014 study of Black students who attended immediately post-*Brown*, desegregated schools shows that these students were more likely to graduate, go to

college, and get a degree. They went on to be more financially successful than those who went to segregated schools, spent less time in jail, and were healthier in general (Hannah-Jones, 2014, para 50). The fact remains, however, that *Brown's* ultimate goal of desegregated education, and perhaps the vision of a desegregated society, remains unfulfilled. America remains stratified along color lines in every corner, and as concerned citizens, as people who believe in equality, it is incumbent upon us to ask, "Why?"

This essay has attempted to answer that question by approaching the opinion as a piece of constitutive rhetoric. I have discussed the theory of constitutive rhetoric as it pertains to the law, how the *Brown* decision attempted to operate as a piece of constitutive rhetoric, and posited that the reason it failed to create a unified American identity is because it argued from a place of Whiteness which inadvertently created a situation in which Black students were left out of that very identity.

*Brown* argued that Black school children should be able to learn the same identity Whites did, when real integration would have called for a new, multi-faceted identity to be forged in integrated spaces. The *Brown* decision, as written, calls for Black students to be brought into a normative American identity, not to bring their unique voices into the ongoing American narrative. Its emphasis on a normative "cultural values" eliminates the possibility of a truly integrated American experience. This "color-blind" approach, which ultimately favors Whiteness, then set the stage for decades of legal reasoning to come. Critical race and legal scholars have argued that in order to address the needs of Black citizens, there must be recognition that there are particular Black needs. The *Brown* opinion sets a rhetorical stage in which such acknowledgements would be difficult, if not impossible, since the crux of the opinion was that separate educations kept Black students from partaking in the American experience. The implication was that the American experience was already defined and that Black students were just being invited to partake, as opposed to their experiences being acknowledged and accounted for. It does not work to bring Black Americans into the public narrative, but establishes that their experiences, specifically as Black Americans, are outside of the norm. The *Brown* opinion establishes a paradigm in which Black Americans are outsiders, and this is the opinion that supplies the reasoning for race-based law for decades to come.

This leads rhetorical and legal scholars into daunting territory, for we must re-examine how the rhetoric of integration has actually constituted an American identity, and assess whether our discourse fosters inclusion or exclusion. The law and judicial opinions need to argue from a place of inclusivity. This means there needs to be room for differences of color without separating by color. American identity must not be understood as normative, but as differentiated. The education system could not be the great equalizer by allowing all students to learn what it meant to be an American, but by being a place where the different facets of American identity could grow and integrate together.

The goal of *Brown* may have been noble, but its means were stymied by an inability to understand the intricacies and nuances of real diversity. As long as Americans are led by “color-blindness” as a guiding principle, Black Americans and other People of Color will be continually shunted to the side. America will never integrate until our rhetoric and our ideology matches our diversity.

This project is quick to point out problems but seems admittedly short on answers. In the face of systemic racism it seems difficult to point to a single solution that will address the problem. That is because there is not a single solution that will address the problem – systemic problems require systemic solutions. While it is essential that individuals address their own behaviors and perspectives, an individual addressing their behavior will do little in the face of systemic Whiteness. That will take educational and policy changes from both the ground up and the top down. First, we must begin to address Whiteness in real ways in our schools and in our conversations. We must learn that Whiteness is not scary, and addressing it should not make us uncomfortable or frightened. We must move beyond “White fragility.” This will only be done through education and individual efforts combined. Secondly, policy makers must recognize systemic racism in housing, education, the penal system, drug policy, and myriad other areas of political and legal areas. This will require pressure from their constituents, which will only happen once there has been the culture change that comes from education and individual effort. The road to inclusion is long and fraught. But it is right.

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<sup>1</sup> For examples of this kind of work, see Richard Kluger, *Simple Justice: The History of "Brown v. Board of Education" and Black America's Struggle for Equality* (New York: Knopf, 1976). For more on Jim Crow and *Brown v. Board*, see Robert J. Cottroll, Raymond T. Diamond, and Leland B. Ware, *Brown v. Board of Education: Caste, Culture, and the Constitution* (Lawrence, KA: UP of Kansas, 2003). For a general collection of essays that is useful background and commentary see Mac A. Steward, *The Promise of Justice: Essays of Brown v. Board of Education* (Columbus, OH: The Ohio State UP, 2008). Leon Friedman's "*Brown v. Board*": *The Landmark Oral Argument Before the Supreme Court* (New York: The New Press, 1969) is not as historical a treatment, but is helpful in understanding the legal rhetoric of the case and is a useful complement to Balkin, as it provides complete transcripts (see also, Brown, *Argument*, bib). Kurt Nutting's "Legal Practices and the Reasoning of the Law," *Argumentation* 16.1 (2002): 111-134 is also notable. Finally, Charlotte Grimes celebrates the historical nature of the decision by bringing together a group of journalists and collecting their first person narratives in "Civil Rights and the Press," *Journalism Studies* 6.1 (Feb 2005): 117-134.

<sup>2</sup> The case was actually a combination a few different cases: *Briggs, v. Elliott* 342 U.S. 350 (1952); *Davis v. County School Board of Prince Edward County* Civ A No. 1333 103 F Supp 337 (1952); *Gebhard v. Belton* ee Del Ch 144, 87 A.2d 862 (Del Ch 1952), add'd, 91 A.2d 137 (Del 1952); *Bolling v. Sharpe* 347 U.S. 497 (1954.)

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