

BLACK PEOPLE IN WHITE FACE: ASSIMILATION, CULTURE, AND THE *BROWN* CASE

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I. INTRODUCTION

It is difficult to criticize a case that no longer stands for a legal point, becoming instead a central part of the social mythology of the country. *Brown v. Board of Education*¹ has, from the beginning, been more than just a law suit. In recent years, *Brown's* legal foundation—or at least what people interpret to be its core rationale—is one of the few issues that has served as a litmus test for judicial or civil rights appointees. For instance, the view that Robert Bork, Lani Guinier, and Lino Graglia were not committed to “the” common understanding of *Brown* empowered the opposition to their appointments.² Although a number of authors have recently questioned the importance or power of

* Professor of Law, Duke University School of Law. I would like to thank my research assistants Frank Cooper and Kevin Vilke for their help. The conference on the fortieth anniversary of *Brown* brought together some of the great people, black and white, that helped to produce the *Brown* decision. I had the great honor of clerking for Judge Nathaniel Jones, one of the successors of Thurgood Marshall as chief counsel of the NAACP, and the joy of getting to know Judge Damon Keith when I was a law clerk for Judge Jones. Judges Jones and Keith are Circuit Judges for the United States Court of Appeals for the Sixth Circuit. Their desire for justice and ability to search and often find justice for Americans of all races and to do so without rancor has been an inspiration to me and is a reflection of the work of all of those who helped to produce *Brown* and those, like Judges Keith and Jones, who have carried forward that work as lawyers, judges, and citizens.

1. 347 U.S. 483 (1954).

2. The view that Lani Guinier's ideas were out of the mainstream was pushed by groups and individuals who themselves were not in the mainstream. See, e.g., Clint Bolick, *Quota Queens*, WALL ST. J., Apr. 30, 1993, at A12. Mr. Bolick, a friend of Clarence Thomas, is both more libertarian and conservative than the country. In a conversation with Judge Damon Keith, I learned that the news media treated Mr. Bolick as if he were mainstream while at the same time refusing to publish mainstream responses by black supporters of Professor Guinier. Professor Guinier's views and work are very consistent with traditional views of *Brown* and the promise of *Brown*. See, e.g., LANI GUINIER, *TYRANNY OF THE MAJORITY* (1994).

the opinion,³ *Brown* stands as the orthodoxy that people can shoot at but not destroy—an orthodoxy that is often deaf to dissent and misunderstands the power of its own efforts to destroy racial segregation. This lack of responsiveness is particularly true of the dissent of black people who were the “beneficiaries” of *Brown*.⁴

The difficulty in understanding *Brown*’s actual accomplishments manifests itself most clearly in the debates that surround the “ungrateful” black students on white campuses. Black students are seen as insular because they segregate themselves at black tables and in black dorms, unappreciative of what *Brown* brought to their college campuses. Last year, for example, black students at the University of North Carolina in Chapel Hill demanded from a recalcitrant administration that the university create, or—after they were able to secure financial support from Michael Jordan’s mother—permit the creation of a black cultural center on campus.⁵ Paul Hardin, Chancellor of the University of North Carolina and dedicated and principled liberal,⁶ appeared

3. See SHADES OF BROWN (Derrick Bell ed., 1979); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994). But see David J. Garrow, *Hopelessly Hollow History: Revisionist Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151 (1994) (stating that the deep seated desire for novelty has led Professor Klarman to rhetorical excesses not supported by the record, which diminish the power and importance of *Brown*); Mark Tushnet, *The Significance of Brown v. Board of Education*, 80 VA. L. REV. 173 (1994) (observing that even though the importance of *Brown* has been overstated by lawyers, Professor Klarman misunderstood the importance of *Brown*).

4. This is one of the inconsistencies of *Brown* and the liberal orthodoxy that supports it. *Brown* has to help both the oppressed and the oppressors so that changes in racial oppression alter the status quo. How we change the status quo determines the division of resources. White people, as well as the black beneficiaries, gained from *Brown*. White teachers gained at the expense of black teachers. Clearly, poor whites gained from the changes in the economic and social status quo although many of them thought they lost something as well—the power to be seen as white and not black. White businessmen gained the right to employ black labor more freely—creating more competition among employees, lower wages, and a more educated work force. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that employment cannot be determined by race).

5. Joe Drape, *UNC Faces Turmoil over Black Cultural Center*, ATLANTA J., Sept. 13, 1992, at A3.

6. Chancellor Hardin graduated from Duke in 1952 and from Duke Law School in 1954. He was a member of the Duke Law Faculty for ten years where he was a leader in speaking out for the welfare of the largely black cleaning staff and other

to do everything in his power to avoid meeting the students' demand. He said he was afraid of separatism and balkanization among students.⁷ Chancellor Hardin, a good and decent man, first argued that the university did not have the resources to undertake such an endeavor.⁸ He then argued against locating the cultural center near the center of campus.⁹ He resisted the students' demands that the center be placed near the seats of intellectual and institutional power on the central campus.¹⁰ In previous years, a number of black students objected to the portrayal of black students in an art work that has one male black student twirling a basketball and one black female figure carrying books on her head.¹¹ These and other incidents on campuses across the country prompted Garry Trudeau to create a *Doonesbury* comic strip in which black students demanded separate water fountains.¹² In the view of many people—including some people who fought very hard for the kinds of changes that occurred as a result of *Brown*—black students' demands amount to a return to the "bad old" days of racial separation and segregation. The Trudeau cartoon illustrated what many people believe: that our desire for the full integration of black Americans has come full circle.¹³ Many white liberals, and a few blacks, contend that African Americans are now not part of the solution but instead part of the problem.

I used two incidents from the University of North Carolina

similar issues.

7. Drape, *supra* note 5, at A3.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

Two years ago, students bitterly protested a sculpture called "The Student Body," which was donated by the class of '85 and placed by the library. Black students felt the sculpture depicted insulting stereotypes of a black man spinning a basketball on his finger and a black woman carrying books on her head. The sculpture was moved to a less conspicuous site after much debate. Still, black students say the incident caused them undue embarrassment.

Id.

12. G.B. Trudeau, *Doonesbury*, WASH. POST, Sept. 12, 1993 (Sunday Comics section).

13. *See id.*

partially because they are and were at the forefront of legal change from the racial separation that was most pronounced in that section of our country¹⁴ Chapel Hill was the first major town in the South to elect a black mayor.¹⁵ Chapel Hill also has a large and significant black student population—something many other institutions in both northern and southern states, including my own, have had a hard time achieving. Chapel Hill and the angst associated with its travails, however, is symptomatic of the problems that plague almost every major institution that has accepted black students in numbers.

I do not want to ask whether *Brown* was important. To me that question, while worth debating and revisiting, is ultimately uninteresting. I want to ask a different question about *Brown's* importance. Why hasn't *Brown* achieved all that its supporters hoped? Put differently, I ask not how has *Brown* succeeded, but why has *Brown* failed in many ways to achieve the ambitions of those who fought and bled to achieve that victory? Accordingly, although I will not discuss primarily the achievements of *Brown*—important achievements that ought to be celebrated on *Brown's* fortieth anniversary—*Brown* clearly changed how we think about the society we live in.

Brown has failed—failed to create the racial nirvana in our nation's classrooms and failed to eliminate completely the vestiges of racial segregation and oppression in the nation. Race matters in this country in ways that have recently been documented by Professor Derrick Bell,¹⁶ and race matters in our country's classrooms. In addition, as I noted above, black students, law-

14. It is important to remember that discrimination was not limited to the South. There were official and unofficial prejudices that controlled the lives of African Americans throughout the United States almost since the first African American set foot on this continent. See Nathaniel R. Jones, *The Desegregation of Urban Schools Thirty Years After Brown*, 55 U. COLO. L. REV. 515 (1984) (describing some of the northern school cases and the discrimination that existed); see also *Milliken v. Bradley*, 433 U.S. 267 (1977); *Segregation in Rockport* (ABC television broadcast, Feb. 17, 1994), available in LEXIS, News Library, ABCNEW File.

15. Howard Lee, the first African American mayor of Chapel Hill, is now estranged from some of his former liberal white supporters who opposed him in his most recent successful reelection campaign for a seat in the North Carolina Senate.

16. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (arguing that black Americans need to change their civil rights strategies due to the failure of equality jurisprudence to improve their lives).

yers, judges, and other successful African Americans have not always found the results of *Brown* as meaningful as they would like in their own lives or the lives of contemporaries or their children.¹⁷

These failures stem from three common misconceptions that were at the heart of the *Brown* decision and its liberal policy. The most important misconception was that if we changed the law of the land, "good" people would comply with it. However, preventing those "good" people from using ruses to achieve their cherished ends served by racial segregation has proven difficult. For example, when courts create "ability tracks" that leave black children racially segregated and alone and then misapply these standards of ability, the difficulty of assuming that good people will live up to the requirements of *Brown* becomes apparent. Just as political institutions did not live up to the "separate but equal" doctrine in *Plessy*, they have not lived up to *Brown*'s requirement of equality free of racial segregation. I call this misconception the "compliance assumption."

The second misconception is that there is a race neutral policy that we can all agree on that will achieve racial justice. The problem that a number of cases have demonstrated is that there is no race neutral standard.¹⁸ *Brown*'s requirement of ending segregation is not the answer, and judges and legal scholars are as yet unable to create a neutral policy. In addition, as many scholars have argued, such a policy in many ways is impossible to achieve.¹⁹ I call this misconception the "neutrality assumption."

The final misconception at the heart of the *Brown* decision is that a single standard of assimilation can be articulated for American society, and that black people will be willing to adhere

17. See ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* (1993) (arguing that further progress toward the goal of equal justice under law can only be initiated by our nation's government).

18. See, e.g., *Ayers v. Allam*, 893 F.2d 732, 743 (5th Cir. 1993) (commenting on different interpretations of the proper standard to apply).

19. See, e.g., Jerome M. Culp, Jr., *Firing Legal Canons and Shooting Blanks: Finding a Neutral Way in the Law*, 10 ST. LOUIS U. PUB. L. REV. 185, 191-95 (1991); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2137-42 (1989).

to that standard. This requirement of black assimilation is akin to a requirement that black people put on white face and is ultimately unacceptable as a goal for a decolonized African American community. This desire for assimilation promotes the conclusion that it is permissible to create white culture but dangerous to have black culture on campuses or in the curriculum because it will politicize our universities. I call this misconception of the *Brown* orthodoxy the "assimilation assumption."

If *Brown* is to "succeed," the political and social network of society must reject all three of these assumptions. Despite Gerry Spann's reminder that courts cannot be the only source for, or the main engine of, political change, failure to understand these misconceptions may mean that courts will not play even a limited role in "permitting change."²⁰

II. THE "COMPLIANCE ASSUMPTION"

The only significant civil rights measure to survive the impasse [during Truman's second term] was desegregation of the armed services, which the president achieved through executive orders that placed it effectively beyond the reach of Congress. Even so, it required a great deal of internal pushing and shoving to bring it about in the face of the outspoken opposition of the star-spangled generals. As Army chief of staff, General Eisenhower declared the armed forces unready "spiritually, philosophically or mentally to absorb blacks and whites together." Even after the order was in effect, his successor, General Omar Bradley, insisted that the Army "is not out to make any social reforms. The Army will put men of different races in different companies. It will change that policy when the nation as a whole changes it."²¹

At the heart of the *Brown* decision was a miscalculation about

20. See Jerome M. Culp, Jr., *An Open Letter from One Black Scholar to Justice Ruth Bader Ginsburg: Or, How Not To Become Justice Sandra Day O'Connor*, 1 DUKE J. GENDER L. & POL'Y 21 (1994) (arguing that Justice O'Connor's judicial record enforces a racial status quo that is reminiscent of the reconstruction era Court and is likely to produce the same result of racial stagnation in society unless the Justices are more concerned with how they deal with racial injustice).

21. HARRY S. ASHMORE, *CIVIL RIGHTS AND WRONGS: A MEMOIR OF RACE AND POLITICS 1944-1994*, at 86-87 (1994).

"good" people. Those who fought for *Brown* understood that many in the South and the North would oppose vigorously the ending of any significant part of the legal racial apartheid. These early proponents of *Brown* probably misunderstood the depths of that reaction. I am sure that they predicted that at least some black children would be attending desegregated schools in every southern state six years after *Brown* was decided. They were wrong. They understood the fight against the Ross Barnetts and the Orville Faubuses, the most vocal opponents of social equality for black Americans in these southern states. Apparently, they did not appreciate the extent of the opposition among those not overtly and forthrightly opposed to desegregation.

Sometimes "good" people were the problem in small and large ways. Forced desegregation of southern schools often resulted in the unnecessary elimination of the jobs of excellent black teachers and all of the "black" cultural aspects of schools that had been segregated for black children. The existing power structure viewed black teachers as inferior and black schools as "too black" for white children. Black children were made to bear a disproportionate share of the cost of integration—leaving their schools and friends for what became, in many situations, hostile territory. When a friend of mine who grew up in Northern Virginia near Washington, D.C., went to a newly integrated grade school in the 1960s, she was greeted with comments like "the little nigger girl wants to talk" whenever she raised her hand in class. Her teacher may have thought of herself as simply defending the honor of the Commonwealth of Virginia, but she was a part of the problem.

Many were opposed to altering the racial status quo. They were not always direct in their actions, but they often increased the cost to those who were in the front lines of the fight for change. In addition, other teachers and administrators who thought black children were inferior but expressed it without the anger, were also involved in making integration a difficult and costly task. These individuals, both black and white, took black inferiority as a given and made it more difficult for black children to succeed. *Brown* assumed that it would be possible to achieve integration by simply altering the legal regime that

supported "separate but equal." *Brown* and its progeny did not consider that "good" people would be part of the problem.

We see aspects of this today when people who were active and important participants in the fight for racial justice demonstrate the belief that the largest problem for racial integration is recalcitrant black students. Professor C. Vann Woodward, whose life long commitment studying southern history and Jim Crow and the system they spawned, helped to enlighten the courts about the power of racial oppression in the period after reconstruction.²² Professor Woodward has become part of this chorus of criticism of black students on white campuses. He questions whether their desire to be free of racial slurs on these campuses is a threat to the ability of college campuses to be places of free exchange of ideas. Similar claims have been made by Arthur Schlesinger, Jr., in his book on multiculturalism.²³ Professor Schlesinger defends the need for the adoption of a common culture and sees multiculturalism and black cultural movements as threats to the unity of the American spirit.²⁴ Similarly, when Justice White concluded that black plaintiffs in *United States v. Fordice*²⁵ sought to upgrade black colleges in the state of Mississippi "so that they may be publicly financed, exclusively black enclaves by private choice,"²⁶ he distorted the history of black colleges and white colleges in the country in general and Mississippi in particular. The demands of the black plaintiffs in *Fordice* were more thoughtful and responsive. Justice White assumed by the way that he characterized the demands of the black plaintiffs that to demand a black cultural dimension to Mississippi education was to do violence to the right of the majority to define blackness as inferior.²⁷ The legacy of *Brown* as-

22. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d rev. ed., 1974).

23. ARTHUR SCHLESINGER, *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1992).

24. *Id.* at 9-20.

25. 112 S. Ct. 2727 (1992).

26. *Id.* at 2743.

27. See *id.* In their brief, the black plaintiffs said:

In Mississippi, the HBIs [Historically Black Institutions] have, in the main, been fulfilling the responsibility of educating the black citizenry—a task allocated to them by Board admission standards and practices of the

sumes that these "good people" or people of goodwill will be committed to the alteration of our society. In many ways, Justice White and Professors Schlesinger and Woodward have remained committed to an elimination of the ills of segregation and sometimes of racial oppression, but goodness or goodwill are not enough. Other factors determine the extent to which these concerns are addressed by the courts and by the law. *Brown* did not understand this truth about the law or people. If justice is to occur for people of color in this country, then we must examine the actual success of the efforts of "good" people in the elimination of racial oppression and compare this success with the extent to which these efforts simply operate to keep black people economically and politically stagnant.²⁸

HWIs [Historically White Institutions]. The ensuing "transition" should, in keeping with *Milliken*, and the authorities requiring that each vestige of discrimination be addressed, witness more education for black citizens, their increased access to HWIs, as well as steps to bring about substantial white enrollment at HBIs—not reduced black enrollment and the destruction of the principal proven instrumentality (the HBIs) for educating the victims of discrimination.

Brief of Petitioners at 68, *Ayers v. Mabus*, 499 U.S. 958 (No. 90-6588), *granting cert. to Ayers v. Allan*, 914 F.2d 676 (5th Cir.), *vacated sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992). In a footnote to this text, the plaintiffs said:

Similarly, there is every reason to believe that as these changes continue and remedies remove the impact of prior discrimination at the [sic] HBIs, one will witness substantial numbers of Afro-Americans and white persons receiving education at HBIs in the future. There are large numbers of white high school graduates who could take advantage of the historic interest of the HBIs in those who perform less well at the high school level.

Id. at 68 n.140. The plaintiffs also quoted the Office of Civil Rights Regulation: The Department [of Education] does not take this language to mean that the traditionally black institutions are exempt from the Constitution or the requirements of Title VI. To the contrary, traditionally black and traditionally white institutions are subject to the same constitutional and congressional mandate to provide an education to all citizens without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. [T]he transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

Id. at 69 (alterations in original) (quoting Revised Criteria, 43 Fed. Reg. 32, 6660 (1978)).

28. See Culp, *supra* note 20 (arguing that Justice O'Connor has helped eliminate

We see the problem with the compliance assumption in *Grimes v. Sobol*.²⁹ In that case, plaintiffs, a class purporting to represent all African-American students and their parents, challenged the failure of the New York public schools to include the experiences and history of blacks in their curriculum.³⁰ The plaintiffs' action under Title VI of the 1964 Civil Rights Act³¹ failed because, as the court concluded, Title VI was not in place to permit challenges to the curricular decisions of school administrators.³² Judge Wood held that Congress, in passing Title VI, and the Executive, in administering it, chose not to include school curricula in the coverage of the Act because of potential First Amendment conflicts and concerns about federal courts and federal regulators becoming curricular censors.³³ In essence, Judge Wood concluded that Title VI, a descendant of the principles of *Brown*, would rely on the goodwill of school administrators and on the political process to provide for equality. This view of the goodwill of the administrators of the New York City school system—a system that is controlled by a process in which black and other children of color represent a majority of the city's school children but a minority in the political process—may leave black children's concerns outside the curricular concerns of school board members. If some school boards and some places remain infected with vestiges of racial oppression and want to ignore the concerns of black children, they have a right to do so under the "compliance assumption." "Good will win in the end" is the assumption that characterizes the *Brown* decision and its modern-day progeny.

Testifying to the failure of that assumption, however, the Civil Rights Division of the Justice Department recently decided to make the elimination of racial tracking a priority after evidence

alternatives for black progress and has become an enforcer of the status quo).

29. 832 F. Supp. 704 (S.D.N.Y. 1993).

30. *Id.* at 706-07.

31. 42 U.S.C. §§ 2000d-2000d5 (1988).

32. *Grimes*, 832 F. Supp. at 713. Plaintiffs also sought to challenge the curricular choices by pointing to the Constitution and to 42 U.S.C. § 1983. *Id.* at 707. Plaintiffs could not prove a violation of the Constitution under § 1983 because they could not prove that the discrimination was intentional. *Id.* at 708-09.

33. *Id.* at 711-12.

came to light that some school districts were tracking black and white children into different classrooms independent of test scores.³⁴ The assumption we have made about desegregation is that if we give school administrators clear rules, they will act without bias, or if there is bias, it will be limited to the bad people who really hate black Americans. Our experience with racial discrimination in education proves that the problems are more deeply entrenched in our system than that. At the heart of this dilemma is the problem of assuming that "good" people will comply with what they know to be goodness without prodding. If our history of race and racism has taught us anything, it is that this assumption rarely applies to "good" people and that not all people are, in fact "good." I do not imply that good people have not taken some positive steps to reduce racial oppression in this country. The point I want to make, however, is that no single "good" act is sufficient. Indeed, our history teaches us that discrimination takes many forms, and our efforts to limit its impact therefore require zealous attention to the vagaries of that divergent experience.³⁵ Good people must comply with both the letter and spirit of the law. Unfortunately, they are rarely able to do so. Many "good" people assume, like President Eisenhower, that many problems more important than race require more immediate action.³⁶ Goodness is not enough if it leaves the status quo in place.

III. THE NEUTRALITY AND ASSIMILATION ASSUMPTIONS

Give us the ballot—and we will transform the salient misdeeds of bloodthirsty mobs into abiding good deeds of orderly

34. *Civil-Rights Chief Patrick Speaks His Mind*, LEGAL TIMES, May 30, 1994, at 9.

35. See NEIL R. McMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW (1989) (contending that Jim Crow was manifested in different ways in Mississippi and across the South, but common to these manifestations was a desire to keep blacks in their place no matter the method of control and degradation necessary).

36. See ASHMORE, *supra* note 21, at 138. After a 1957 meeting at the White House, in which Martin Luther King, Jr. appealed for federal support, President Eisenhower, while walking his guest out, murmured, "Reverend, there are so many problems Lebanon, Algeria " *Id.*

citizens.

Give us the ballot—and we will fill the legislative halls with men of good will.

Give us the ballot [now the crowd was chanting the opening line with him]—and we will place judges on the benches of the South who will do justice and love mercy

Give us the ballot—and we will quietly and nonviolently, without rancor and bitterness, implement the Supreme Court's decision of May 17, 1954.³⁷

The second reason that *Brown* has failed is the strong belief that a common, race-neutral policy can be articulated. This "neutrality assumption" plagues much of current constitutional interpretation. When, for example, Martin Luther King, Jr., called for ballot access for black Americans, presumably Americans, at least in the long run, could agree on that as a goal. However, the tortured history of the Voting Rights Act of 1965³⁸ demonstrates the difficulty of building such a consensus. For example, in *Shaw v. Reno*,³⁹ Justice O'Connor stated that a particular redistricting plan that created two majority black congressional districts cannot be understood as anything other than an effort to classify and separate voters by race⁴⁰ and that such a plan "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."⁴¹ The Court in *Shaw* considered the majority black districts to be oddly structured.⁴² The "neutral position" that Justice O'Connor would have the Court adopt, and black citizens of North Carolina accept, leaves a permanent white majority in control of the political concerns of North Carolina in Congress—unless by chance a black person were elected. Justice O'Connor stated that race will matter to the black cit-

37. *Id.* at 137-38 (quoting Martin Luther King, Jr. speaking exactly three years after *Brown I* on the steps of the Lincoln Memorial at a prayer pilgrimage attended by approximately 25,000 people, most of whom were black).

38. 42 U.S.C. § 1971 (1988).

39. 113 S. Ct. 2816 (1993).

40. *See id.* at 2828.

41. *Id.*

42. *See id.* at 2819-21.

izens who might be elected to represent districts in North Carolina but that it will not matter to the white representatives elected in their stead by a process that is controlled by racial block voting. Existing empirical evidence does not support Justice O'Connor's neutral assertion of a lack of white interest or even the exclusion of white interests by black representatives.

In the same manner that Justice O'Connor found the challenge by the five white citizens did not have a race component, or at least not one that they asserted, to require any legal consequence,⁴³ she assumed that white interests—because they are a majority in the state and country as a whole—do not have a racial context. Likewise, Justice O'Connor contended in her concurrence in *Johnson v. De Grandy*⁴⁴ that there is no requirement under section two of the Voting Rights Act to maximize the electoral districts that “can” elect minority representatives and that proportionality or the lack thereof is not dispositive in determining whether the voting interests of any group is improperly affected.⁴⁵ In essence, in *De Grandy*, Justice O'Connor said to the hispanic and black communities that because the legislature decided not to maximize their interests, they do not have a valid claim for relief. Conversely, white citizens, whose “access to the political process” is not impeded by districts no more odd than those of majority white districts, have been injured.⁴⁶ This neutral position enforces the existing power of the white majority to dominate the concerns of black citizens.⁴⁷ Justice O'Connor arrives at these conclusions by assuming away the concerns of black Americans. In *Shaw* after all, whether the Supreme Court's rule or the lower court's rule would lead to a more integrated nation is an empirical question. O'Connor's view

43. See *id.* at 2824.

44. 114 S. Ct. 2647 (1994).

45. *Id.* at 2664 (O'Connor, J., concurring).

46. *Id.*

47. The fact that some black people may agree with this view of the law does not render it an obvious or neutral position. See *Holder v. Hall*, 114 S. Ct. 2581, 2591 (1994) (Thomas, J., concurring). Ignoring more than twenty years of court interpretation and two reenactments of the Voting Rights Act, Justice Thomas suggests that we ought to interpret § 2 to protect only election procedures. *Id.* at 2603. This view echoes the majority opinions in the *Civil Rights Cases* and *Plessy v. Ferguson* in its effort to ignore the racial realities of black voters.

of integration assumes facts about the process and ignores the importance and power of community in the short run to alleviate the issues of racial discrimination and isolation. This view also assumes that integration is required of black and hispanic communities in a world where political power and progress may require desegregation and not integration. My point is not that the Court could not weigh the issues associated with voting and reach the result articulated in Justice O'Connor's opinion in *Shaw*, but that O'Connor does not address all pertinent concerns in her analysis. She assumes a neutral starting place as to how to govern this country that ignores black interests and concerns.

The assumption that all blacks seek or should seek assimilation is one of the neutral rules that courts have imposed on the discourse between black and white communities. This view is most evident in education where debate continues over the possible forms of relief available to redress the unconstitutional racial discrimination suffered by blacks and others and over when that relief should end. In some sense the question in both instances is the same: What is the ultimate aim of eliminating discrimination? The courts have consistently answered this question by assuming that assimilation and cultural degradation were the only two courses available. In *Brown II*,⁴⁸ the Court said that desegregation should proceed with "all deliberate speed" not because the Court wished to protect the culture or values of the black community, but because the Court assumed that there were no values worth protecting in the black community.⁴⁹ As others have noted, the Court found a constitutional violation but delayed the elimination of the constitutional harms.⁵⁰ The Court has begun to end the brief period of effective enforcement of remedies for discrimination in the provision of school services, but it has again failed to deal with the ques-

48. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

49. *Id.* at 301.

50. See, e.g., Louis Lusky, *The Stereotype: Hard Core of Racism*, 13 BUFF. L. REV. 450, 457-59 (1964). Professor Lusky suggests that *Brown* was the first time the Court ignored remedying constitutional harm suffered by individual plaintiffs in order to fashion a remedy for an entire class of individuals in similar circumstances. *Id.* at 458. Some Native American litigants might disagree with this observation.

tion of how these concerns will influence the black community

In a similar fashion black interests on college campuses seem to be outside the purview of school administrators. Black students who sit together in an effort to create a community in a world where their interests and views are often excluded are seen as the fundamental problem preventing the success of integration on college campuses. When the students at the University of North Carolina sought to have a black cultural center placed at the heart of the college campus, in the only open space left near the center of campus, their demands were seen as militant and inappropriate. Editorials denounced them for their effrontery of wanting to make some part of the University of North Carolina respond to black concerns.⁵¹ What caused this anger at the effort of black students to make themselves participants in the university's activities? The only plausible answer is that many participants in the civil rights struggle, important and able participants, thought that black people were agreeing to a "neutral principle" of assimilation. Black students would become white students with black faces and our college campuses would not change at all. The issues we discuss, the concerns we emphasize, and the programs we administer would remain the same, only the complexions of some in the classroom and perhaps at the podium would be altered.

This view of black students as passive participants in a process that is not responsive to their needs is reflected in the rhetoric of the debate surrounding the controversy at the University of North Carolina. Paul Hardin initially opposed the creation of a black cultural center because of the possibility that it would become a fortress.⁵² Some students thought the issue of the

51. See, e.g., Stephen Buckley, *Black Like Fewer of Us—Soon We Won't Be the Majority Minority*, WASH. POST, July 18, 1993, at C5.

52. Vern E. Smith, *A Place To Call Their Own*, NEWSWEEK, Oct. 12, 1992, at 92. Mr. Smith reported:

Hardin had initially objected to the center, saying it would increase racial separatism on the campus, where blacks make up only about 8 percent of the 23,000 member student body. "What's broken my heart is that I've been portrayed as a '60s liberal who stopped growing," he says. "I believe in the legitimacy of a black-culture center. I'm not an opponent."

Id., see also Drape, *supra* note 5. According to Drape:

"blackness" of the cultural center could be avoided by making it a multicultural center for all "diverse interests" on campus.⁵³ After substantial protests by black students, alumni, and national black leaders, the university agreed to build the center but opposed making it too large and fought having it situated in the last open space in the heart of the campus.⁵⁴ As Chuck Stone has noted, Chancellor Hardin is a person of goodwill,⁵⁵ but the problem for black students who sought to participate in the social and political life of the University of North Carolina is that they were limited to being participants in an endeavor where the university that did not give them access to a ballot—a voice

the Sonja Haynes Stone Black Cultural Center looks like the renovated snack bar it is, rather than the powerful symbol it has become. Inside glass walls, young men and women have spent a year planning how to turn this fishbowl into a showplace for African-American arts and letters. University of North Carolina administrators first said they were broke—so the students lined up donors. Next, officials asked where would it go, and the young people found a site in the heart of student life on the southwest corner of Polk Place. Then, when Chancellor Paul Hardin voiced concern that a free-standing building might be perceived as a "fortress" that would promote racial separatism, the struggle became a '60s-style movement.

Id.

53. See *Morning Edition* (NPR Radio Broadcast, Sept. 23, 1992), available in LEXIS, News Library, NPR File.

Molpus: Some black students also express misgivings about the way things are going. They say whites need to be less suspicious and blacks need to ratchet down the rhetoric. A few students are searching for a compromise. Cheryl Preshau, a student from India, is helping to form a group promoting a multicultural center that would incorporate Asians, Native Americans, Hispanics and blacks.

Id.

54. *Dispute over Black Center Tears U. of North Carolina*, N.Y. TIMES, Apr. 21, 1993, at B11.

55. Drape, *supra* note 5, at A3.

Chuck Stone, who holds the Walter Spearman chair in the School of Journalism, says the vilification of Mr. Hardin is unfortunate. "*He's a man of good will,*" said Mr. Stone, who holds one of 13 endowed chairs that belong to blacks at the university. Mr. Stone also conducted the study that showed of the 56 endowed chairs blacks hold nationwide, UNC offered more than three times as many as second-place Princeton University. "This is a progressive place, but the young brothers and sisters do not think it is moving fast enough," he said. "I understand in honest, well-meaning people, free-standing connotes separate."

Id. (emphasis added).

in the process of defining the issues and the culture of the University of North Carolina.⁵⁶ Some of the black student supporters of the Black Cultural Center said some foolish things about some of the opponents of the center, white people, and supporters of Chancellor Hardin,⁵⁷ but one reason people are loud is that their ability to participate has been limited by refusals to be heard. It is not possible to get useful responses to these issues if we assume that the only good students effectively have to put on white face. There is nothing wrong with desegregation of schools, but the willingness of black people to acquiesce to assimilation requires careful consideration by the black community. It is not enough to assume that assimilation is the only answer.

IV CONCLUSION

We know more specifically, I take it, that Othello's blackness means something. But what specifically does it mean? Mean, I mean, to him—for otherwise it is not Othello's color that we are interested in but some generalized blackness, meaning perhaps "sooty" or "filthy" as elsewhere in the play. This difference may show in the way one takes Desdemona's early statement: "I saw Othello's visage in his mind." I think it is commonly felt that she means she overlooked his blackness in favor of his inner brilliance; and perhaps further felt that this is a piece of deception, at least of herself. But what the line more naturally says is that she saw his visage as he sees it, that she understands his blackness as he understands it, as the expression of his mind—which is not overlooking it. Then how does he understand it? As the color of a romantic hero. For he, as he was and is, manifested by his parts, his title, and his "perfect soul."⁵⁸

What did "black" mean to the Supreme Court in 1954 and 1955 when the *Brown* cases were decided? Clearly the Court saw

56. *Id.*

57. See *Morning Edition*, *supra* note 53.

58. STANLEY CAVELL, *DISOWNING KNOWLEDGE: IN SIX PLAYS OF SHAKESPEARE* 129 (1987).

the world mainly through lenses of the white majority. It sought to make black people white people with black skin. The Court and the educational establishment have had a much more difficult time accommodating the interests, culture, and lives of black Americans.⁵⁹ Was the Court populated by "good people?" Certainly, those who were on either side of the line thought the participants in the American form of racial oppression were good men. The southern governors who fought desegregation tooth and nail were thought to be "good people." The administrators of segregated public institutions knew themselves to be "good people." The school board members in southern school districts that discriminated in pay for black teachers and in services between black and white children knew themselves to be "good people." The Supreme Court Justices who unanimously supported the *Brown* decisions thought of themselves as "good people" despite whatever prejudices they still harbored. I raise this issue to suggest that there remains in all of us vestiges of racism that still distort our present. Being "good," while better than being "bad" is not sufficient to cure our racial present. The gains that have been made in this country for black Americans would not have been possible without "good" people, black and white. However, there is a tendency in all of us to interpret one act of goodwill as a form of perpetual dispensation from the racism that exists and influences the lives of black elementary, high school, and college students.⁶⁰ If we are to reach the promise suggested by the powerful and noble ideal of *Brown*, we have to rethink the question of exactly how we see "black." White Americans have to accommodate black interests and concerns. Liberal scholars often look at this issue by seeing race in the same way as the readers of *Othello*—as something that Desdemona ought to overlook, as something outside useful analysis. At least in America, race is not equivalent to poverty or class. The suggestions by the Supreme Court or others⁶¹ that racial problems can

59. See, e.g., Jerome M. Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 CONN. L. REV. 209 (1993) (citing examples of the failures of the Supreme Court and universities in addressing racial issues).

60. See *id.* at 212 (noting that freedom from racism involves more than doing one particular nonracist action).

61. See, e.g., Steven A. Holmes, *A Rights Leader Minimizes Racism as a Poverty*

always be cured by addressing poverty or class concerns are wrong.

If we are to answer the demand of Martin Luther King on the steps of the Lincoln Memorial to allow blacks to have the ballot—by which I think he meant to become a real participant in the decision-making process of society—white America has to change how we interpret the promise of *Brown*. *Brown* has to become more than just a slogan for the racial status quo and assimilation. For me, race is part of the law not something to be put aside, but instead, to paraphrase Cavell, something to be understood from the perspective of black people.⁶² Not black people in white face, but simply people with much to contribute to our society including their blackness as they define it.

Factor, N.Y. TIMES, July 24, 1994, at 18. The first public pronouncement of the new head of the Urban League was to claim that white racism, though relevant and important, is not the most important social problem for black Americans. *Id.* This argument ignores the structural factors that limit the likely success of this suggestion. See Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 163 (1994); Jerome M. Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993).

62. See Cavell, *supra* note 58, at 129.

