

**RACE, LAW AND EDUCATION IN  
THE POST-DESEGREGATION ERA**



# RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA

*Four Perspectives on Desegregation and Resegregation*

**Kevin Brown**

*Professor of Law, Charles A. Whistler Faculty Fellow  
and Director of the Hudson & Holland Scholars Programs  
Indiana University-Bloomington*

CAROLINA ACADEMIC PRESS

---

Durham, North Carolina

Copyright © 2005  
Kevin Brown  
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Brown, Kevin Dion.

Race, law, and education in the post-desegregation era / by Kevin Brown.

p. cm.

Includes bibliographical references.

ISBN 1-59460-025-2 (alk. paper)

1. Segregation in education--Law and legislation--United States.
2. Discrimination in education--Law and legislation--United States.
3. United States--Race relations. I. Title.

KF4155.B678 2004  
379.2'63'0973--dc22

2004018302

Carolina Academic Press  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
E-mail: [cap@cap-press.com](mailto:cap@cap-press.com)  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

*This book is dedicated to my four children: Nichole, Crystal, Shayla and Devin. Contained within this book is all the wisdom that a father can convey to his children. This book is also dedicated to the rainbow of my life, my wife Dianne. Without her support, encouragement and patience I could not have completed this book.*



# CONTENTS

<b>Preface</b>	xv
<b>Acknowledgments</b>	xvii
<b>Introduction</b>	1
I. Changes in American Society Resulting from <i>Brown v. Board of Education</i>	1
II. Public Education Has Moved into the Post-Desegregation Era	5
III. The Two Interwoven Objectives	9
A. Current Educational Situation of African- American Schoolchildren	11
1. Racial Gaps in Academic Achievement	11
2. Change in the Background Assumptions for Interpreting the Equal Protection Clause since <i>Brown v. Board of</i> <i>Education</i>	14
3. Increase in School Choice as a Principal Means of Pursuing Educational Reform	16
B. Post-Desegregation Awareness and the Four Discourses	20
IV. Summary of the Following Chapters	25
<b>PART I THE FOUR DISCOURSES</b>	31
<b>Chapter One The Discourse of Traditional Americanism</b>	35
I. The Conceptual Structure	37
A. Conception of the Social World	37
B. Moral and Ethical Beliefs	38
C. The Role of Government and Society	38
D. Contrasted with Other Systems of Meaning	40

II. History of Blacks in America and the Legal System's Treatment of Them	41
A. The Colonial Period	42
B. The Antebellum Period	43
C. The Civil War and Reconstruction Era	48
D. Disenfranchisement and the Institution of Segregation	54
E. Acceptance of Segregation in Public Education	57
III. Rationales for the Belief in the Inferiority of Blacks	60
A. Rationales for Slavery	61
1. Religious Justifications for Slavery	61
2. Slavery was Often Viewed as a Beneficial Institution for the Slaves	62
3. Scientific Justifications for Slavery	65
B. Rationales for Segregation	68
Conclusion	72
<b>Chapter Two The Discourse of African-American Centralism</b>	<b>73</b>
I. The Conceptual Structure	74
A. Conception of the Social World	75
B. Epistemology and the Meaning of Words Related to Racial Issues	76
C. Moral and Ethical Beliefs	77
D. One Putative Function of Government	78
E. Contrasted with Other Systems of Meaning	79
II. History of the African-American Experience	81
A. Traditional African Beliefs	81
B. The Era of Slavery	82
C. The End of Slavery, The Civil War and Reconstruction Era	88
D. Disenfranchisement and the Imposition of Segregation	92
Conclusion	101
<b>Chapter Three The Discourse of Colorblind Individualism</b>	<b>103</b>
I. The Conceptual Structure	105

A. Conception of the Social World and of the Knowing Individual	105
B. The Knowing Individual's Relationship to Historically Developed Traditions	106
C. Epistemology and the Meaning of Words Related to Racial Issues	108
D. Moral and Ethical Beliefs	109
E. The Role of Government and Society	110
F. Contrasted with Other Systems of Meaning	111
II. History of Those Who Happened to be Black and the Legal System's Treatment of Them	114
A. The Colonial Period	114
B. Founding of the Republic and the Antebellum Period	116
C. The Civil War and Reconstruction	119
D. Disenfranchisement and the Institution of Segregation	122
Conclusion	128
<b>Chapter Four The Discourse of American Collectivism</b>	129
I. The Conceptual Structure	130
A. Conception of the Social World	130
B. Epistemology and the Meaning of Words Related to Racial Issues	132
C. Moral and Ethical Beliefs	133
D. The Role of Government and Society	134
E. Contrasted with Other Systems of Meaning	135
II. History of Blacks in America	136
A. The Colonial Period: How Slavery in America Advanced the Collective Interest of the British Empire	137
B. Founding of the Republic and the Antebellum Period: How Slavery Advanced the Interest of America	138
C. The Civil War: How Abolition of Slavery Advanced the Collective Interest of the Union	143
D. Reconstruction: How Granting Blacks Civil and Political Rights Advanced the Collective Interest	148

E. Segregation and Disenfranchisement: How Segregation and Blacks' Loss of the Right to Vote Advanced the Collective Interest	152
Conclusion	156
<b>PART II BROWN V. BOARD OF EDUCATION AND THE RISE OF SCHOOL DESEGREGATION AS CONCEPTUALIZED WITHIN EACH OF THE FOUR DISCOURSES</b>	157
<b>Chapter Five The Rise of School Desegregation</b>	159
I. Graduate School Cases that Preceded <i>Brown v. Board of Education</i>	160
II. <i>Brown v. Board of Education</i> : Striking Down Statutes that Segregate Public Schools	163
III. Resistance to School Desegregation	167
IV. The Obligation to Achieve the Greatest Possible Degree of Actual Desegregation	174
Conclusion	176
<b>Chapter Six The Rise of School Desegregation Comprehended within Each of the Four Different Discourses</b>	179
I. Traditional Americanism	184
II. African-American Centralism	186
III. Colorblind Individualism	189
IV. American Collectivism	192
Conclusion	197
<b>PART III THE POST-DESEGREGATION ERA: RESEGREGATION AND INCREASING SCHOOL CHOICE</b>	199
<b>Chapter Seven Equal Protection Clause Interpretations that Led to Resegregation</b>	205
I. Supreme Court Decisions of the 1970s Backing Away from the Commitment to Pursue Desegregation	207
A. <i>Keyes v. School District No. 1</i> —The <i>De Jure/De Facto</i> Segregation Distinction	208

B. <i>Milliken v. Bradley (Milliken I)</i> —Limitation on Cross-District Desegregation Remedies	210
C. <i>Pasadena City Board of Education v. Spangler</i> —The Impact of Subsequent Resegregation of Students	212
D. Conclusion	213
II. School Desegregation Termination Cases	213
A. <i>Board of Education v. Dowell</i> —The Supreme Court’s First School Desegregation Termination Opinion	215
B. <i>Freeman v. Pitts</i> —Approval of Partial Release of a School District from Federal Court Supervision	217
C. <i>Missouri v. Jenkins</i> —Limitations on Educational Remedies	220
D. Conclusion	222
III. Equal Protection Challenges to the Use of Racial Classifications to Promote Integrated Education	224
A. First and Fourth Circuit Cases Rejecting the Use of Racial Classifications to Promote Voluntary Integration	225
1. First Circuit Case of <i>Wessmann v. Gittens</i>	225
2. Fourth Circuit Opinions in <i>Tuttle v. Arlington County School Board</i> and <i>Eisenberg v. Montgomery County Public Schools</i>	230
B. Federal Court of Appeals Opinions Upholding Integration Plans	232
1. Ninth Circuit Opinion in <i>Hunter v. Regents of University of California</i>	232
2. Second Circuit Opinion in <i>Brewer v. West Irondequoit Central School District</i>	233
C. Conclusion	234
Conclusion	236
<b>Chapter Eight Equal Protection Clause Trends that Limit the Ability to Attack the Racial Academic Achievement Gaps</b>	<b>237</b>
I. Limitations on the Use of Educational Policies and Procedures Employing Racial Classifications	240
II. Recent Developments Interpreting Title VI	241

III. Challenging Certain Educational Policies and Practices as Discriminatory Under the Equal Protection Clause	244
A. Tracking or Ability Skills Grouping	245
1. Defining Tracking or Ability Skills Grouping	245
2. Legal Challenges to Tracking or Ability Skills Grouping	249
B. High-Stakes Testing	258
1. General Discussion about High-Stakes Testing	259
2. Implications of High-Stakes Testing for African-American Schoolchildren	260
(a) <i>Hobson v. Hansen</i>	249
(b) <i>Fifth and later Eleventh Circuits</i>	251
(c) <i>Other Tracking Cases</i>	255
3. Equal Protection Challenges to High-Stakes Testing	261
4. Conclusion to High-Stakes Testing	264
C. Equal Protection Challenges to the Educational Curriculum	265
Conclusion	268
<b>Chapter Nine Why Increased School Choice is a Growing Educational Reform Movement in the Post-Desegregation Era</b>	<b>271</b>
I. Current Academic Performance of African-American Students and Condition of Black School Teachers	273
A. Performance on Standardized Tests	274
B. High School Graduation Rates	276
C. Grade Retention	277
D. Tracking or Achievement Skills Grouping	277
E. Underrepresentation of African-American School Teachers	278
II. Increasing Parental Choice Through Providing Charter Schools and Tuition Vouchers	280
A. Public School Choice in the Form of Charter Schools	282
B. Public Funding of Private School Choice or School Vouchers	284
C. Private School Choice Provides for More Educational Diversity than Public School Choice	288
1. Involvement of Black Churches in Education	288

2. Gender Segregated Education for African-American Males and Females	289
3. African-American Immersion Schools	291
D. The No Child Left Behind Act	292
Conclusion	296
<b>Chapter Ten   Increased School Choice as Comprehended                   in the Four Discourses</b>	297
I. Traditional Americanism	299
II. African-American Centralism	302
III. Colorblind Individualism	309
IV. American Collectivism	312
Conclusion	315
<b>Conclusion</b>	317
<b>Endnotes</b>	323
<b>Bibliography</b>	391
<b>Index of Cases</b>	417
<b>Index of Names</b>	421
<b>General Index</b>	425



## PREFACE

This book is intended to address the era of the desegregation of public schools that occurred in American society over the past fifty years. Thus, it discusses the rise of desegregation from the Supreme Court's 1954 decision in *Brown v. Board of Education* to the fall of desegregation beginning in the late 1980s to the current educational reform movement of expanding school choice. These developments are discussed primarily in terms of their implications for African-American schoolchildren because they were designated as the principal beneficiaries of desegregation. But this book is an examination of the desegregation of American education from the vantage point of this, the Post-Desegregation Era. Thus, while this book discusses the history of race relations, the desegregation of public schools and the current educational situation of African-American schoolchildren, this book is not about those issues. Rather this book is intended to discuss and reveal the most significant realization about racial phenomena and racial issues that stems from the experience of the desegregation of American society. This realization also constitutes the core experience of the Post-Desegregation Era.

To understand and experience something, it must be conceptualized against a *sub silento* background of a much larger set of ideas. These larger unseen, and often unperceived, background sets of ideas provide the conceptual contexts to place given events into "proper" context. The comprehension of racial and ethnic phenomena are merely a subset of this basic limit of human understanding. Thus, the comprehension of any particular racial or ethnic phenomena is always done against a background of a much larger set of ideas about race and ethnicity that structures and limits the perception of such a phenomena and the types of arguments that are persuasive to resolve a given racial or ethnic dispute. And just as important, there have always been multiple sets of background ideas about race and ethnicity in American society in which to comprehend a given racial phenomena and discuss a given racial issue. As a result, there are always multiple understandings of racial phenomena and thus multiple solutions to given racial conflicts. While

these different background sets of ideas could be viewed as different points of view or different perspectives, this book will refer to these larger diverse sets of ideas as the following: “discourses”; “patterns of understanding”; “systems of meaning”; or “cognitive frameworks.”

When reexamining the desegregation era of public education from the vantage point of the Post-Desegregation Era, it must be acknowledged initially that this reexamination can not provide only one objective and truthful interpretation, but rather multiple interpretations. It is the recognition that racial phenomena are understood against the background of different discourses that is both the most significant realization of the Desegregation Era and the core experience of the Post-Desegregation Era. Thus, how to comprehend the desegregation of public schools, as well as the history of race relations and the current educational situation of African-American schoolchildren, will largely be a function of the discourse upon which the comprehension is based. In order to reveal the structures and limits of thinking about race, this book discusses these racial issues within the conceptual limits of four different patterns of understanding referred to as Traditional Americanism, African-American Centralism, Colorblind Individualism and American Collectivism, which provide alternative understandings of these racial issues.

There is a philosophy woven into this book. Despite the fact that understandings of separate racial phenomena ostensibly appear as detached and distinct occurrences, our appreciation of them is never in such isolation. The comprehension of racial phenomena that force themselves into our consciousness is the comprehension of a part of a much larger pattern of understanding that is present to provide structure for and limitation of what is consciously perceived. There is also a hope that is woven into this book as well. To be constantly aware of multiple interpretations of racial phenomena requires an acculturation into a broader horizon of knowledge for which new, and hopefully, better solutions to racial conflicts can be conceived, developed and implemented.

## ACKNOWLEDGMENTS

The genesis of this book began with a law review article that I published over a decade ago. I would like to acknowledge my indebtedness to the many colleagues both at Indiana University and in the legal academy who have commented upon various drafts of portions of this book, especially the following individuals: Alexander Aleinikoff, A. B. Assensoh, John Baker, Pat Baude, Craig Bradley, Trevor Brown, Wendy Brown, Paulette Caldwell, Dan Conkle, Anthony Cook, John Dayton, Judy Failer, Richard Fraher, Bryant Garth, Don Gjerdingen, Dwight Greene, Linda Greene, Carol Greenhouse, Matthew Gutwein, Lynne Henderson, Stephanie Jones, Daniel Kobil, Brian Landsberg, Douglas Laycock, John Lucaites, Alan Mathewson, Martha McCarthy, Michael Middleton, Martha Minnow, John Pratter, David Rabban, Lauren Robel, John Scanlan, Theodore Shaw, David Smith, Leland Ware, David Williams and Susan Williams.

I would also like to thank the following law students at Indiana University School of Law or the University of Texas School of Law for their invaluable research and editorial assistance: Glenda Alexander, Margaret Allen, Silvia Biers, Vivek Boray, Daletta Briggs, Carmen Brun, Robyn Carr, John Dayton, Scott Gilchrist, Victor Katz, Olivia Phillips, Cheryl Peebles, Clarence Pollard, Alex Sharma, Tina Speagle, Scott Timberman and Daniel Trammel. I would, however, like to especially acknowledge the extraordinary research and editorial assistance of Andrija Samardzich. Further I would like to thank the many students in my Race, American Society and the Law courses over the years at Indiana University School of Law, the University of Texas School of Law and the University of Alabama School of Law for their many insights and suggestions that I incorporated into my thinking and, thus, this book. But I would especially like to thank the following students in my Fall 2003 Seminar on Antidiscrimination in Education: Nathalie Collins, Shakeba DuBose, David Giampetroni, Nathaniel Sinn and Kristine Zeabart. Finally, I would like to acknowledge Deborah Eads, Krystie Herndon, Marjorie Young and Peggy Wilkes for their secretarial assistance on this book.



**RACE, LAW AND EDUCATION IN  
THE POST-DESEGREGATION ERA**

