# Book Review

Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law*, New York: Random House, 2013, pp. 304, $25.95.

Reviewed by Mae Kuykendall

With apologies to David Herbert Donald,[1] who opened a chapter on Lincoln's marriage with a stark, unqualified description of conjugal misery drawn from popular opinion, let me begin a review of Professor Randall Kennedy's new book with my "explanation" (in partial imitation of Donald's ironic description) of race in much of popular and even judicial understanding in today's America. Having moved past racial slavery, segregation, and other forms of legally sanctioned racism, the United States of America has long enjoyed the blessings of a pristine, scrupulously fair racial order. Happily, a color-blind Constitution safeguards the harmony of a color-blind American society. The constitutional shield protecting the American tradition is fortunate, because race is a toxic category that must not be used for government action. Yet even today, in 2015, in our color-blind society, the Supreme Court must occasionally discipline public universities for unaccountably predicating admissions on racial factors.

Chief Justice Roberts has explained that a color-blind society that once legally discriminated against blacks must be vigilant to prevent relapse. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[2] In our color-blind nation, any granting of a state benefit on

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1. David Herbert Donald, Lincoln Reconsidered: Essays on the Civil War 75 (2001) ("From that day in November 1842 [when he married Mary Todd] Lincoln's home life was a domestic hell.").

2. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J.). Since this piece was drafted, Justice Sonia Sotomayor has brought renewed attention to Roberts's phrasing. *See* Schuette, Attorney General of Michigan v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality By Any Means Necessary (BAMN), et al., 134 S. Ct. 1623 (2014) (Sotomayor, dissenting) ("The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.").

an acknowledged racial basis is divisive and corrosive. The ensuing damage includes white resentment and a diminished chance to compete, erosion of the status of blacks who achieve without the granting of a benefit, and sabotage of the education of poorly prepared black students. Other categories for special consideration, such as regional origin, poverty level, kinship to an alumnus or alumna, or attendance at an elite private school, are also controversial, but race is different.

As a color-blind society, we suffer from a related medical condition: chromophobia, the abnormal fear of a color or colors.[3] The condition, with its manifestations, is subtle. Only the physicians on the Supreme Court of the United States are able to diagnose and treat it, with prophylaxis and follow-up. (If you wonder at these bald statements, please read the footnote.[4])

As Randall Kennedy demonstrates in *For Discrimination: Race, Affirmative Action, and the Law*, his adroit and accessible combination of historical context, legal doctrine, and cultural awareness, race has been different for a long time. When the first Civil Rights Act was passed in 1866, Kennedy reminds the reader, President Andrew Johnson's veto message launched the political and cultural effort to rescue our color-blind society from a wrong turn. Provisions for judicial enforcement of rights, such as contracting and property-owning, were, Johnson proclaimed, "made to operate in favor of the colored and against the white race" (23). In the wink of three decades, the Supreme Court honed the message of individual, not group, rights by "impatiently lecturing the black plaintiffs in the Civil Rights Cases": "When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws…."[5] Continuing the long-standing judicial caution about race as a formal category, Justice Powell was concerned in his landmark *Bakke*

3. This condition is diagnosed in a forthcoming piece on the failures of "diversity" as a cure to a legacy of racial silence. Mae Kuykendall & Charles Adside, III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and a Legacy of Racial Silence*, 22 Wm. & Mary Bill Rts. J. 1075 (2014).

4. Readers repeatedly warned me that the description of race in America in the preceding paragraphs was confusing because the content "cuts somewhat close to how some people really think about discrimination." Hence, I repeat a warning I had imagined was not needed. The preceding paragraphs are done in partial imitation of David Herbert Donald's opening paragraph on the Lincoln marriage. Donald, *supra* note 1, at 75 ("… after his removal to Springfield he was trapped by the ambitious and aggressive Mary Todd into a promise of marriage.").

5. *Id*. at 24 (quoting *Civil Rights Cases*, 109 U.S. 3, 25 (1883)). A century later, President Kennedy was vigilant to prevent the emergence of quotas in a futile effort to "undo the past." President Kennedy seemingly forgot, our namesake author Kennedy notes, that "quotas had long existed that permitted white men to monopolize almost entirely the upper ranks of government, business, academia, the Fourth Estate, and other key domains." *Id*. at 36.

opinion that no group should become "special wards entitled to a degree of protection greater than that accorded to others."[6]

With a blend of moderation and nuance, Kennedy describes how legal and political voices have consistently explained versions of "race is different." He balances concessions to negatives about benign "discrimination" [against] unvarnished moral censure of the racial wrongs of the past, and present. He mixes measured conclusions about the net positives of affirmative action, weighed against a fully stocked and conceded catalogue of negatives, with blunt contempt for silly claims and with stern moral accounting. As to the merely silly, Kennedy anoints the claim by Justice Thomas of "a moral [and] constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality" as "one of the silliest, albeit influential, formulations in all of American law" (165).

The strengths of Kennedy's book are considerable. In its compact yet comprehensive coverage, it provides an excellent checklist for law professors and other academics who address issues concerning race. The willingness to mix carefully balanced reasoning about net benefits over costs with blunt moral assessment about America's racial history and present is an impressive certification of fairness, moral fortitude, and candor. The book provides a useful vocabulary with a sampling of coinages and striking phrases: color-blind immediatists,[7] proportionalism, Negrophobia, white racial innocence, class *not* race, diversity talk, epistemic diversity, white-oriented pigmentocracy, American pigmentocracy, the mismatch objection, "color blind" racism, racial laissez-faire, credentializing of race, judicial anxiety, "talented tenth," and positive discrimination. These phrases alone provide a tutorial in the cultural and legal themes regarding race in the United States.

Kennedy gives a useful explanation of the source of the color-blind meme in the good intentions during the civil rights era held by advocates of racial justice. American society at the time, higgledy-piggledy from its much celebrated color-blind provenance, was infected with formal, legal racial oppression that held many in restricted lives and limited prospects. In enacting protections for the exercise of civil rights, lawmakers sought to claim a color-blind ideal for the protection of persons of color for whom something had gone awry. These lawmakers hoped to avoid the perception of error as alleged by President Andrew Johnson against the first civil rights era: laws favoring blacks over whites by apportioning protections from discrimination on the basis of race, by race.

Accordingly, the color-blind ideal appeared in the speeches of eminent leaders. Hubert Humphrey provided assurances that nondiscrimination

6. *Id*. at 191 (quoting Regents of University of California v. Bakke, 438 U.S. 265, 295 (1978) (Powell, J.)).

7. Before the Civil War, those who demanded immediate, unconditional abolition of slavery were adherents of immediatism. *See, e.g.*, William Lee Miller, Arguing about Slavery: The Great Battle in the United States Congress 72-74 (1996).

merely meant equal, not special, treatment (37-38). Martin Luther King, Jr. is imagined by some to have paid color-blindness tribute.[8] As might be anticipated, in the civil rights era, both an ideal of fairness to blacks, and a tactic of reassurance for whites, became a cheerful source of the color-blind rhetoric that today recovers the old concern, expressed by the first President Johnson, to avoid "racial favoritism" of blacks over whites (24). In the minds of many whites, high and low, the threat of racial favoritism is not new. In pungent words that Professor Kennedy revives for a modern reader, a Florida slaveholder lamented that the abolition of slavery was a project of those "determined to give the [N****r] more rights than the white man" (24).

Kennedy's thesis is clear and morally compelling as a statement of the case for affirmative action. "The affirmative action ethos is not a necessary evil; it is a positive good" (244). By "good," Kennedy means, in American circumstances, a moral necessity. There is therefore no need of apologetics or "anxiety about an endpoint" (254)[9] in the American practice of affirmative action. Rather, for Kennedy, affirmative action is the responsible choice for a society faced with a history of deep injustice and continuing large disparities that can be traced to formal and relatively recent state-facilitated racial harms.

In presenting the case for affirmative action, Kennedy provides a comprehensive, educational, and historically accurate account of the cultural and legal evolution of the law of race in the United States. The presentation is free of excesses of argumentation,[10] yet does not stint on the ugly facts of our racial past.

In such an intellectual and moral bounty, where might lie a chance for the critic? The compensation, in the Emersonian sense ("For every grain of wit there is a grain of folly"[11]), for a tone of moderation in argument is a relative diminution of the power that would come with a strong, deeply developed, and original thesis based on primary research or on a novel claim argued with depth and intensity. The book has numerous vivid passages, but does not offer a unique contribution (except for its capacity for balance) to thinking about affirmative action, or, in Kennedy's ironic title term, discrimination. It is, to be sure, a massively helpful extended essay on the highlights of racial argumentation in the U.S., made especially valuable by Kennedy's sharp eye

8. For a critical analysis of efforts by conservatives to make of King's *I Have a Dream* words "the favorite color-blindness cudgel to use against African-Americans in the political and legal arena," *see* Mary F. Berry, *Vindicating Martin Luther King, Jr.: The Road to a Color-Blind Society*, 81 J. Negro Hist. 137, 137 (1996).

9. He disclaims any effort at "universal assessment" (252). In no sense, then, is Kennedy using the term in its philosophical sense of "intrinsic good."

10. In one passage, Kennedy identifies and defines "color-blind racism," but rates broader formulations than his own "sometimes excessively expansive" (164).

11. This is a simple formulation from Ralph Waldo Emerson's essay *Compensation* of his thesis that strength is compensated by some type of cost. Ralph Waldo Emerson, *Compensation, in* The Portable Emerson 165, 169 (Carl Bode & Malcolm Cowley eds., 1981)(1841).

for telling connections between past and present usage in race discussions.[12] It is a model by which to locate for oneself a tone of moderation in combination with an unflinching recognition of our racial wrongs. In that sense, Kennedy shows the rest of us an accessible, mature, and modulated voice to use in joining discourse about race, given our heritage and present voices.

Another Emersonian compensating feature of the book's reach is Kennedy's relatively cursory treatment of the moral arguments relevant to any individual who must predicate official action on the racial complications of American life. Kennedy makes the moral case for affirmative action. In doing so, he concedes deficits noted by critics, such as the conferring of benefit on some already in possession of advantage,[13] hypocrisy by elites masking in the language of diversity their real motive (that of rectifying racial wrongs), and stigma affecting blacks of achievement and subjecting black students to dispiriting elements of doubt.

In conceding and defending the education bureaucrat's deceptive presentation of purpose, Kennedy's argument might uncharitably be labeled "glib," a makeshift response skimming the surface of a project of moral assessment, an argumentative maneuver better-suited to fast-paced oral argument. He argues that policy can sometimes benefit from masking of its purpose. He cites the example of a deficiency of candor in *Brown v. Board of Education*, which famously skirted the moral wrong of *de jure* segregation and avoided careful discussion of the framers' intent in the Fourteenth Amendment (104). Kennedy quotes Calabresi on the mistake of burdening society with "total candor" (104) and pleads for tolerance of "well-intentioned people engaging in subterfuge out of a felt need[14] to skirt volatile issues that are the legacy of racist misconduct" (105).

12. For example, Kennedy describes the response in the 1940s to FDR's ban on hiring discrimination in the defense industries and to an early New York law forbidding discrimination in employment. Reactions by a Mississippi Democrat (Jamie Whitten), a New York administrator (Robert Moses), and a conservative journalist (Westbrook Pegler) fashioned the beginnings of rhetoric charging racial entitlement was the real meaning of nondiscrimination law (27). Further, he notes that the U.S. Supreme Court, in Hughes v. Superior Court, 339 U.S. 460 (1950), upheld a ban on picketing in Richmond, California, to achieve hiring proportionate to local patronage by black shoppers. *Id.* The reasoning of the Court was that the demand was contrary to public policy. The arguments substantially tracked later anti-affirmative action arguments (29-30, quoting Hughes, 339 U.S. at 464) and Mark Tushnet, *Change and Continuity in the Concept of Civil Rights: Thurgood Marshall and Affirmative Action*, Soc. Phil. & Pol'y July 2012 at 150, 151 (1991).

13. Kennedy reminds us, though, that, "Middle class black people bear injuries, often hidden… that are passed on from one generation to the next …." (87).

14. An admirable feature of Kennedy's prose is the fresh language, free of jargon or insider code. The term "felt need" strikes me as a departure. "Felt need" shows up in the language of community development and in the preaching profession. It is a vague phrase, available as a conclusory assertion of sentiment, unassigned to anyone but the speaker predicating action on it for those whose "need" is "felt." As such, the term is an intrusion into Kennedy's otherwise unpresuming style of open, fully accountable argumentation.

Here, Kennedy fails to credit the weight of the damage done by manipulative rationales, used by academic administrators[15] who, in Kennedy's words, have relied for decades on "the ritualistic, incantatory repetition of the terms 'diversity' and 'holistic'…."(239). In opposing a categorical ban on racially sensitive admissions, Kennedy opines that depriving administrators of a language they have mastered would be costly (239). Earlier, he says that experimentation with the diversity rationale should be cautious, fundamentally on the grounds it is all we have (145-46). Yet many of the conceded costs of affirmative action surely arise from a cynicism generated by the perceived deceptions of academic bureaucrats. Experimentation to replace harmfully evasive administrative speech with discourse-liberating programmatic design might be the prudent, not the risky course.

The language of *Brown v. Board* did not penetrate into the daily speech of academic institutions or other settings where choices were made. It lacked, in my view, the corrosive potential of the pervasive and bland diversity incantation.[16] It groped for a moral language, but fell short. The language of education diversity contains moral flaws in conception and execution that undermine its moral purpose. The sponsorship of evasive language is among the flaws.

One can concede that a ritualized language, severing the speech of administrators from the pith of race in the vernacular, is better than root-and-branch disavowal of a morally fraught racial legacy. Yet a plea for the value of subterfuge and for caution about efforts to improve the basis for and operation of a university environment to foster racial health and robust speech fails to satisfy. As analysis, it shortchanges the depth of damage done by administrative sleight of hand. As advocacy, it leaves us with no solution to a flawed approach of disavowing race and using it.

"Rhetoric has a way of imprisoning those who use it…."[17] In the case of diversity, the bars may confine administrators and students and faculty in separate cells, the first tied to a gratifying "incantation," and students—and even faculty—[fearful] of invading the stylized and policed speech turf of university functionaries.[18]

In light of its substantial merit, Kennedy's book calls for a sequel. The sequel should treat in greater depth the moral and pragmatic faults of a structure of cagily manufactured administrative speech. Harms arise from a culture of deception supporting a practice of unmoored bureaucratic scripts, a devalued

15. The academic practice is for illustration. The phenomenon of a contrived speech of diversity occurs in a variety of contexts throughout society and presents similar concerns.

16. It is difficult to reject as inapt Kennedy's nod to Shelby Steele's term: "administrative banality" (101, quoting an email from Shelby Steele to Randall Kennedy).

17. Donald, *supra* note 1, at 147.

18. *See generally* Kuykendall & Adside, *supra* note 3. *See also* Kennedy at 218 ("A criticism of academic culture on many campuses is that it stifles robust debate regarding affirmative action, preferring instead rote acquiescence.").

language and a timid academy, administrative laziness that often fails to create a learning environment that the diversity rhetoric purports to foster,[19] and a use of black students (and others) in a game[20] that pays larger returns to administrators than to blacks or to racial harmony. The moral rationale for diversity admissions needs a stronger base in genuine collaboration among the members of the university community and a defensible programmatic plan to make diversity a building block for a first-ever practice of open discourse about race in America. "Attentiveness to the expressive function of integration," in Kennedy's words, calls for much greater attentiveness to the costs to expression of obfuscation by administrators. To paraphrase Chief Justice Roberts in *Community Schools v. Seattle School District*, "the way to start a practice of attentiveness is to start being attentive."[21]

The late William Lee Miller, a student of virtue in political and cultural life, wrote a statement that could be joined by Kennedy, or, in the case of his leaning toward the status quo in affirmative action, directed to him:

> It is a revealing curiosity of American popular attitudes that a people so practical, so optimistic, so energetic, so direct, so quick to say that anything can be done by an effort of will—the impossible takes a little longer—on other topics, have regularly and abruptly turned to the opposite extreme on issues of slavery and race: nothing can be done. Leave it alone. Don't meddle. It cannot be fixed. American slavery and racial injustice cannot be ended by direct human decision and actions.[22]

Kennedy's account of injustice and basic evasion is undeniable, but his chosen, pragmatic solution to our race heritage has a flaw, which is his view

19. A recent movement by black students at several universities charges universities with paying lip service to the goals of an enriched discursive climate built around diversity. In Ann Arbor, a student group demanding better inclusion and support indicated "they expected platitudes from university officials." Ben Freed, *Being Black at University of Michigan organizers threaten 'physical action' if demands aren't met,* MLive (Jan. 20, 2014, 1:15 PM), http://www.mlive.com/news/ann-arbor/index.ssf/2014/01/being_black_at_university_of_m.html; "We have heard the phrase 'we are listening' since 1970, and I am tired of waiting for a response,' senior Shayla Scales said." *Id*.

20. Nancy Leong has recently labeled this phenomenon as "racial capitalism." *See Racial Capitalism,* 126 Harv. L. Rev. 2151, 2154 (2013) (arguing that white institutions derive value from associating with nonwhite-identified individuals and treat "nonwhites" as a commodity).

21. I drafted this paraphrase before Justice Sotomayor offered her own rewrite of Roberts's "platitude" about discrimination. I leave it in to underline the nature of the problem of a judicially coined tautology that, if honored, suppresses forms of public expression about the reality of a sad race history and the potential for a shared undertaking to "speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination." *See Schuette* 134 S. Ct. at 1638-39.

22. Miller, *supra* note 7, at 15-16. On the whole, Kennedy discloses and concedes serious problems with diversity affirmative action but concludes that the result is nonetheless good enough. It is, in his considered view, good enough because he cannot imagine any other path to meeting the actual need for social justice or creating a sharing of leadership visibility with the "talented tenth".

of the therapeutic effects of indirection, silence, and top-down solutions. In taking this view, he tolerates the lingering habit of collective silence.

Given his comprehensive knowledge and fair approach, Randall Kennedy is a good nominee to help with the optimistic work needed for "direct [openly disclosed] human decision and actions" to build a just, multiracial American nation.