BOOK REVIEW

How to Be An Anti-Racist

by Ibram X. Kendi

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With the retreats and setbacks the cause of civil rights has suffered, both in the Supreme Court and elsewhere, since Dr. King's passing in 1968, there is ample reason to question whether our country has given up on both "the fierce urgency of now" and "the arc of the moral universe" that he embraced.

Over the past few years, video recordings of the deaths of Black Americans at the hands of the police, the burgeoning Black Lives Matter movement, and the 1619 Project combined to support a growing national consensus to address racial injustice. The May 26, 2020 murder of George Floyd produced a tidal wave of protests across the racial divide, leading so far to such changes as the removal of Confederate monuments in the South and the removal of "Providence Plantations" from our State's official name last November after voters had overwhelmingly rejected a similar proposal in 2010.

These events spurred many of us to learn more about the issue of racial injustice by reading such books as Professor Ibram X. Kendi's How To Be An Anti-Racist (2019). The volume really is two books in one, combining a personal memoir with a doctrinal statement of policy principles. Most readers will focus on the first book, in which Professor Kendi's candid and compelling stories encourage readers (including this one) to reflect on their own experiences and gain insight concerning their unconscious biases. At the same time, the policy principles presented in the second book, which are the subject of this review, raise difficult questions for attorneys, highlighting the gaps in our country's realization of the ideal of equal justice under law (as reflected in the Supreme Court's jurisprudence) and offering a controversial way to fill these gaps.

More specifically, Professor Kendi's policy principles push back on a view of the nation's history many of us learned in law school and celebrate each Martin Luther King Day, namely that the civil rights era validated a national value of justice and equality, starting a long march towards those goals that continues to this day, albeit at a frustratingly slow pace. Professor Kendi's argument essentially rejects that gauzy vision, proposing a starker alternative.

To understand Professor Kendi's argument, this article will begin with a brief overview of three lines of Supreme Court equal protection cases (in the areas of public education, affirmative action in public university admissions, and voting rights) in which the early promise of the civil rights era was weakened over time by court decisions that limited remedies to cases of intentional discrimination, and which restricted the use of racial criteria in fashioning remedies, causing racial inequities to remain or worsen.[1] It will then describe how Professor Kendi's doctrinal framework essentially flips the status quo around, placing the burden of proof on those who seek to justify any policy or action that does not have a favorable impact on reducing racial disparities. This article will conclude with some suggestions for lessons our legal community can take from Professor Kendi's argument.

I. The Civil Rights Era And Its Aftermath

A. Public School Integration

For many historians, the civil rights era began with the **Brown v. Board** of Education decision in 1954, in which the Supreme Court declared that "in the field of public education the doctrine of 'separate but equal' has no place."[2] The **Brown** court presented a new standard of equal protection in public schools, stating:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[3]

At first, the Court allowed local communities to develop their own compliance plans to implement the new rights "with all deliberate speed."[4] When local communities failed to act on their own, the Supreme Court upheld comprehensive court orders, stating that a school board must take "whatever steps might be necessary to convert to a unitary system in which discrimination is eliminated root and branch," and that it must "come forward with a plan that promises realistically to work, and promises realistically to work *now*."[5]

The Supreme Court's initial position of strong support shifted during the 1970s as the Warren Court gave way to the Burger, Rehnquist and Roberts Courts. In the **Swann** decision of 1971,[6] the Court placed limits on court-ordered busing, stating:

> Absent a constitutional violation there would

> be no basis for judicially ordering assignment of students on a racial basis… All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.[7]

Two years later, in **Keyes v. School District No. 1, Denver, Colorado**,[8] the Supreme Court held that Denver's student assignment plan, which was proven discriminatory in some neighborhoods, should be presumed discriminatory as a whole absent proof to the contrary.[9] While **Keyes** marked some progress in the battle against school segregation, the majority chose not to adopt a stronger standard proposed in Justice Powell's concurring opinion, which viewed racial imbalances in school populations as a proper subject for judicial relief regardless of whether they resulted from explicit policies (*de jure* segregation) or from other factors (*de facto* segregation).[10]

The Burger Court's focus on *de jure* discrimination left it powerless to address the issue of suburban "white flight" in its 1974 **Milliken v. Bradley** majority decision, which Justice Marshall criticized in his dissent as being "more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law."[11] **Milliken** marked a major retreat in the Court's efforts to integrate schools, as it limited remedies to cases where there was explicit proof of intentional discrimination leading to segregation, closing the courthouse door to other cases of segregation that may have resulted from other sources, such as housing discrimination.[12]

In its 2007 **Parents Involved in Community Schools v. Seattle School District No. 1** decision,[13] the Supreme Court went even further, holding that two school districts' voluntary integration plans were themselves discriminatory and unconstitutional. In his plurality opinion, Chief Justice Roberts described the key holding of **Brown v. Board of Education** as being that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[14] In dissent, Justice Breyer warned that

> The last half century has witnessed great strides towards racial equality, but we have not yet realized the promise of **Brown**. [Chief Justice Roberts's] position, I fear, would break that promise. This is a decision that the Court and Nation will come to regret.[15]

In many ways, the **Parents Involved** plurality decision ended the promise of **Brown v. Board of Education** to make public education "available to all on equal terms."[16] Earlier decisions had limited the Court's protection to *de jure*, rather than *de facto* discrimination, and now the Court barred even voluntary integration programs by school districts to remedy past segregation.

B. Affirmative Action in University Admissions Policies

In 1966, President Johnson issued Executive Order 11246, directing contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Many colleges and universities adopted affirmative action into their admissions policies with dramatic results; for example, Columbia University admitted more than twice as many African American students to its 1969 freshman class compared to the previous year.[17] In 1978, however, the Supreme Court held, through Justice Powell's decisive opinion in **Regents of the University of California v. Bakke**,[18] that public university affirmative action policies based on race were subject to "strict

scrutiny," and could be found to violate the Constitutional rights of white students barring some compelling justification. The **Bakke** court allowed these universities to consider race as a limited "plus factor" as part of a broader review of student qualifications to promote diversity.[19] In 2003, the Supreme Court (in an opinion by Justice O'Connor) placed even stricter limitations on the use of race in admissions decisions, stating:

> We take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable.... It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased..... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[20]

The Court's 25-year time limit on this form of affirmative action was consistent with its approach towards school desegregation decrees – in the Court's view, the losses that white students incurred under affirmative action policies could not be justified absent evidence of a clear connection to prior discrimination against students of color. Subsequent case decisions from the Court, as well as changes in the Court's composition, validate Justice O'Connor's prediction; if anything, the end of affirmative action programs may come sooner.[21]

C. Voting Rights

After Selma, Alabama police violently ended a peaceful civil rights march across the Edmund Pettus Bridge, President Johnson urged Congress to pass a voting rights act with this message:

> What happened in Selma is part of a far larger movement which reaches into every section and State of America. It is the effort of American Negroes to secure for themselves the full blessings of American life.
>
> Their cause must be our cause too. Because it is not just Negroes, but really it is all of us, who must overcome the crippling legacy of bigotry and injustice.
>
> And we shall overcome.[22]

The passage of the 1965 Voting Rights Act was, in many ways, the crowning achievement of the civil rights era. **In South Carolina v. Katzenbach**,[23] the Warren Court upheld its broad provisions, rejecting several Constitutional challenges, including one to the Act's "pre-clearance" requirement of prior federal approval of state-created voting districts in jurisdictions with a prior history of discrimination. The 1965 Act contained a five-year time limit, but Congress subsequently extended and enhanced it with reauthorizations and amendments in 1970, 1975, 1982, and 2006, with the last two reauthorizations for 25 years each.[24] When the Supreme Court reviewed the Act in 2013, however, it held that the extension of the pre-clearance program was an unconstitutional infringement on states' rights, declaring that the country's progress since the Act's original passage in 1965 removed the compelling justification for the legislative remedy that existed at the time it was originally enacted. In dissent, Justice Ginsburg reviewed the serious racial disparities in

voting access that remained, famously stating that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[25]

D. The End of the Civil Rights Era

Dr. King struggled with the slow pace of progress during the civil rights era. During the 1963 March on Washington, he noted that:

> We are now faced with the fact that tomorrow is today. We are confronted with the fierce urgency of now. In this unfolding conundrum of life and history, there "is" such a thing as being too late. This is no time for apathy or complacency. This is a time for vigorous and positive action.

At other times, Dr. King took a longer view, such as in one of his final speeches before his untimely death in which he famously stated that "the arc of the moral universe is long, but it bends toward justice."[26]:

With the retreats and setbacks the cause of civil rights has suffered, both in the Supreme Court and elsewhere, since Dr. King's passing in 1968, there is ample reason to question whether our country has given up on both "the fierce urgency of now" and "the arc of the moral universe" that he embraced.

II. How Professor Kendi Fills the Gaps

Professor Kendi begins his book by describing a speech he presented in high school on the subject of "Dr. King's message for the millennium." As a high school student, he viewed Dr. King's vision as promoting "color blindness," and the gap in fulfillment of Dr. King's dream as largely the fault of Black youth. Professor Kendi describes how, over time, he realized his high school ideas represented a failed project that held the country back from true equality. To replace our country's flagging commitment to civil rights, Professor Kendi provides an alternative analytic framework based on four key definitions and propositions:

1. Racist: One who is supporting a racist policy through their actions or inaction or expressing a racist idea.
2. Antiracist: One who is supporting an antiracist policy through their actions or expressing an antiracist idea.
3. By policy, I mean written and unwritten laws, rules, procedures, processes, regulations and guidelines that govern people. There is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every nation is producing or sustaining either racial inequity or equity between racial groups.
4. The only remedy to racist discrimination is antiracist discrimination.

See How To Be An Anti-Racist, pp. 13, 17, 18 (2019) (Kindle edition).[27]

As lawyers, we can view Professor Kendi's framework as a direct response to the shortcomings of the Supreme Court's Constitutional jurisprudence just described. While the evolution of Constitutional case law confined the ongoing problem of racial discrimination to cases in which there is evidence of ongoing discriminatory intent, with no remedy available for cases of disparate impacts alone, Professor Kendi flips the script, stating people are "racist" *unless* they support policies that actively reduce disparities. In other words, Professor Kendi's definition shifts the cohort of people with indifferent attitudes

from "non-racist" to "racist." Also, while the Supreme Court jurisprudence rejects race-based remedies as producing unacceptable "reverse discrimination," Professor Kendi's definitions describe those policies as a necessary remedy.

Professor Kendi places his framework within a broader historical tradition, pointing to the earlier work of Kwame Toure and Charles Hamilton, who contrasted the "individual racism" of a White terrorist who bombs a church in Birmingham, Alabama with the "institutional racism" in that city when "500 Black babies die each year because of the lack of proper food, shelter and medical facilities."[28] Professor Kendi also acknowledges that he is building on the concept of "systemic racism," which calls out societal racial harms without specifically identifying the discrimination that caused them. Professor Kendi, however, rejects the qualifiers "institutional" and "systemic," stating that "everyday people" have difficulty with these qualifying terms, and that it is easier just to use the term "racism" to apply to all conditions of inequality, without regard to who or what acted as the cause.[29]

It is not surprising that such a bold framework raises its own issues. At one point, the book asks readers to overcome their initial discomfort with this broader definition of "racism" by stating it is used as a clinical or descriptive term rather than as a pejorative one, but on an adjacent page it describes racism as a "crime."[30] In rejecting "assimilationism," Professor Kendi discounts the significance of any cross-racial measures, including the educational goal of "closing the achievement gap." Instead, Professor Kendi views "the achievement gap" as inherently "racist." For this reason, he rejects the project of identifying and correcting inequities in standardized testing, as well as the success of visionary educators who succeed in helping children of all backgrounds achieve high test scores. In his review of the book, Harvard Law School Professor Randall Kennedy questions the wisdom of this rejection of cross-racial measurements of skill and accomplishment, asking whether it "mean[s] that the applicant for a professorship who has a Ph.D. should stand on merely a different, not a higher, basis than the applicant who is illiterate?"[31]

In short, Professor Kendi has more work ahead to complete his project of constructing an alternative to fill the gaps in our current jurisprudence. With that said, he offers a trenchant critique of our Nation's flagging commitment to end racism and its effects.

III. Conclusion

On the third Monday of January each year, Americans gather to celebrate the civil rights legacy of Dr. King, who helped bring the practice of our country's institutions closer to the ideals of equality stated in our nation's founding documents. In the half-century following Dr. King's passing, the Supreme Court ended many of the legal reforms he advocated to advance and sustain that progress, raising the question of whether the arc of America's moral universe continues to bend towards justice. Professor Kendi's book offers a sobering assessment of the optimism of the civil rights era, arguing instead that its ideals will never succeed, and that the vision of a post-racial society is both an illusion and a source of ongoing harm. We can learn much from his book's thought experiment of redefining racism, even if that experiment does not yield a complete solution to the flaws of the status quo.

ENDNOTES

1 *During the civil rights era (and since), Congress enacted statutes that authorize judicial remedies based on findings of disparate racial impact without proof of discriminatory intent, such as in certain cases of employment regulated by Title VII of the Civil Rights Act of 1964, **see Griggs v. Duke Power Co.**, 401 U.S. 424 (1971). **In Washington v. Davis**, 426 U.S. 229 (1976), the Supreme Court held that proof of disparate impact alone is not sufficient to establish a Fourteenth Amendment violation.*

2 ***Brown v. Board of Education**, 347 U.S. 483, 495 (1954). The **Brown** decision represented the culmination of a brilliant decades-long campaign mounted by the legal team at the National Association for the Advancement of Colored People. **See, e.g.**, Richard Kluger, Simple Justice (1975).*

3 ***Brown v. Board of Education**, 347 U.S. 483, 493 (1954).*

4 ***Brown v. Board of Education** ("**Brown II**"), 349 U.S. 294, 301 (1955).*

5 ***Green v. County School Board of New Kent County, Virginia**, 391 U.S. 430, 439 (1968) (emphasis added).*

6 ***Swann v. Charlotte-Mecklenburg County School Board**, 402 U.S. 1 (1971).*

7 ***See Swann**, n. 6, **supra**, 402 U.S. at 28. **See generally**, Justin Driver, The Schoolhouse Gate: Public Education, The Supreme Court And The Battle For The American Mind (2018), which provides a thorough historical overview of this evolution.*

8 *413 U.S. 189 (1973).*

9 ***Keyes**, n. 8, **supra**, 413 U.S. at 207-13.*

10 ***Keyes**, n. 8, **supra**, 413 U.S. at 217-53 (Powell, J. concurring). One must also note, however, that Justice Powell's concurrence stated his reservations concerning the disruptions caused by busing, which he considered to place limitations on the availability of this remedy. **Id.***

11 ***Milliken v. Bradley**, 418 U.S. 717, 741-42 (1974).*

12 ***See, e.g.**, Richard Rothstein, The Color Of Law: A Forgotten History Of How Our Government Segregated America (2017).*

13 *551 U.S. 701 (2007).*

14 ***Parents Involved**, n. 13, **supra**, 551 U.S. at 748.*

15 ***Parents Involved**, n. 13, **supra**, 551 U.S. at 767-68.*

16 ***See Brown**, n. 3, **supra**.*

17 ***See** 50 Years of Affirmative Action: What Went Right, and What It Got Wrong," The New York Times, March 30, 2019, viewable at https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html.*

18 *438 U.S. 265 (1978).*

19 *In recent years, the lower federal courts have reviewed cases challenging the use of racial criteria in admissions policies at private universities receiving federal funds that raise similar issues. **See, e.g, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College**, 397 F.Supp. 3d 126 (D. Mass. 2019) (upholding Harvard University's admissions policy against challenge based on Title VI), **aff'd**, --- F.3d --- (1st Cir. 2020).*

20 ***Grutter v. Bollinger**, 539 U.S. 306, 343 (2003).*

21 ***In Fisher v. University of Texas at Austin**, 136 S.Ct. 2198 (2016), the Supreme Court upheld a university's admissions policy that included a race-based component as part of a broader review of student qualifications. The dissenters (Justices Roberts, Alito and Thomas) all would have found the program unconstitutional. The subsequent retirement of Justice Kennedy and the passing of Justice Ginsburg, both of whom voted to uphold the policy, create the possibility that a future court might prohibit any use of race as a factor in university admission policies.*

22 *From March 15, 1965 Special Message to Congress, full text and video at http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise.*

23 *383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).*

24 ***See Shelby County, Alabama v. Holder**, 570 U.S. 529, 537-39 (2013).*

25 ***See Shelby County, n.24, supra** 570 U.S. at 590.*

26 *Dr. Martin Luther King Jr., **"Remaining Awake Through a Great Revolution."** Speech given at the National Cathedral, March 31, 1968.*

27 *The book also addresses issues of justice related to class, gender and gender identity, topics that are beyond the scope of this book review.*

28 ***See** Ibram X. Kendi, How To Be An Anti-Racist (2019), p. 219 (Kindle edition), discussing Kwame Toure and Charles Hamilton, Black Power: The Politics Of Liberation In America (1967).*

29 ***See** Kendi, **supra**, p. 222.*

30 ***See** Randall Kennedy, "A black academic grapples with his own racism," The Washington Post, August 23, 2019, viewable at https://www.washingtonpost.com/outlook/a-black-academic-grapples-with-his-own-racism/2019/08/23/ee1ea2f2-a194-11e9-b8c8-75dae2607e60_story.html*

31 ***See** Kennedy, n. 30, **supra**.* ◊