Book Review

Making Sense of Desegregation and Affirmative Action

FROM *BROWN* TO *BAKKE*—THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978. By J. Harvie Wilkinson III.† New York: Oxford University Press, 1979. Pp. ix, 368. $17.95.

COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER*. By Terry Eastland‡ and William J. Bennett.†† New York: Basic Books, 1979. Pp. x, 243. $10.95.

Reviewed by William Van Alstyne*

Mr. Wilkinson has clerked for Mr. Justice Powell, taught (and published) as an associate professor of law at the University of Virginia, and currently serves as editor of the Norfolk *Virginian-Pilot*. *From Brown to Bakke*,[1] his review of our tumultuous quarter-century of school integration, reflects these touch points of personal biography, both for better and for worse.

"For better" in respect to a good and useful number of things. The title speaks accurately of the subject and Mr. Wilkinson's book establishes an independent claim for itself. His subject is not race relations at large. Neither is it still another assessment of "the Second Reconstruction." Mr. Wilkinson does not draw within his discussion a review of Supreme Court developments in related areas of race relations and constitutional law during the past quarter-century, and he makes very little use of the proliferating Acts of Congress and acts of executive discretion during the same period. The book's focus is the Supreme Court and public school integration, and that focus is maintained sharply. The manner in which the principal decisions are illuminated

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1. J. WILKINSON, FROM *BROWN* TO *BAKKE*—THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 (1979) [hereinafter cited as J. WILKINSON].

by the practical, legal, and political difficulties at each step of the way provides a very well-informed perspective that is both interesting and important.

After a brief introduction of events from the original apartheid decision in *Plessy v. Ferguson*,[2] and of the graduate school decisions that marked its erosion between 1938 and 1950,[3] Mr. Wilkinson reaches *Brown v. Board of Education*[4] by page twenty-six. The ensuing chapters move briskly through "*Brown II*,"[5] the principal decisions of the early 1960s[6] (pursuant to which very little desegregation occurred), and the stiffening of judicial attitude in 1968 that required prompt dismantling of racially dual school systems: "to come forward with a plan that promises realistically to work, and promises realistically to work *now*."[7] With solid attention to the role of the federal district and circuit courts in the South during this period, Mr. Wilkinson also suitably develops the diverse interpretations of the original *Brown* decision, which first led the Fourth and the Fifth Circuits toward quite different courses of action—the Fourth Circuit originally requiring little beyond the discontinuance of compulsory state-directed school segregation in the Carolinas, Maryland, and Virginia, and the Fifth Circuit directing more aggressive court-ordered remedies to achieve a degree of school integration that might ordinarily have been expected but for previous and persistent state-orchestrated segregation.[8]

With *Swann v. Charlotte-Mecklenburg Board of Education*[9] in 1971, the Supreme Court unanimously sustained as within the discretion of a careful district judge the fashioning of a busing decree to secure significant desegregation within a very large, formerly de jure segregated school district in a state well accustomed to using that very means over a long period of time to maintain and to entrench racial apartheid. Mr. Wilkinson appropriately recognizes *Swann* (as have others) as the apogee of Supreme Court resolve and involvement. After *Swann*, just as the Warren Court's reapportionment decisions had reached ultimate stopping places (lest they overrun the constitutional

2. 163 U.S. 537 (1896).

3. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents, 332 U.S. 631 (1948); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

4. 347 U.S. 483 (1954).

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

6. Goss v. Board of Educ., 373 U.S. 683 (1963); Griffin v. County School Bd., 377 U.S. 218 (1964); Bradley v. School Bd., 382 U.S. 103 (1965) (per curiam).

7. Green v. County School Bd., 391 U.S. 430, 439 (1968) (emphasis in original).

8. *Compare* Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957), *with* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966).

9. 402 U.S. 1 (1971).

justifications that brought about the original decisions), the doctrinal barriers to further judicial innovation became more complex and formidable. The decisions after *Swann* are plainly marked by a sense of growing perplexity and dimming efficacy. Mr. Wilkinson notes them very well, neglecting neither the doctrinal problems, the demographic realities, nor the significant differences of judicial attitude on the Court that most probably arose from the several appointments made by Mr. Nixon following his campaign against the Court in 1968.

The de jure foundations of the Southern desegregation cases were less reliable as one moved north and west, discoverable only piecemeal in the actual practices of particular school districts, rather than observable in statutes. The attempt to provide school desegregation remedies that correspond to specific racial wrongs of school boards (as distinct from racial wrongs by realty boards or by other private or public entities) strained remedial powers and remedial legitimacy. The impact on race-related income differences affecting housing choices, the capacity of private families to secure resegregation by moving to nearby districts, the attentuation of constitutional justification to mandate desegregation across district lines (or across city or county lines), the disputable efficacy of directing tax fund expenditures for transportation (rather than, say, for improved or for superior close-by schools)—all of these factors complicated the principal post-*Swann* cases.[10] Sometimes undercut by Congress, infrequently assisted by the executive department, massively resisted North and South, and—most of all—stretched ever more thinly from the constitutional underpinnings of *Brown* itself, the limits of school integration and the Supreme Court are recapitulated with skillful, lawyerlike discussions and full presentation of the relevant facts. In brief, this book is commendable because it does what its title tells us it will do. In doing that task quite well, it finds no duplication elsewhere in the enormous literature that otherwise overlaps it.

To be sure, virtually all of Mr. Wilkinson's writing is "borrowed"—one may readily find some previously published source for nearly everything he offers us. But there is no fault in this, and the several hundred footnotes (inconveniently gathered in the back of the book) are faithful both in reporting the author's sources and in indicating the impressive variety of published works he has drawn upon. In essence, he has culled from a very bulky literature, reorganized much

10. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

pertinent information to outfit a case law discussion that might otherwise have suffered from professional parochialism, and produced a more streamlined product reflecting a superior understanding of his subject as a whole. Commendably, too, he is often at pains to give the strongest arguments on *both* sides of each major case and development; that some of the strongest arguments originate in a book by an Alexander Bickel, or in an article by a Herbert Wechsler or a Charles Black (rather than in an original fancy of Mr. Wilkinson), is a credit to his own professionalism. This is, after all, not a new or unaddressed subject. That individuals who have personally read the cross-disciplinary literature related to *Brown v. Board of Education* during the past two decades may find few surprises here is quite beside the point.

Despite its excellent qualities, however, *From Brown to Bakke* also poses a severe problem for the reader. Its substantive excellence is too often obscured by a jejune style. Mr. Wilkinson may have thought that a more straightforward exposition, unaccompanied by homilies and melodrama, would have been insufficiently interesting. If so, I think he was greatly mistaken. Rather, what is otherwise a straightforward book was compromised by a failure to keep the presentation lean and unadorned.

From the outset, the author attempts to make more of things than a serious reader knows to be appropriate. Hyperbole is everywhere. Herbert Wechsler becomes "a high priest of academia."[11] Professor Wechsler does not merely raise serious questions about some unaddressed matters in the original *Brown* opinion; rather he is said to "accuse the Court . . . of original sin."[12] It was not merely notable that Thurgood Marshall argued the case; rather we are heavily informed that, in doing so, Marshall thereby signified to "his people" that "blacks in their own destiny would henceforth have a say."[13] The appearance of John Davis on the other side is likewise lyricized in Homeric fashion: "Like a rock he stood for segregation,"[14] and "[l]ike Robert E. Lee, Davis went the path of ennobling defeat, a testament to the South's ability to recruit men of character and principle to its most woeful cause."[15] The *Brown* decision was not only unusually spare for an opinion of such moment; rather, we are told that it possibly reflected "questionable means,"[16] "untoward methods,"[17] contained "the most

11. J. WILKINSON 34.
12. *Id.*
13. *Id.* at 27.
14. *Id.* at 26.
15. *Id.*
16. *Id.* at 39.
17. *Id.*

inflammatory English ever in fine print,"[18] and failed "to lift the nation to the magnificence of the principle that it had that day redeemed."[19] While the author castigates the unanimity of *Brown* because the Justices avoided separate concurrences or dissents (which Mr. Wilkinson inaccurately declares broke with "the Court's most hallowed tradition: that of open and spirited dissent"[20]), ironically he rebukes *Bakke*[21] for precisely the opposite alleged defect, *i.e.*, such an array of differing opinions (six in all) that we are told it was in fact "a brokered judgment."[22] Occasionally saying more than his footnotes or sources will support, Mr. Wilkinson volunteers his view that "[t]he Court's own task in *Bakke* was to avoid a conclusive outcome,"[23] a suggestion that will lift the spirits of lay cynics (but is quite the opposite of my impression from correspondence with two of the Justices, namely, that there was very genuine regret over the Justices' inability to reach accord in the case). Not wholly above the "defense" that injures, moreover, he writes of the pivotal opinion in *Bakke* by Mr. Justice Powell (for whom he once clerked): "[T]o call Powell's approach dissembling is not quite fair."[24]

These and other unsuccessful flights of rhetoric and gratuitous description produce an overall schizophrenia in this book. A great number of people are deeply interested in responsible factual accounts of the judiciary's involvement in school desegregation. In the main, when Mr. Wilkinson stuck to that task, drawing very competently from a great deal of the intelligent literature which illuminates that involvement, he did very well indeed; the middle chapters are solid, compact descriptions of highly complicated events fully worth one's time and interest. It is in his attempts at punditry, and in his ambition to make the book a piece of Southern literature as well, that Mr. Wilkinson does not do well, turning bad and even embarrassing at times. There is a suggestion that Mr. Wilkinson teetered between trades as an academic and as a journalist. He is very good as an academic, judging by the central portions of this book (as well as previous articles in a number of law reviews[25]). We should look forward to his return.

18. *Id.* at 31.
19. *Id.* at 29.
20. *Id.* at 30.
21. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
22. J. WILKINSON 298.
23. *Id.*
24. *Id.* at 304.
25. *See, e.g.,* Wilkinson, *The Supreme Court and Southern School Desegregation, 1955-1970: A History and Analysis*, 64 VA. L. REV. 485 (1978); Wilkinson, *Mr. Justice Powell: An Overview,*

Counting by Race[26] is a provocative complement to *From Brown to Bakke*; it takes up essentially where the other ends. Mr. Wilkinson's book is devoted to a critical review of the Supreme Court's indefatigable efforts to stop state and local governments from counting by race in ways that have been baneful to blacks—in directing where children shall attend school, where they are to find seats on buses, whom they may marry, and where they may eat. Eastland (a journalist) and Bennett (Director of the National Humanities Center) direct their attention to the new instrumentalism of racial justice: counting by race to guarantee a minimum complement of government contracts, jobs, university seats, promotions, visible offices of public power, and other concrete examples of success for blacks, Chicanos, Indians, and other minorities.

The prematurity of announcing a "colorblind" Constitution has seemed self-evident to many observers. No case has ever held that race is a forbidden classification per se, no clear language (or "history") of the fourteenth amendment compels such a holding, and the sudden discovery of such a rule by a (predominantly white) Supreme Court might well appear to carry implications of (white) majoritarian double-dealing, self-servingly heedless of what past racial abuses have wrought. Eastland and Bennett also recall Lyndon Johnson's commencement address at Howard University in 1965 as a very forceful statement of the case for mandating racial minority preferences:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "You are free to compete with all the others," and still justly believe that you have been completely fair.
>
> Thus, it is not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.
>
> This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity . . . not just equality as a right and a theory, *but equality as a fact and as a result*.[27]

Indeed, the case for providing racial minority preferences in both the public and private sectors has seemed so compelling that in the recent *Bakke* case, *not one* of the more than sixty briefs urged a totally colorblind interpretation of the fourteenth amendment—and virtually

11 RICH. L. REV. 259 (1977); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977).

26. T. EASTLAND & W. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER* (1979) [hereinafter cited as T. EASTLAND & W. BENNETT].

27. *Quoted in id.* at 6 (emphasis added by Eastland & Bennett).

every "establishment" group filing as a friend of court urged the Court to sustain the constitutionality of separate and more permissive admission standards that provided sixteen percent more minority students (in addition to the fourteen percent who made it into the Davis Medical School pursuant to the regular admissions process). Among these groups were the American Bar Association, the Association of American Law Schools, and the American Association of University Professors.

Eastland and Bennett are fully aware of these things, yet they are not exactly overwhelmed by them. Thus, having labored over those three-score briefs, they suggest:

> The briefs in the *Bakke* case are full of efforts to distinguish between this "test" and that by which racial classifications are said to be valid or invalid under the Fourteenth Amendment; one reads of "rational relationship tests," "compelling interest tests," "intermediate balance tests," and yet others. It is possible to get lost in the sea of tests . . . .[28]

And the authors are likewise warranted in noting that the consensus of compassionate opinion itself has not been entirely stable. Not only is it true that general polls (which produce consistent results both within minorities and in the population at large) disapprove the licitness of certifying individuals by racial tests for purposes of applying different standards of eligibility for employment, promotion, admission, or contracts, but just three decades ago 187 law professors urged as amicus in the same Supreme Court that "the Equal Protection Clause makes racial classifications unreasonable *per se*."[29] Earlier still, moreover, just as some racial Reconstruction legislation specifically benefited blacks (as there was also some that disadvantaged them—such as that which segregated the public schools in the District of Columbia), there had been soundings in favor of a categorical imperative, altogether forbidding government to use race as a basis for treating persons differently. The authors well remember Justice Harlan for his dissenting voice in *Plessy*:

> Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[30]

28. *Id.* at 20.
29. *Quoted in id.* at 102.
30. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *quoted in* T. EASTLAND & W. BENNETT at 83.

As Eastland and Bennett recall, that position seemed very close to what Richard Cain, a black who represented North Carolina in the House, endorsed in 1875: "We do not want any discriminations. I do not ask any legislation for the colored people of this country that is not applied to the white people. All that we ask is equal laws, equal legislation, and equal rights throughout the length and breadth of this land."[31] And they recall too that Alexander Bickel, scholarly exponent of judicial conservatism, had presumed to derive from the Warren Court much the same thought. Thus, they quote Bickel from his last work: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same at least for a generation: discrimination on the basis of race is illegal, immoral, and unconstitutional, inherently wrong, and destructive of democratic society."[32]

Eastland and Bennett leave no doubt of their own position and find within a variety of (separate and unequal) affirmative action arrangements an inadvertent tendency to confirm racial stereotypes. The diversity the Davis plan produced, they note by way of example, was not a racial diversity among equals but a racial diversity among students performing nationally within the *ninetieth* percentile of a test (which the medical school felt sufficiently reliable to count in significant measure for all regular applicants), and racially different students within the *thirtieth* percentile of the same test. The diversity was thus not among racially diverse and educationally equivalent students but among educationally mismatched students.[33]

Their point, written larger, is a disturbing one. An individual selected by race to perform work that he or she may even assuredly be "qualified" to do—but according to the government's own usual standards, not as well qualified as another—may at once possess the emoluments of "equality as a fact and as a result" (which President Johnson sought), but neither the respect nor credibility of that prescribed equality. Indeed, the risk may not be a trivial one that proliferation of such arrangements may itself operate to inculcate a renewed (and, alas, an empirically based) expectation by others that the race of an individual bespeaks a probability of on-the-job inferiority: that the race of the individual whom one confronts across a policeman's desk, a lathe, a shop counter, or an operating table evidences some uncertain degree of

31. *Quoted in* T. EASTLAND & W. BENNETT, at 91.

32. A. BICKEL, THE MORALITY OF CONSENT 133 (1975), *quoted in* T. EASTLAND & W. BENNETT at 183.

33. Eastland and Bennett discuss this point in Chapter 8 of *Counting by Race*, which is entitled "Create in Him a Habit of Dependence" and subtitled "The Case Against Numerical Equality."

lesser skill, troubling one's confidence and simultaneously stigmatizing all other persons of the same race holding equivalent positions, though few (if any) of those others may have achieved their statuses other than by a commendable combination of skill and work. The point is not one that can be brushed aside as a contrivance of hostility to affirmative action. It is at least as old as Hans Christian Anderson's fable of The Emperor's New Clothes.[34]

One may earnestly respond that the degree and extent of race-designated minimum set-asides, quotas, or whatever may be superintended to avoid severe mismatching, but the means to "constitutionalize" the limits of permissible differences are quite a different matter. Political processes clearly will not do it; what Phoenix may resist in ordering racial shares, Berkeley or Detroit may find altogether right. What Minneapolis may think to be a sufficient additional "minority contractors" set-aside, the District of Columbia may elect to expand to twenty-five percent or more (and has, in fact, already done so). Moreover, insofar as one group succeeds in securing a racially designated share of fixed resources, the political pressure (and propriety) of other groups' "resegregating" by race as special race-propelled interest groups, becomes heightened. It may, as Bickel suggested, yield a dis-integrative politics, *racially* reorganized political interest groups, thoroughly "destructive of democratic society." There may, indeed, be much wisdom in borrowing from the observation Mr. Justice Jackson offered in a related context: "It seems trite but necessary to say that . . . our Constitution was designed to avoid these ends by avoiding these beginnings."[35]

The Eastland-Bennett essay on *Counting by Race* must not, however, be read in isolation. While thoughtful and highly readable, it is sufficiently committed to expounding the unwisdom of societies that count by race that lawyers and laymen alike should want to read a good deal else as well. Two of the best of such readings doubtless include Thurgood Marshall's powerful partial concurrence in the *Bakke* case[36] and Judge Hastie's address, "Affirmative Action in Vindicating Civil Rights."[37] That both authors are black, that each is well over

34. I once asked a colleague who is genuinely committed to race-preference varieties of affirmative action whether it would be a datum of indifference to know the race of a university clinic physician assigned to assist him. The response, a bit slow in coming, was that it would make no difference, assuming only that the physician were over the age of 35—no minority-race physician of such age was likely to have been an "affirmative action" doctor.

35. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943) (Jackson, J.).

36. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387-402 (1978) (Marshall, J., concurring in part and dissenting in part).

37. Hastie, *Affirmative Action in Vindicating Civil Rights*, 1975 U. ILL. L.F. 502.

thirty-five (and plainly earned his way to the reputation he acquired in the law long before affirmative action was fashionable), and that both regard it as premature to read the Constitution even now as colorblind, may make their writings especially worth considering.[38]

38. For my views on the topic, see Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).