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From *Brown* to *Bakke*: The Supreme Court and School Integration: 1954-1978

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

"*Brown* may be the most important political, social, and legal event in America's twentieth-century history. Its greatness lay in the enormity of injustice it condemned, in the entrenched sentiment it challenged, in the immensity of law it both created and overthrew" (p. 6). *From Brown to Bakke* narrates the nation's uneven acceptance and the Supreme Court's unsure implementation of *Brown v. Board of Education*.[1] The narrative's plot: the Supreme Court's attempt to integrate education, beginning with *Brown* and culminating, twenty-two years later, in *Regents of the University of California v. Bakke*.[2] Its characters: the nation's highest court, students black and white, local school boards, NAACP attorneys, well-meaning social scientists, much-harried federal district court judges, and, of course, the forces of evil, personified in figures like former Arkansas Governor Orval Faubus. Its theme: like many tales of Milton and Blake, this book studies the loss of innocence.

The Supreme Court's innocence was manifested in the unanimous *Brown* opinion, where integration and racial equality seemed so eminently attainable, a simple matter of judicial decree and reliance on the children (" 'I have seen them do it,' Thurgood Marshall told the Court in *Brown*. 'They play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together' " (p. 41)). That innocence was but a memory by the time of the "brokered judgment" (p. 298) in *Bakke*, where the Justices struggled in several opinions to maintain some semblance of support for affirmative action, seemingly the last, best hope of blacks seeking educational and social parity in the Land of Promise.

J. Harvie Wilkinson attributes this loss of innocence, this change in spirit from *Brown* to *Bakke*, to two forces. In grand fictional form, one force was internal, personal to the Court, and thus in some sense less excusable. The other was impersonal, finding its expression in two disheartening racial clashes generated by the inner logic of the Court's sweeping attempt to integrate education.

The Supreme Court's personal failing, Wilkinson believes, was in not standing behind the "all deliberate speed" language of *Brown*

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* This book review was prepared by an Editor of the *Michigan Law Review*.—Ed.

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

2. 438 U.S. 265 (1978).

II.[3] He argues forcefully, if ultimately unpersuasively,[4] that *Brown II* was itself correct. In his view, gradualism — "a course of steadily mounting federal pressure, which allowed the South its filibusters and fulminations, but all the while forced private reckonings that Southerners were, after all, a part of the nation" (p. 68) — was the proper course. But from 1955, the year of *Brown II*, until the landmark *Green*[5] decision in 1968, the Supreme Court virtually abandoned the field of school desegregation it had so promisingly staked out. Implementation was left to the forty-eight federal district judges in the southern states and, to a lesser degree, to the Fourth and Fifth Circuit Courts of Appeals. The Supreme Court's failure to supervise this implementation contributed largely to the uneven and uninspired progress of integration.

Wilkinson describes the Court's unsure implementation of *Brown* — rather than demanding substantial integration, "it pleaded, mediated, mollified, or even withdrew" (p. 310) — but he fails to explain it. He emphasizes that the Supreme Court is a pragmatic institution, both reflective of and responsive to the political environment in which it operates, and he notes that "[i]n almost all the landmark school cases, white racial sensibilities weighed heavily" (p. 310). But he never clearly explains why this pragmatic institution cared so much about white racial sensibilities.

Perhaps the Justices feared that a "desegregation now" order would provoke outbreaks of violence that would threaten life and property. Perhaps they feared that such an order would leave black children with a pyrrhic victory — desegregated education that was valueless in the face of white hostility. Or perhaps they were concerned that outright defiance would reveal the Court's powerlessness to enforce its own judgment.

Whatever the reason for the Court's failure, it did not stay above the fray forever. In 1968, in *Green v. County School Board*, it announced that its attempt to integrate education would be "deliberate" no longer. Yet Wilkinson contends that this victory over the internal force was not adequate to prevent the loss of innocence. The promises made in *Brown* could not be fulfilled by judicial fiat; the logic of the *Brown* decision itself generated clashes that forced the Court to confront the complexity of America's racial problem.

Brown stood for several propositions. On the one hand, its message was that minorities have a right to equal educational opportunity, and segregated classrooms and instruction do not provide

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

4. *Cf.* Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970) (arguing that *Brown II* undermined respect for fundamental law by asking blacks to postpone enjoyment of a right the Supreme Court had just declared was constitutionally theirs).

5. Green v. County School Bd., 391 U.S. 430 (1968).

that equal educational opportunity. But America's neighborhoods — particularly in the urban North and West — were as segregated as its schools. Practically speaking, if *Brown* required integration, it also required busing. But *Brown* also stood for the primacy and centrality of education in American life, and for many, particularly middle- and lower-class urban whites, education meant safe, secure neighborhood schools. These ideals inevitably clashed and rekindled the fears and hatred that *Brown* had hoped to still. In the 1974 Detroit busing case[6] — the first school case lost by black plaintiffs in the *Brown* era[7] — the Supreme Court resolved the clash in favor of the neighborhood. For Wilkinson, the decision was a "great gamble . . . that black progress would continue in the absence of an activist judiciary" (p. 242). It was also a sign that the loss of innocence would not be pretty.

Brown stood for still another idea — the color-blind Constitution.[8] In its purest form, such an ideal is irreconcilable with affirmative action programs that seek to remedy the educational disadvantages of past prejudice by treating minorities preferentially. The clash between the ideal of color-blindness and the ideal of equal educational opportunity also found its way to the Supreme Court, first in *DeFunis* and finally in *Bakke*.

With *Bakke*, the Court's loss of innocence was complete. The long moralistic voyage begun with "optimism and confidence" had reached a stage of "confusion and doubt" (p. 308). Wilkinson's discussion of the *Bakke* decision is slightly less insightful than his analysis of the busing decisions, in part, perhaps, because it was written so soon after the event. But while he hedges in expressing his personal opinion on busing, Wilkinson's judgment on *Bakke* shines through clearly:

> Perhaps there has never been a case before the Supreme Court with opposing arguments of more equal legitimacy. The Court's own task in *Bakke* was to avoid a conclusive outcome. . . .
>
> The Court did just that. If *Brown* was a great moral blow, *Bakke* was a brokered judgment. The Supreme Court offered "a Solomonic compromise," in which "the nine justices spoke in many voices, a chorus of competing viewpoints adding up to a well-modulated counterpoint". [P. 298.]

From Brown to Bakke is elegant and engrossing. It loses none of its penetration for being written in clear and simple prose, and it loses none of its winsomeness for including a heavy dose of professorial legal analysis. One of the most engaging aspects of the narrative

6. Milliken v. Bradley, 418 U.S. 717 (1974).

7. There followed a rash of others. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

8. The phrase was coined by the elder Justice Harlan in lone dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

is the liberal sprinkling of anecdotes. For example, Wilkinson describes Virginia Governor Linwood Holton's politically courageous decision in 1973 to send his children to black-majority public schools in Richmond in hopes of lessening resistance to desegregation orders in that race-torn city. We also learn that Marco DeFunis, two short years after escaping the notoriety that would forever belong to Allan Bakke,[9] filed an amicus brief on Bakke's behalf for the Young Americans for Freedom.

Perhaps, as Professor David Chambers suggested in an earlier review, Mr. Wilkinson writes "generally with the detachment of a person telling someone else's tale,"[10] and perhaps the book suffers as a result; but I do not think so. For while its narrator may be detached, his story is ours. As the black minority shared the humiliation, so must the white majority share the shame. Together we must face an uncertain future:

> From *Brown* to *Bakke* has been a maturing journey also. Findings in the education cases laid bare the depth of American prejudice and made clear the true dimensions of our difficulties. We now seem to be many sad and wise days away from those happy forecasts of playground bliss. What we better understand is our own lack of understanding. School integration has taught us at home what Vietnam did abroad: how much eludes the American capacity to reshape. [P. 308.]

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9. DeFunis was, in 1971, in a position similar to that of Allan Bakke. However, he was admitted to the University of Washington Law School while his appeal from an unfavorable state supreme court ruling was pending. Although the Supreme Court granted certiorari, it declared the question before it moot when it became apparent that DeFunis would graduate regardless of the outcome of the case. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam).

10. Chambers, *Clashes in the Classroom*, Wash. Post, July 8, 1979, § E, at 1, col. 1.