One Nation Color-Blind

J. Harvie Wilkinson, III
One Nation Indivisible: How Ethnic Separatism Threatens America
Addison-Wesley 1997

Ashutosh Bhagwat

In *one nation indivisible*, Chief Judge J. Harvie Wilkinson, III of the United States Court of Appeals for the Fourth Circuit presents his vision of multiethnic America, what he calls "New America," including both its problems and its promise. Intermingled with his discussion of multiculturalism and the new ethnic pluralism in this country is a wide-ranging examination of racial policy in modern America, with a special focus (not surprisingly) on the role of the courts in implementing, and restricting, those policies. These are distinct topics, but in Judge Wilkinson's view they are closely related, and must be understood together. On a broad level, what emerges from the book is a vision of a future United States in which racial and ethnic differences will have, through a process of integration and assimilation, faded to the point of irrelevance. Most importantly, the specter of "separatism," which Judge Wilkinson feels is the greatest danger arising from recent changes in America, will have been defeated; and what will remain is a stronger, wiser, and more unified nation. While some may disagree with this view of where the country should go, the racial harmony presented is no doubt an appealing vision, and one that Judge Wilkinson believes in passionately.

It is when *One Nation Indivisible* turns from the broad vision to specifics that it becomes more controversial, and problematic. Much of the latter part of the book is dedicated to an argument that the only path through which Judge Wilkinson's vision of a racially harmonious America can be achieved is the complete elimination of race-conscious policies from American public life. On this point the book is perhaps less persuasive, and in particular is

Ashutosh Bhagwat is an Associate Professor of Law at University of California, Hastings College of the Law. <bhagwata@uchastings.edu>. B.A. 1986 Yale University; J.D. 1990 The University of Chicago. *He would like to thank Bill Dodge, Shannon Gaffney, Reuel Schiller, and Andy Wiegand for extremely helpful comments and suggestions.*

unlikely to persuade those who come to these issues with different premises from the author's. Judge Wilkinson's faith in the ability of race-neutral policies to achieve a racially just society necessarily presumes the fairness and neutrality of the existing baseline distribution of power and entitlements in the United States – a set of entitlements from which he, as a member of this country's elite, has of course benefited greatly.[1] Nonetheless, on the whole Judge Wilkinson has made a significant contribution to the ongoing debate on racial policy in the United States, by presenting what comes across clearly as a sincere, well-intentioned, and carefully thought out conservative viewpoint on these issues, from a highly respected member of the federal judiciary.

I. The "New America"

The first part of *One Nation Indivisible* presents a vivid description of the massive demographic changes that have occurred in the United States in the past two decades. Using statistics (between 1970 and 1990, the number of foreign-born Americans increased five-fold – p. 4), anecdotes ("[c]ustomers of New York Telephone can expect repair service in 140 languages" – p. 8), and projections (by 2050, blacks, Hispanics and Asians could constitute close to 50 percent of the U.S. population – p. 4), Judge Wilkinson paints a picture of an open immigration policy which has produced over the last three decades not only a large increase in the relative numbers of immigrants in this country, but because of the very different origins of recent immigration, also a massive increase in the racial and ethnic diversity of the American population. If the United States was ever a primarily white, European nation, Judge Wilkinson seems to be saying, it clearly will not be much longer.

Moreover, on the whole Judge Wilkinson seems to view these changes as a source of hope and opportunity, not fear. His book is brimming with the possibilities which arise from so many different people, of so many different backgrounds and perspectives, interacting on a regular basis. The increased diversity of this country brings together a wealth of new and different ideas and beliefs, which in the long run will inevitably change and diversify American culture. In addition, the new immigrants, like their predecessors, are bringing new skills, new energy, and a new wave of entrepreneurship to the American economy. Finally, one illustrative, even if trivial, example given by Judge Wilkinson of the benefits from growing diversity is the increase in the variety, and quality, of restaurant food in the United States (p. 7).

Of course, the new wave of immigration into this country, and the concomitant increase in the diversity of the population, also poses risks and dangers, says Judge Wilkinson. Because the new immigrants are more different from the preexisting population than the largely white, European, Judeo-Christian immigrants of previous waves, there will be greater difficulties in assimilating them into the American population, and a greater danger of ethnic strife in the meantime. Ultimately, however, Judge Wilkinson clearly believes that these difficulties are surmountable, just as they were surmounted for previous generations of immigrants. In the modern American debate over immigration, *One Nation Indivisible* comes down quite firmly, albeit with some reservations, on the pro-immigration side; and indeed the book goes quite far

1 Prior to his appointment to the bench, Judge Wilkinson was a senior official in the Civil Rights Division of the Reagan Administration's Department of Justice, and one is left with a strong impression that his views on race-conscious policies were strongly shaped by that experience, perhaps more so than by his general views on multiethnic America.

(though perhaps not quite far enough) in condemning the outright bigotry that seems to drive many of the recent opponents of our current immigration policy ("[a] real rub for [Peter Brimelow, a vocal opponent of immigration] seems to be that the new arrivals are not from Europe. … The pessimists subtly seek to define Americans by the color of their skin." – p. 15).

II. The "Separatist" Threat

The second part of *One Nation Indivisible* noticeably turns away from the optimistic tone of the first part, by examining what Judge Wilkinson sees as the biggest threat facing late 20th century America: the problem of ethnic and racial separatism. Briefly, Judge Wilkinson sees a disturbing trend in the political and cultural dialogue of this country, away from the integrationist ideals of *Brown v. Board of Education* and the Civil Rights Movement, and towards a pluralistic model of racial and ethnic enclaves. He ties this development at least partly to the increasing diversity of the country, simply because greater diversity makes separatism both more appealing (by making integration more difficult), and less threatening (because there will no longer be a dominant majority ready to subordinate ethnic enclaves). The result, however, he fears will be a loss of any common American culture, and ultimately a breakdown in the political unity and strength of the country, including especially in the joint commitment to the constitutive values of the United States.

Judge Wilkinson does not blame minorities alone, or indeed even primarily, for the new separatist ideology that has taken root in America. He is quick to note that the original white reaction to desegregation in the 1960s and 1970s, including "white flight" and, notably, the "Southern Strategy" of the Nixon Administration, as well as other "coded" racism of the era, probably contributed greatly to the growth of a separatist ideology among minorities. He also acknowledges that there are real differences, in experiences, beliefs, and values, which produce the tendency towards separation. Nonetheless, Judge Wilkinson insists, separatism is a mistake. It is a mistake for whites, who are deprived of the knowledge and understanding that comes from interaction with people different from them; it is a mistake for minorities, who risk permanent exclusion from the mainstream of American life; and it is a mistake for the nation as a whole, which might cease to exist in a meaningful way if separatist trends continue.

There are many details of the story Judge Wilkinson tells about growing separatism with which one might disagree. For example, I am dubious that recent immigration trends really have much to do with the spread of separatist beliefs. The truth is, the modern movement away from integration, and towards separatism, seems more an outgrowth of developments in the civil rights arena, and the trend towards separation is more clearly a phenomenon between blacks and whites, than it is related to the new immigrants – as indicated by the fact that almost all the examples given by Judge Wilkinson of growing separatism involve blacks and whites (*e.g.*, pp. 36-38). Certainly, some recent immigrants have resisted assimilation, but that is nothing new; American history is full of groups such as the Amish, the Mennonites, and even the Irish at times,[2] as well as other religious and ethnic enclaves who have sought to retain an inde-

2 My wife's family, on her father's side, is Irish-American, and came to this country in the mid 19th century in the wake of the potato famine. She tells me that until her father's generation (*i.e.*, for over 100 years), there was essentially no intermarriage in her family outside of the Irish (and certainly not with the English), even while the family migrated from New Orleans, to Iowa, to eastern Washing-

pendent existence. I see no evidence, and Judge Wilkinson suggests none, that the most recent wave of immigrants incline more in this direction than any previous one. Moreover, Judge Wilkinson may also be overstating the extent to which separatism has increased in strength in recent years, even in the black community. After all, separatist beliefs have played an important role in the civil rights movement since at least the time of Marcus Garvey and W.E.B. Du Bois (not to mention Malcolm X). Nonetheless, Judge Wilkinson seems clearly correct that, for whatever reason, separatism has gained force as an ideology in recent years, and that it is not limited to whites and blacks, but has spread to Asian and Hispanic minority groups as well. He also makes a strong case that this separatism should be a matter of concern, because of its implications for the country in the long term. Certainly not all will be convinced by this argument, but I think many will be, given the passion and force with which it is presented by Judge Wilkinson.

III. The Color-Blind Solution

The final part of *One Nation Indivisible* discusses modern civil rights law and policy, including both current trends and the author's views on where the law should go from here; because it is here that Judge Wilkinson believes the solution to the threat of separatism lies. The book examines a number of highly controversial public policy issues in the civil rights area, including the use of race in the creation of legislative districts, affirmative action both in employment and education, bilingual education, and campus speech codes, demonstrating along the way Judge Wilkinson's breadth of knowledge and thoughtful perspective. It is here, however, that the persuasive power of *One Nation Indivisible* begins to wane; because the answer Judge Wilkinson sees to the myriad problems of integration, assimilation, and separatism, is a simple one – strict color-blindness, and the elimination of all race-conscious policies, both public and private, in American public life. One is left with no doubt that Judge Wilkinson's prescriptions are thoroughly well-intentioned. That he cares passionately both about racial justice, and about the country's future, one also does not doubt. What one may doubt, however, is that the solution is really quite as straightforward as he believes.

The problem with race-conscious policies, Judge Wilkinson argues, is that they promote and exaggerate the differences between us, rather than encouraging us to think of ourselves as a single people. In the extreme, such policies lead to people thinking of themselves first as part of an ethnic group, and only second as Americans. Unity becomes impossible, and national politics becomes a free-for-all in pursuit of racial spoils. When certain races are favored over others, it creates resentment in the disfavored races (such as whites and Asians), and so can increase ethnic strife. And in any event, race-based policies are based on stereotyping members of races, while ignoring all differences within a racial or ethnic group, which is dehumanizing. For example, the creation of majority-minority districts assumes that all members of a minority group (usually black or Hispanic) have similar electoral views and preferences, which are incompatible with those of whites; and it reduces the need to form interracial political coalitions (pp. 107-09). Affirmative action, especially through numerical quotas, leads to great resentment, and also ignores important differences within favored as well as disfavored groups, in terms of the barriers faced by indi-

ton State. Certainly intermarriage is not the only test of integration, but it does seem an important indicator.

viduals, and the contributions that different individuals have to offer. Bilingual education, when sought as an end rather than as a means to achieve the goal of integration, can lead to the creation of a permanent linguistic "out" group, who will inevitably be denied access to large elements of the economy and power structure. And speech codes, perhaps most troublingly, create barriers to communication on racial issues, even in educational settings, and therefore strengthen and entrench the barriers of separation that already exist in society.

Not only are race-conscious policies a mistake, Judge Wilkinson argues, they are fast becoming unworkable. "Policies that were viable in the bipolar world of black and white will no longer work in a multicultural setting" (p. 23). Given the enormous diversity among the new immigrants, it is becoming more and more difficult to determine who deserves preferences, and who does not. Moreover, often the conflicts that arise in granting preferences today occur between two minority groups, rather than minority versus white (he gives the example of Chinese American students in San Francisco who are challenging the desegregation plan for the city's public schools, because it keeps them out of elite schools – p. 140). Thus some new approach to civil rights must be developed, before the current system implodes under its own weight.

These arguments tell a good story. But are they really true? For starters, it is not at all clear that increasing ethnic diversity makes *all* race-conscious policies unworkable. It is true that crass proportionalism, without any underlying theory, becomes infeasible in a world with myriad groups. But if race-based policies, including notably affirmative action, are narrowly targeted to benefit groups who for historical reasons have suffered, and continue to suffer, special disadvantages – blacks and Native Americans being the obvious examples – then increasing diversity in the rest of the population is irrelevant to retaining those policies. And just because everyone tries to jump on the affirmative action bandwagon (though I think Judge Wilkinson exaggerates the extent to which they really do) does not mean that we as a society, or the courts, have to agree to let them. Furthermore, the "minority versus minority" problem also can be seen from a different perspective. In discussing the admissions policies at the elite Lowell High School in San Francisco, Judge Wilkinson notes the injustice that Chinese Americans had to score much higher on an entrance exam than blacks and Hispanics to be admitted – 66 as against 56 on a test scored out of 69. But, as he notes but does not focus on, what is truly peculiar about the situation is that whites (and Asians not of Chinese origin) are admitted to Lowell with a score of only 59 (p. 140). Arguably, that is the real discrimination going on, since favoring whites over Chinese Americans seems inexplicable in public policy terms (unless one accepts "racial balance" in schools as a stand-alone goal), while favoring blacks and Hispanics over everyone else might well be defensible on historical grounds (especially in California). Similar allegations have been made in the past about admissions policies at the University of California. Seen in this light, the "Asian victim" argument becomes a form of "divide-and-conquer" strategy adopted by opponents of affirmative action, which obscures the underlying truths.[3]

On a more fundamental level, there are certain presumptions regarding equality of opportunity and the prevalence of discrimination in our society which necessarily undergird Judge Wilkinson's call for legally enforced color-blindness, and which proponents of race-conscious policies probably do not share. Consider redistricting. Judge Wilkinson argues that we should eliminate race entirely

3 *See* Mari Matsuda, *We Will Not Be Used*, 1 Asian Am. Pac. Is. L. J. 79 (1993).

as a legitimate factor in redistricting, whether used to dilute minority power, or to increase it. But, what if the status quo of how lines are "neutrally" drawn as well as where people live reflect historical efforts to disenfranchise blacks? And what if racial vote dilution remains endemic in American politics?[4] In such a world, race-conscious measures are the *only* effective way to combat discrimination. Indeed, one might argue that the entire system of political redistricting is so infused with special preferences and ad hoc political compromises, that to forbid race-conscious redistricting would be in effect to permit special political consideration for everyone *except* minorities. A similar argument can be made in favor of affirmative action: in the face of pervasive, egregious prejudice, whether conscious or not, against certain minorities, only explicit preferences can even the playing field. Moreover, such preferences in fact must be *racial*, not class-based, because prejudice is racial. Judge Wilkinson acknowledges this argument (pp. 131-32), but then inexplicably dismisses it.

The baseline problem infects Judge Wilkinson's argument against speech codes as well. What if, because of hostility and attitudes in our society, minority speech is already disproportionately silenced, and racial epithets increase that effect? In this regard it should be noted that there are no words hurled at whites that carry the same force and hurtfulness as those aimed at various minorities (especially, of course, blacks). Of course, that does not negate Judge Wilkinson's concerns about the overbreadth and vagueness of many speech codes (concerns I share), but it does suggest that plausible arguments can be made for at least some carefully defined speech codes, especially on college campuses, as a way to *increase* dialogue.

A good illustration of differing baselines in evaluating affirmative action policies can be found in Judge Wilkinson's discussion of Cheryl Hopwood's case (pp. 122-26). Ms. Hopwood, who is white, was denied admission at the University of Texas Law School, and in response initiated litigation that ultimately spelled the end of the Law School's race-conscious admissions policies.[5] Hopwood's case was undoubtedly a sympathetic one – when younger, she had been unable to attend an elite undergraduate institution for financial reasons, and had overcome serious, personal adversity in reaching the point where she could apply to law school. Yet ultimately, she was denied admission because, according to Judge Wilkinson, the Law School's admissions system prevented her from competing on even terms with black and Hispanic candidates. That is the message that he, and the Fifth Circuit Court of Appeals, took from the case. But, one could take another message. As Judge Wilkinson's account reveals, Cheryl Hopwood would have been admitted to the Law School if she had compiled the same record at Princeton, where she had wanted to go and had been admitted, that she did at the less "competitive" (and cheaper) state schools that she did attend. Moreover, there is no reason to believe that she would have been unable to compile a similar record at Princeton; but she had been denied the opportunity to try because she could not afford to pay Princeton's tuition. In other words, she was denied admission at the Law School because she had been poor when younger, to the benefit of some (presumably) wealthier Ivy Leaguer. Why is that not the "discrimination" that has been condemned, rather than affirmative action? And this is hardly the only kind of nonracial discrimination that creeps into admissions

4 Judge Wilkinson admits that racial manipulation "is not always easy to detect" (p. 103); but he apparently does not worry too much about this, because he thinks such behavior rare.

5 *See Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied* 116 S. Ct. 2580 (1996).

policies. For example, private institutions especially are well-known for favoring the offspring of alumni and large donors in their admissions processes – but how many of those are minorities? The broader point here is that the fair and neutral background of admissions policies that Judge Wilkinson and other opponents of affirmative action assume, simply does not exist. And without it, the attack on affirmative action begins to lose force, because what is left behind is hardly "fair."

Finally, questions do arise about the practical effects of Judge Wilkinson's proposals. Will eliminating all race-based policies really further integrative ideals? Recent experiences at the professional schools of the University of California suggest not – after the University's Board of Regents voted to prohibit the use of race in admissions, many of the schools saw massive drops in minority enrollments.[6] Is this really integration, or is it yet a further step towards making certain minorities feel excluded from the American polity? At the least, reasonable people might differ as to the answer. Similarly, are restrictions on race-based relief in school desegregation plans (*i.e.*, busing) really a step towards integration (see pp. 57-58, discussing the Supreme Court's *Missouri v. Jenkins* decision)? One wonders. So why does Judge Wilkinson, who undoubtedly does believe in integration, support such policies? The answer, I think, lies in a very telling passage from *One Nation Indivisible*, early in the book. "Law," the book says, "should act as a facilitator of integration, not as a bludgeon of it" (p. 41). This is the viewpoint of one who trusts society, and the baseline distribution of benefits and power that undergird it. Such a person is able to rely on good intentions, evolutionary change, and facially neutral policies to achieve racial justice. It is an appealing outlook, but it is not a universal point of view, and it does not flow inevitably from the realities of "New America."

Conclusion

Though I have criticized many of its specific conclusions, I have no doubt that in *One Nation Indivisible* Judge Wilkinson has made a substantial contribution to the too-polarized, modern debate over racial policies. First, the book demonstrates thoroughly that old policies, and old ways of thinking, must be rethought in light of the massive changes occurring in America today. It is also a gratifying reminder (speaking as an immigrant) that not all political conservatives in this country are hostile to immigration and immigrants. Finally, Judge Wilkinson's book presents a thoughtful, conservative argument in favor of color-blind public policies, made by a person of undoubted character and integrity, to which those of us who continue to support race-conscious policies should respond in kind. Perhaps the single most important observation made in *One Nation Indivisible* concerns the tragic lack of communication in modern America on racial issues, and among people of different races and ethnicities. I take Judge Wilkinson's book as an effort to start a reasoned and honest dialogue on these issues, rather than as the last word on the subject. It is an excellent beginning.

6 *See* Pamela Burdman, *How UC Admissions Have Been Reshaped: Recruiting Without Affirmative Action*, San Fran. Chron., Aug. 18, 1997, at a1.