

1989

Book Review: Behind Bakke: Affirmative Action and the Supreme Court. by Bernard Schwartz.

Daniel O. Conkle

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Conkle, Daniel O., "Book Review: Behind Bakke: Affirmative Action and the Supreme Court. by Bernard Schwartz." (1989).
Constitutional Commentary. 186.
<https://scholarship.law.umn.edu/concomm/186>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT. By Bernard Schwartz.¹ New York and London: New York University Press. 1988. Pp. x, 266. \$35.00.

*Daniel O. Conkle*²

This is another in Professor Bernard Schwartz's series of "inside stories" about the Supreme Court. *Behind Bakke* recounts the inside story of the Court's 1978 decision in the *Bakke* case. The book is based upon "conference notes, docket books, correspondence, notes, memoranda, and draft opinions of Justices," some of which are reproduced in full in the book's appendices. According to Professor Schwartz, "[a]lmost all" of these various items "have never before been published." In addition, the book draws upon conversations with participants, including unidentified Supreme Court Justices and law clerks.

The production of this type of book requires the participation of Justices and law clerks who are willing to breach their institutional and personal obligations of confidentiality and disclose matters that were never intended to be public. These breaches of confidence, moreover, may be especially problematic when they concern the actions of Justices who continue to sit on the Court. The Court's traditional secrecy encourages candor and open communication, thereby facilitating the Court's deliberative process. Books such as this inevitably inhibit that candor and jeopardize the process it supports.

Yet it is also true that the Supreme Court's deliberations almost cry out for investigation. The Court is one of our most powerful institutions, and its process of decision is—or should be—of critical interest not only to scholars, but also to the public at large. On this ground, perhaps "inside stories" are justifiable if they provide important new information about the Court.³

Behind Bakke claims to provide important new information. Professor Schwartz states that his purpose is not "to produce a mini-*Brethren*," but rather "to give students of the Supreme Court further insight into the Court's largely unrevealed decision process." The book jacket goes further, promising "an unprecedented

1. Edwin D. Webb Professor of Law, New York University.

2. Professor of Law, Indiana University, Bloomington.

3. For Professor Schwartz's own defense of his books' intrusions on the Court's secrecy, see B. SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 22-27 (1988).

picture of the Supreme Court's decision process . . . , a unique picture of what goes on in the Marble Palace that will be a revelation to all those concerned with the operation of the highest court."

Whatever his intentions, Schwartz's book includes a *Brethren*-like disclosure of potentially embarrassing, but largely inconsequential, Supreme Court trivia—mostly concerning Justice Blackmun. Schwartz tells us, for example, that Blackmun withheld his vote in *Bakke* for so long that the other Justices began to refer to the period as "waiting for Harry." During this time, Blackmun at one point became angry because Chief Justice Burger approached him about the case while Blackmun was doing exercises, which was "a sacred period for him." And Blackmun's "occasional outbursts"—in one instance through a "voice filled with outrage"—were "troublesome" to Justice Brennan, although Brennan ultimately concluded that "the outbursts were aberrations" that did not suggest that Blackmun's "mental state" was in serious question. Schwartz also reveals that Blackmun, in a candid communication intended to remain within the Court, referred to Professor Alexander Bickel's position on affirmative action as "the 'accepted' Jewish approach"; Blackmun stated that "[t]hey understandably want 'pure' equality and are willing to take their chances with it, knowing that they have the inherent ability to excel and to live with it successfully." Blackmun indicated at the time that he hoped these remarks would "offend no one, for I do not mean to do so." Schwartz's disclosure, of course, makes public that which was intended to be private, thereby increasing the risk that Blackmun's remarks will cause the very type of offense he meant to avoid.

In general, however, *Behind Bakke* is much more scholarly than *The Brethren*. Unfortunately, in my view, Schwartz takes scholarly thoroughness to an extreme, providing detailed explanations of matters that are of only marginal interest. Indeed, most of *Behind Bakke* is a rather laborious rehearsal of draft opinions and exchanges between the Justices revealing little of importance that is not evident in the final opinions.

To be sure, the book does contain some significant disclosures. The most important concerns a change in the position of Justice Powell. Although he spoke largely for himself alone, Powell's opinion in *Bakke* eventually became the lead opinion in the case. In his final opinion, joined by different groups of four Justices for each of two holdings, Powell concluded that the California Supreme Court should be affirmed in its decision finding the California-Davis affirmative action program to be unlawful, but reversed to the extent that it prohibited the school from considering the race of applicants

in its admissions process. Powell reasoned that the Davis program was unconstitutional because it reserved a fixed number of seats for minority applicants, but that it would be permissible for Davis to consider race as one factor among many under a more flexible, "Harvard-type" admissions plan.

Schwartz reveals that in an initial draft, Powell had called for a simple affirmance of the California Supreme Court's judgment. Powell's constitutional reasoning in this draft, including his explicit approval of a Harvard-type plan, was "virtually identical" to that of his final opinion, but he apparently had not focused on the form of judgment this reasoning would suggest. In any event, Powell was persuaded by a comment from Justice Brennan that this reasoning in fact called not for a complete affirmance, but instead for the "affirmance in part and reversal in part" that Powell ultimately endorsed.

This is an important disclosure. If Powell had not changed his mind concerning the form of the judgment, his opinion presumably would not have been the lead opinion in the case. Instead, Justice Stevens's opinion for four Justices, which relied on Title VI in finding the Davis program unlawful, probably would have been the lead opinion, with Justice Powell "concurring in the judgment" on constitutional grounds and the remaining four Justices writing in dissent. Such a change in the structure of the decision might have affected the precedential impact of *Bakke* and the public's perception of the decision. Even so, however, Schwartz makes too much of this possibility. He claims that "[s]uch a decision could have meant the end of affirmative action programs in higher education, including the Harvard program Powell had referred to favorably in the draft." This surely is unrealistic. After all, the substance of the Justices' various opinions would not have been any different. The group opinion of the four Justices led by Brennan, coupled with the opinion of Powell, still would have revealed a Supreme Court majority willing to uphold Harvard-type plans. Given the strong desire of universities to retain affirmative action, it is inconceivable that they and their lawyers would have overlooked this obvious fact.

Another interesting set of disclosures—although, again, far from startling—concerns the role of Justice Brennan in this case. In addition to persuading Powell to change his mind about the form of the judgment, (1) Brennan opposed granting certiorari in *Bakke* because he thought the case was not sufficiently "sympathetic" as a vehicle for upholding affirmative action (although he did not join Justice Marshall in seeking a "pretext to get rid of the case" after

the certiorari decision had been made); (2) after the Court had agreed to review the case, Brennan wrote opinions in related cases with an eye toward influencing the disposition of *Bakke*; (3) in a completely unrelated case, Brennan assigned the majority opinion to Justice Blackmun because he believed that such an assignment, which Blackmun had requested, might help ensure that Blackmun would vote with Brennan in *Bakke*; (4) Brennan was especially concerned with how the public would perceive the Court's ruling in *Bakke*; and (5) both in his group opinion for four Justices and in an oral statement when the Court's decision was announced, Brennan was able to describe "the central meaning" of *Bakke* as he did only by characterizing Justice Powell's position in a way that Powell apparently believed to be misleading. It is for the reader to judge whether these various actions merit applause, condemnation, or indifference.

There are other disclosures that some may find interesting. For example, one can read the constitutional views that Chief Justice Burger and Justice Rehnquist expressed in tentative memoranda, before they decided that they would vote to resolve the case on the basis of Title VI. In the main, however, this book reveals little of significance. Not surprisingly, the deliberations in *Bakke* involved an exchange of views among the Justices and the circulation of draft opinions. But there is no indication that any Justice changed his position as the result of "horsetrading" or "politicking" unrelated to the merits of the case. Nor does the book's discussion of prior drafts reveal important doctrinal insights that otherwise might remain undiscovered. Indeed, it appears that the process of decision in *Bakke* was largely a matter of "waiting," not just "for Harry," but for all of the Justices to finalize their positions in the case and to prepare and revise the opinions that would reflect these views. As Schwartz himself concedes, the Court's deliberations "led neither to an agreement on an opinion of the Court, nor to substantial changes in the drafts that were circulated. The positions taken by the Justices in the first conference on the merits, on December 9, remained unchanged throughout the *Bakke* decision process."

Perhaps because of my respect for the confidentiality of the Court's decision-making process, I may lack the sense of inherent fascination others may feel for "behind the scenes" accounts of its rulings. If such accounts are to be justified by the significance of their disclosures, however, it seems to me that this book fails the test. Given the importance of *Bakke*, one could argue that Schwartz properly might have published a brief account of the Jus-

tices' decisionmaking process, highlighting Justice Powell's change of mind concerning the form of the Court's judgment. But at least in my view, Schwartz's findings did not justify a book.⁴

STATE SUPREME COURTS IN STATE AND NATION.
By G. Alan Tarr¹ and Mary Cornelia Aldis Porter.² New Haven, Conn.: Yale University Press. 1988. Pp. 288. \$28.50

*Michael C. Tolley*³

Before the so-called "new judicial federalism," state supreme courts and state constitutional law were largely ignored in the study of public law and the judicial process. However, as more and more lawyers discover that conservative federal judges are unsympathetic to federal constitutional claims, and come to rely increasingly on state constitutional provisions in cases before state courts,⁴ the study of state appellate courts takes on new importance. Thanks to several innovative works, scholarship about state supreme courts and state constitutional law has begun to respond to this demand.

State Supreme Courts in State and Nation is the second work on state supreme courts by the same authors.⁵ Porter and Tarr rightly assume that there is no one type of state supreme court. "Because there is no typical state supreme court, there can be no typical role for a state supreme court in either the state or national arenas." What are the roles of state supreme courts? How are the roles of these institutions affected by legal and extra-legal factors? With these questions as their guide, the authors set out to identify the causes and consequences of the similarities and differences in state appellate courts.

One of the book's central themes is that the diversity among state supreme courts is due to both national and intrastate factors. To pinpoint these factors, the authors focus on three supreme courts (Alabama, Ohio, and New Jersey) chosen simply because

4. I find it difficult to understand why Schwartz did not simply include *Bakke* among the several cases that he addresses in his other—and considerably more interesting—recent book, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT*.

1. Professor and Chair of Political Science, Rutgers University—Camden.

2. Professor Emerita of Political Science, Barat College.

3. Assistant Professor, Dept. of Political Science, Northeastern University.

4. See generally Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985). Cf. *THE BURGER COURT* (V. Blasi ed. 1983).

5. *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* (Porter and Tarr eds. 1982).