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Bakke & the Politics of Equality

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BAKKE & THE POLITICS OF EQUALITY. By *Timothy J. O'Neill*. Middletown, Conn.: Wesleyan University Press. 1985. Pp. xviii, 325. \$27.95.

The success of a democratic society depends, in large part, on the political education of its citizens. In *Bakke & the Politics of Equality*, Timothy O'Neill¹ examines the role of the judicial process in political education. In particular, the book seeks to evaluate the effectiveness of participation in the amicus curiae process as a means of political education. Through a series of interviews and surveys of members of the 117 organizations that submitted briefs in *Regents of the University of California v. Bakke*,² O'Neill attempts to discover whether the process of preparing and submitting amicus briefs serves to educate organization members about the issues involved.

With this as his goal, O'Neill proceeds to claim a greater significance for his work:

If *Bakke* did teach and the members of amici organizations did learn, then litigation can help the nation learn to identify and assess problems of public policy and to choose from among alternatives. If *Bakke* did not teach about the issue of equality, claims that the courts are "teachers in a vital seminar" must be viewed skeptically. [p. 6]

In spite of this obviously debatable suggestion that the failure of the amicus process to serve as an effective educational tool casts serious doubt on the entire educative function of the courts, O'Neill himself admits that "*Bakke* provoked a national debate over the legal, social, and ethical justifications for preferential treatment of racially disadvantaged groups" (p. 6). And, in the preceding paragraph, he points out that his book emphasizes "not what the arguments [in the briefs] taught the courts or what the courts taught the nation, but the learning process *within* litigating organizations" (p. 6; emphasis in original). O'Neill's failure to identify clearly the hypotheses he purports to test clouds his analysis, leaving the reader uncertain of the book's objectives.

Leaving aside, for the moment, the question of whether we should be surprised or dismayed if we learn that the amicus process is not the most effective means to educate citizens politically, the discussion in the book goes far beyond this limited inquiry to address broader problems of group organizational behavior. O'Neill presents three rather vague hypotheses, which he apparently intends to test in his study of the amici organizations: (1) "The more 'business-like' an organization is, the less 'school-like' it will be"; (2) "'Good faith' con-

1. Timothy J. O'Neill, a graduate of Claremont Men's College (B.A. 1971) and of the University of California at Berkeley (M.A. 1974; Ph.D. 1981), is presently Assistant Professor of Political Science at Wellesley College.

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

flict encourages education"; and (3) "Democracy need not be sacrificed in order for an organization to teach and to be effective" (pp. 11-17). The broader implications of these hypotheses indicate that O'Neill is interested not only in examining the effectiveness of the amicus process as a tool for political education, but also in using his study of the amicus organizations in *Bakke* to test his hypotheses on organizational behavior. O'Neill never clearly articulates the goal of the book, however, nor does he ever rigorously pursue any particular line of analysis. Thus, the work suffers from a lack of purpose throughout.

To aid in his analysis of the 117 amici organizations, O'Neill attempts to categorize neatly these very diverse organizations.³ He creates some fourteen different categories, including three subcategories of "interest orientation," three of "scope," two of "leadership style," three of "polarization," and three of "decision-making behavior." An organization must satisfy a number of criteria or "indicators" before being placed in a particular category. O'Neill assures the reader of the certainty of his method by pointing out that twenty-five of his students, who were given an explanation of the criteria for assigning organizations to categories and the empirical data on a random sample of thirty-five organizations, reached almost the same results in categorization as O'Neill (pp. xvi-xvii). The important question, however, is not whether these students, given the categories and criteria for assignment, were able to fit square pegs into square holes, but whether the categories and the empirical data themselves serve any useful purpose in O'Neill's analysis. The failure of the book to arrive at any significant conclusions suggests that they do not.

O'Neill acknowledges the difficulties in relying upon people's own perceptions of their learning as a measurement of the actual extent of their political education (p. 17). Perhaps one of the most significant weaknesses of this book is O'Neill's failure to come to terms with these problems. He states that "[t]he human response may be a misleading one, but it is a plausible place to begin. If the response is corroborated by more observable evidence, its credibility can be established" (p. 17). The lack of any observable corroborating evidence prevents O'Neill from drawing any meaningful conclusions from his study.

Having vaguely established his thesis in the introduction, O'Neill begins the first chapter with an unnecessarily long elaboration of the background of *Bakke*'s dispute with the University of California at Davis, its progression through the courts, and several relevant cases prior to *Bakke* (pp. 20-45). The chapter also includes a short essay on theories of equality (pp. 49-56). Because O'Neill asked the members of the amici organizations only *whether* they learned about the issues involved, rather than *what* they learned, this chapter is entirely superfluous.

3. See the appendix on methodology, pp. 263-66.

In the second chapter, O'Neill tests the validity of his first hypothesis — that “the more ‘business-like’ an organization is, the less ‘school-like’ it will be.” He divides the amici organizations into two sets of categories — organizational purpose (interest groups, minority-defense organizations, or public-interest advocates) and scope (broad, medium, or narrow range of arguments or facts presented to the organization’s members) — and proceeds to discuss, one by one, the characteristics of various groups in each category and the nature of their participation in *Bakke*. O'Neill apparently considers an organization to be “business-like” when its purpose is to defend specific interests of its members (interest groups) and not “business-like” when its purpose is to promote interests not directly benefiting its members (public-interest advocates). Minority-defense organizations, according to O'Neill's scheme, fall somewhere in between (p. 62). O'Neill argues, then, that if his first hypothesis is correct, “it is reasonable to presume that organizational purpose would determine the breadth and diversity (scope) of the organizational debate over *Bakke*” (p. 62). He finds, however, that no such correlation exists (p. 63). O'Neill tries to explain away this failure of his scheme of categories to produce expected results by concluding that “survival needs” of many organizations took precedence over the goals that the organizations were formed to achieve (p. 63). He briefly considers and then rejects the possibility that his categories may be inadequate: “It is possible to expand the meaning of organizational ‘purpose’ to include these extra- and intraorganizational concerns. The consequences of such redefinition are not attractive. More ambiguity, not less, would result, and thereby lessen the value of the idea of a ‘purpose’ ” (pp. 118-19). As much as O'Neill would like to wish away ambiguity, the failure of his categorizations to serve any useful function calls into serious doubt the value of his idea of a “purpose.” In the final analysis, he concludes only that “the differing perspectives, resources and pressures among organizations determined the kind of decision-making process they were to exhibit” (p. 118). The unique characteristics of the diverse organizations seem to have eluded O'Neill. Nothing in the chapter suggests why the amicus process, in particular, would lead to any given type of decision-making process.

After a brief excursion into theories of organizational behavior (pp. 120-29), O'Neill sets out in Chapter Three to discover whether participation in the amicus process in *Bakke* encouraged “nourishing conflict and responsible participation” among members of the organizations. As one might expect, O'Neill finds that those organizations which encouraged more democratic participation among their members⁴ pro-

4. O'Neill characterized the organizations as democratic or oligarchic on the basis of five indicators: “active membership involvement before the brief was filed; encouragement of dissenting opinions; alternative positions to the affirmative action issue offered; presence of an existing

vided better opportunity for education than those which tended toward a more oligarchical structure (p. 170). The chapter says very little, however, about any characteristics peculiar to participation in the amicus process that cause the process to encourage certain types of behavior. In fact, O'Neill suggests that participation in the amicus process may induce very different behavior in the same organization from one case to the next, depending upon a multitude of factors: "[O]rganizational behavior no doubt varies from issue to issue, dependent on time and resources available and the nature of each controversy, and including the external and internal demands and pressures concentrated on an organization in the context of a particular issue" (p. 133). Once again, the unique characteristics and necessities of the various organizations refuse to submit themselves to the facile analysis to which O'Neill tries to subject them.

In Chapter Four, O'Neill examines the manner in which democratic organizations taught their members about participation in the political process. He does so by considering the degree of polarization and the leadership and democratic decision-making styles exhibited by the organizations.⁵ The chapter considers such varying organizations as the Carter Administration, the American Jewish Congress, and the NAACP. As in previous chapters, the discussion does not focus on the role of the amicus process in determining or affecting these factors. O'Neill merely observes that the organizations had those various characteristics and were therefore more or less successful in educating their memberships. In considering the crucial question of *why* these organizations pursued the type of strategy they did, O'Neill can only conclude that "the evidence suggesting why some sets of leaders and members sought a democratic style is limited" (p. 210).

In the fifth chapter, O'Neill finally deals with a matter that arguably has some bearing on a specific characteristic of the amicus process generating certain tendencies in organizational behavior. In this chapter, entitled "The Lawyer as an Organizational Leader," he considers the special role of the lawyer in the amicus process. O'Neill contends that the presence of lawyers in the amicus process leads to elitist decisionmaking not conducive to education. Whether the special role of the lawyer is peculiar to the amicus process is called into question by the significant role that lawyers play in all aspects of many

membership mandate on the issue; and the emphasis placed on 'consensus' or amicable agreement within the organization." P. 265.

5. High, medium, or low scores of polarization depended upon the respondents' degree of agreement with the statement, "Discussion about *Bakke* in my organization involved name calling, personal hostilities, and bitterness." Similarly, "bargaining," "compromise," or "integrative" decision-making styles were determined by a series of questions eliciting the respondents' perceptions of the decision-making behavior in their organizations. Pp. 265-66. As to leadership style, see note 4 *supra*.

of these organizations' activities.⁶ One could imagine that the lawyer's role in the brief-writing process is a distinct one, and that the organization's need to rely on the lawyer's technical skills in this particular activity may place him in greater control over the amicus process than over other activities. However, because O'Neill offers no empirical data making comparisons with the organizations' other activities, it is impossible to tell whether this is, in fact, the case.

Even assuming that the lawyer's role is especially prominent in the amicus process and that this leads to a less effective education of the members of amici organizations, we return to the inevitable question of whether we should be terribly concerned if, in fact, the amicus process is not an effective educational tool. After all, participation in the amicus process is only a small portion of these organizations' activities.⁷ And, more importantly, participation in the amicus process is only one small way in which the courts can teach the nation. Indeed, O'Neill acknowledges that *Bakke* did give rise to an extensive national debate (p. 48). It is thus difficult to understand how he can conclude in the final chapter that "*Bakke* teaches that the court's abilities to instruct may be more limited than we suppose. If participants in litigation rarely learn, rarely reflect on the alternatives, then the more passive audience of the public may never learn" (p. 255). The wandering and unpersuasive analysis of O'Neill's work hardly merits such a bold conclusion.

— Paul V. Timmins

6. According to O'Neill:

As full-time employees of an organization, lawyers have an opportunity to demonstrate their commitment to its goals and their loyalty to its values. The resulting greater confidence in the lawyer can allow him or her to play other roles for the organization: as a public relations expert; as an organizational representative before a court, a legislative committee, or an administrative agency hearing board; and as an "idea man" and policy researcher.

Pp. 219-20.

7. O'Neill found that "sixty-five percent of the 115 [organizations] contacted had participated in fewer than five court cases during the preceding ten years." P. 61.