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Discrimination, Jobs, and Politics

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BOOK REVIEWS

DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL, by Paul Burstein, University of Chicago Press, 1985, Price: U.S. Cloth \$30.00, Paper \$12.95

*Reviewed by Anita L. Allen**

Three sets of inquiries frame sociologist Paul Burstein's study of the struggle for equal employment opportunity in the United States since the New Deal. The "struggle" about which he writes is the effort to obtain passage of legislation legitimating demands for equal employment opportunity, providing channels for redress of grievances, ending discrimination in the labor market, and increasing the income and status of those discriminated against.¹ The passage of the Equal Employment Opportunity Acts, Title VII of the Civil Rights Act of 1964 and its 1972 amendments,² were milestones in that struggle. The 1980's have already become an era of reassessment for Title VII and the Equal Employment Opportunity Commission it created.³

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1. P. BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL at 127 (1985).

2. The Equal Employment Opportunity Act of 1964, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) to 2000(e)-(17) (1981), hereinafter referred to as "Title VII," was amended by the Equal Employment Act of 1972, Public L. 92-261, 86 Stat. 103. The Amendments broadened the enforcement and investigatory powers of the Equal Employment Opportunity Commission ("EEOC").

In broad aspect, Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin by certain private employers, labor organizations and employment agencies engaged in or related to industries affecting interstate commerce. Proscribed conduct includes discriminatory hiring, discharge, job classification and referral. Also prohibited are discrimination in the terms, compensation, conditions, or privileges of employment, and retaliatory discharges of persons seeking relief under the provisions of Title VII.

Title VII created the EEOC with administrative authority to receive, investigate and resolve complaints. It also authorized private persons whose complaints against private employers are not resolved by the EEOC to bring an action in federal court. The Attorney General was authorized by Title VII to bring actions against employers deemed to have engaged in a pattern or practice of discrimination.

3. Title VII and the EEOC were criticized in 1970's as having had only a limited impact on the reduction of labor discrimination. See generally, e.g., Hill, *The Equal Employment Opportunity Acts*

Burstein's attempt to measure and explain the equal employment gains of recent decades are thus potentially of practical as well as scholarly import.

Burstein's first set of inquiries concerns the causes and consequences of the passage of equal employment legislation. A second set of inquiries relates to the role of the social sciences in sharpening understanding of legislative processes and democratic politics. A third and final set of inquiries relates to the responsiveness of the American democratic government to the preferences and concerns of the public.

Chapter 1 introduces and motivates these three areas of inquiry. Chapters 2 through 4 set forth Burstein's account of the origin of Title VII and his pivotal conclusion that public opinion was the determinant factor leading to the enactment of Title VII in 1964 and its strengthening in 1972. Chapter 5 takes on the competing view that "elitist" factors such as elections, lobbying, Congressional leadership or presidential pressure were more determinant than public opinion in bringing about Title VII. Chapters 6 and 7 report good news on the economic consequences of Title VII in the 1970's and project the law's long-range impact. Chapter 8 concludes the book with a sketchy survey of theories concerning the power of public opinion in the modern democratic state. It is suggested that the struggle for equal employment legislation is an affirmative lesson about the efficacy of public opinion in shaping governmental policy.

WHY CONGRESS ENACTED TITLE VII

Burstein commences with the claim that methodological developments in the social sciences make it possible to eschew vague and imprecise accounts of Congressional action offered by lawyers and others.⁴ Earlier accounts, he argues, identify a "long list of factors"

of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law, 2 INDUS. REL. L.J. 1 (1977).

Responding to perceived opposition to government enforcement of equal employment laws, the U.S. Civil Rights Commission ("CRC") formally recommended in a 1981 Report that the federal government seek to "vigorously enforce all laws related to nondiscrimination in employment," alleging that "despite civil rights laws prohibiting discrimination, there is ample evidence that employment and promotional opportunities are not available to minorities and women on an equal basis with white males." U.S. Commission on Civil Rights, *Report to the President and the Congress*, January 1981 at 14. The CRC report warned that the unemployment rates of minorities and women, compared to white males had *risen* between 1970 and 1976 and between 1976 and 1979, that women and minorities were still excluded from better paying job categories, and that affirmative action would be required to effectively combat discrimination. *Id.* at 14-15.

4. The methodological developments referred to are uses of statistical and economic methods

whose distinct causal roles and interaction in bringing about passage of Title VII are not explained.⁵

Towards offering a more precise account, Burstein relies on systematic, statistical analysis of diverse data. Appropriately, methodological arguments accompany each foray beyond standard social science resources and traditional uses of United States Bureau of the Census and Department of Labor statistics. Hence, this book includes arguments that bill sponsorship trends are reliable indicators of Congressional support for equal employment legislation; that public opinion poll responses are reliable indicators of the thrust of public opinion on civil rights matters; and that *New York Times* coverage of civil rights and anti-civil rights demonstrations is a reliable indicator of the impact of the civil rights movement on the public.

On the basis of these data, Burstein explains Congressional passage of Title VII as a complex interplay, “the result of the conjunction of three forces—public opinion on EEO [here, and elsewhere, “equal employment opportunity”] and civil rights, the civil rights movement, and the ideas that led to the drafting of the law in the particular form it took.”⁶ However, he singled out what he described as the slow, steady growth of public opinion favoring equal employment as the “fundamental” determinant behind the initial passage and strengthen-

to systematically analyze and gauge the consequences of “congressional action, public opinion, and other relevant social, political and economic phenomena” over time. See P. BURSTEIN, at 6 and note 9 (citing examples of the new social science methodology, including E. TUFTE, *POLITICAL CONTROL OF THE ECONOMY* (1978)).

5. Writers have ascribed a causal role in the passage of Title VII, or, to the 1964 Civil Rights Act as a whole to some of nearly a dozen different factors. See, e.g., C. WHALEN AND B. WHALEN, *THE LONGEST DEBATE* (1985) (stressing “citizen support”); F. PIVEN AND R. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (stressing the role of demonstrations, fear of violence and the civil rights movement). These include public opinion, mass demonstrations, fear of violence, the civil rights movement and/or pressure applied by its leadership, lobbying by commercial, religious and labor groups, the election of Democrats, the moral concerns of individual members of Congress, and the influence of Congressional leaders and the White House.

6. See P. BURSTEIN, at 94. In *THE LONGEST DEBATE*, *supra* note 5, Burstein cites not three but five forces as having converged to spawn “citizen support” said to have resulted in the passage of the Civil Rights Act of 1964. First, black Americans took protests to the streets; second, protests were conducted in regions of the country other the South; third, publicized violence against blacks aroused public sympathy; fourth, civil rights leaders made effective use of the media; and fifth, civil rights leaders successfully cast the pending Civil Rights Act in appealing moral and religious terms. See *id.* at 230-34.

Although Whalen and Whalen employ journalistic rather than social scientific methods in *THE LONGEST DEBATE*, their conclusion that “citizen support” was the fundamental cause of passage of the 1964 Civil Rights Act is strikingly similar to Burstein’s. “Citizen support” appears to approximate what Burstein means by “public opinion”.

ing of Title VII.⁷

Burstein argued that what Congress finally enacted, having rejected hundreds of equal employment measures throughout the 1940's and 1950's,⁸ was tantamount to long-delayed New Deal legislation. The New Deal-rooted inspiration behind Title VII was the notion that Congress should invoke the Commerce Clause to intervene in the private labor market to end discrimination.⁹ Of course, the idea that the commerce powers of the federal government authorize imposing non-discrimination strictures on the private labor sector had its detractors both in the 1940's and in the 1960's.¹⁰ Moreover, while the concept that the federal government could permit implementation of nondiscrimination policies applicable to private labor gained footing in the New Deal, key substantive provisions of Title VII made it considerably more than simply delayed New Deal legislation. Most notably, the sex discrimination prohibition of Title VII originated in the Senate in 1964—not in the New Deal.¹¹

Burstein convincingly illustrates through analysis of public opinion surveys dating back to the late 1930's and 1940's that there was a gradual shift in public sentiment toward equal employment rights for blacks and women. However, he falls short of eliminating doubt as to the "determinant" cause of Congressional action on equal employment legislation. It is evident that by 1964 the public favored equal employment, at least in the abstract, and that Congressional action to secure it in 1964 and 1972 was consistent with what the public favored. As Burstein summarizes the evidence:

Congress first *passed* EEO legislation in 1964 when the proportion of the public favoring EEO and the public's intensity of concern had

7. See P. BURSTEIN, at 95.

8. Cf. Hill, *supra* note 3, at 2 note 7.

9. The Commerce Clause, U.S. CONST., art. I, § 8, provides that: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

10. See, e.g., Ervin, *The United States Congress and Civil Rights Legislation*, 42 N.C.L. REV. 3, 7 (1963) ("Once we begin using the commerce clause to affect matters that have no rational connection with the free flow of goods, then we have fatally dropped the bar to governmental tyranny that was the purpose of the original framers of the Constitution, who were so careful to construct safeguards against an all-encompassing federal government.").

11. The sex discrimination prohibition was added to H.R. 7152 pursuant to an amendment offered by Representative Howard Smith to belittle or stymie passage of what was to become Title VII. See C. WHALEN AND B. WHALEN, *supra* note 5, at 115-17. See also P. BURSTEIN, at 95 ("Before the adoption of Title 7, there was almost no public demand that women be protected by the EEO law.").

reached historical high points, the proportion of the public covered by state EEO laws had just exceeded half for the first time, the proportion of the public believing the government was moving too fast on integration had fallen to a low point, and a majority of whites in all regions favored EEO.

Congress adopted the 1972 *amendments* to Title 7 when almost everyone favored EEO for blacks in principle; two thirds of the public approved of women's working outside the home, two-thirds of the public said they would be more likely to vote for a candidate if he or she favored improving opportunities for blacks and women, and relatively few people felt intensely concerned about the issue.¹²

This is very suggestive but not conclusive evidence that, in the particular form it emerged from its journey through the House of Representatives and then the Senate, Title VII was a response to popular opinion. It is still possible that passage of Title VII was precipitated by dramatic protests and race confrontations in the South.

Interestingly, although he defined his task as providing a more *precise* account than others have given of why Congress passed Title VII when it did and in the form that it did, Burstein did not focus sharply or realistically on the motives of individual Congressmen. He did not take evidence of actual motives and what shaped them systematically into account. No methodological rationale was offered for restricting attention to influences on *aggregate action* rather than the *motives of individual players*. Although the barriers to identification of motives are apparent, Charles and Barbara Whalen's journalistic account of the passage of the Civil Rights Act of 1964 demonstrates that carefully organized factual data can shed light on the complex motives of Presidents and members of Congress.¹³ Failing to take such data into account, Burstein's conclusion that public opinion was the fundamental determinant of Congressional action—though based on the methods and theories of social science—is, after all, imprecise.

Burstein has not succeeded at precisely and conclusively establishing public opinion as the "determinant" factor behind passage of Title VII, but he has made good use of his data to clarify the roles of elections, lobbying, Congressional leadership and the White House.¹⁴ One of Burstein's primary concerns was to establish whether these

12. *Id.* at 67.

13. C. WHALEN AND B. WHALEN, *supra* note 5. These writers present lush, detailed factual data highly suggestive of the motives of individual Congressmen, but without an overt methodological rationale for doing so.

14. *See generally* P. BURSTEIN, at Chapter 5.

“elitist” factors rather than public opinion were the fundamental causes of Title VII’s enactment. His analysis of the evidence argues that they were not.

The role played by Congressional leaders in the years before passage was as the “organizers of the congressional response to public opinion rather than as actors powerful in their own right.”¹⁵ Nor did Presidents greatly influence Congressional support for equal employment legislation, so far as Burstein could gauge.¹⁶ Lobbying appears to have had little effect, other than to have helped to communicate trends in public opinion. Lobbying did not get Congress to act in opposition to the desires of the public.¹⁷

Surprisingly, support for equal employment legislation appears to have correlated little with the numerical strength of the Democratic party in Congress. Prior to 1964, sponsors of equal employment legislation were not more likely to be Democrats than Republicans.¹⁸ They *were* likely to be junior members of Congress, particularly sensitive to trends in public opinion because they could not be confident of retaining their seats.¹⁹ Not until the late 1960’s, in time for the move to strengthen Title VII with enforcement provisions, had civil rights become a Democratic party cause.²⁰

TITLE VII’S CONSEQUENCES: GOOD NEWS

What effects have Title VII’s prohibitions²¹ against discrimination had on the economic status of its intended beneficiaries? Have the relative employment gains of minorities and women attributable to equal employment legislation been negligible as some critics claim? Toward providing answers to these questions Burstein drew on formal economic models, but interpreted data from a viewpoint intended to take fully into account the political implications of the passage of legislation, the effect of social change on the struggle for equal employment opportunity, and the implication of equal employment

15. See P. BURSTEIN, at 122.

16. See *id.* at 115 (“Presidents Truman, Johnson, and Nixon publicly favored passing or strengthening EEO legislation, whereas Roosevelt and Kennedy were neutral and Eisenhower was opposed Overall, the correlation between presidential support for EEO and Congressional sponsorship was [a low] .42.” [footnote omitted]).

17. See *id.* at 122.

18. See *id.* at 100-01.

19. See *id.* at 101.

20. See *id.*

21. See *supra* note 2.

opportunity for the economic status of social groups. Burstein concluded that, while women and minorities have not achieved parity with white males, they have made significant economic gains and incurred no measurable losses.²²

This claim is bound to spark controversy. Today, equal employment legislation is being blamed for a panoply of social and economic ills. As Burstein points out, it is said to have divided Americans by race and national origin into groups entitled to special privileges, destroyed the autonomy of local government, and assaulted basic notions of individual worth and merit.²³ Moreover, economic studies making use of the methods and statistical techniques of contemporary social science have concluded that (1) the income gains of non-white men since World War II must be attributed to gains in productivity rather than to equal employment opportunity policies and (2) women's income has made only modest gains attributable to equal employment legislation.²⁴

Burstein's study attacked these conclusions and offered strikingly different ones. He depicted the economic status of women and minorities as a function of at least four variables: relative productivity, discriminatory attitudes or other measures of the social context, the demand for labor in the economy and the enforcement of equal employment opportunity legislation. Examining the impact of these variables Burstein concluded that equal employment opportunity expenditures and court victories have had a significant positive effect on the earnings, income and group shares of women and minorities.²⁵ Burstein concluded that neither women nor non-white men have suffered losses attributable to equal employment legislation. Moreover,

22. See P. BURSTEIN, at 150-51.

23. See *id.* at 125. It is ironic that equal employment legislation is blamed, if only on the basis of impressionistic and anecdotal evidence, for racial divisiveness and impaired self-esteem—some of the very social ills it was designed to cure.

24. See *id.* at 125-26.

25. "Group share" in this context is "a measure of the *proportion of total income* going to each of the four relevant groups—white men, non-white men, white-women, and non-white women—relative to each group's *proportion of the total population*, taking into account individuals old enough to be in the labor force, regardless of whether they were working or had income." *Id.* at 134. Utilizing the proportionate "group share" measure and focusing on the years 1948-1978, Burstein concluded that the economic status of non-white men and non-white women have shown an upward trend since 1948, and especially since equal employment legislation was passed and went into effect in the mid-1960's.

White women's median earnings as a percentage of white males registered a distinct decline during the same period, falling steadily through the early 1970's, reaching their lowest level in 1973 before slightly rising by 1978. See *id.* at 136-38. However, while white women's relative total in-

there is no evidence that one group has gained at the expense of another.²⁶ Non-white women have been the biggest winners, having reaped the benefits of new found employment and educational opportunities.²⁷

PUBLIC OPINION, DEMOCRACY AND LEGISLATION

Burstein wraps up his study posing a great many methodological questions and pondering the implications for democratic politics of his finding that public opinion was the driving force behind passage of Title VII. Does this finding, he asks, vindicate the pluralist vision of American democratic government? Is the history of the struggle for equal employment an object lesson about the extent to which democratic politics can be successfully used to redistribute rights, opportunities, and income in society?

Questions like these about the power of the public to direct governmental activity have been raised before in connection with the struggle for equal employment.²⁸ However, Burstein may be among the first to systematically employ empirical data to buttress a tentative majoritarian optimism.²⁹ That optimism is warranted, he suggests, because recent studies³⁰ of the economy, war and civil rights have shown that the government is frequently responsive to public opinion. The struggle for equal employment was an occasion when the formal and informal institutions of democratic government played a signifi-

comes as a percentage of white men's declined through the early 1960's, the downward trend reversed about the time equal employment opportunity legislation was passed. *See id.*

Burstein concludes that the effect of equal employment on white women has been variable and less predictable than its effect on non-whites. Women's mixed victory may relate, the author suggests, to there being less than universal acceptance of women working outside the home and having the same rights as men in the labor force. *See id.* at 150-52.

Burstein's findings conflict with some of those reached by equal employment supporters who believe Title VII has had little or no impact on improving the economic status of minorities and women. *See, e.g.,* U.S. Commission on Civil Rights *supra* note 3.

26. *See* P. BURSTEIN, at 151-52.

27. *See* P. BURSTEIN, at 147, 150.

28. *See, e.g.,* Blumrosen, *The Crossroads for Equal Employment Opportunity: Incisive Administration or Indecisive Bureaucracy?*, 49 NOTRE DAME LAW. 46, 62 (1973) ("The unresolved question for our time is whether we are able to direct governmental activity, or whether it will, from forces which we imperfectly understand, drift in such a way as to magnify our social tragedy.").

29. P. BURSTEIN, at 188, 199 ("Democratic politics has not ended discrimination or produced equality; but has increased the opportunities available to millions of people and helped insure they would be fairly treated.").

30. *Id.* at 190.

cant role in getting the federal government to reallocate economic rights.

Burstein concludes that his finding that public opinion was the driving force behind passage of equal employment legislation "is quite compatible with the pluralist view, but not with the elitist view."³¹ At the same time he recognizes that "pluralists," represented by Robert Dahl in *Pluralist Democracy in the United States* (1967), and "elitists," represented by William Gamson, share the core belief that the government is responsive to public opinion, but that its response is limited.³² The differences between "pluralist" and "elitist" lie in the accounts they give of how much and why governmental response to public opinion is limited. As Burstein rightly points out, claims that the process of legislation is "elitist" or "pluralist" are ultimately too vague to be proven or disproven. But this does not close the door on a concern for better understanding of the efficacy of public opinion in the timing and shaping of legislation.

SOME LIMITATIONS

There are more readable accounts of the passage of Title VII than this one,³³ although Burstein's obvious commitment to the ideal of equal employment and faith in democratic institutions add a measure of humanistic vitality to a highly quantitative presentation. There are also accounts that more closely and critically examine specific provisions of Title VII and the activity of the EEOC.³⁴ Very little substantive analysis of case law developments, original or otherwise, is contained in this book.

These features will lessen the utility of the book to legal scholars. On the other hand, Burstein's work makes a unique contribution. Analyses tracing public and Congressional support for equal employment principles and legislation over a forty-year period are not to be found elsewhere. His tally of Title VII cases whose decisions favor women and minorities and his judgments about their influence should be of interest to labor and civil rights lawyers.

Burstein himself directs readers to some of the major limitations of his study.³⁵ One of these is reliance on pre-1980 data, even though

31. *Id.* at 187-89.

32. *Id.* at 189.

33. *See, e.g.,* C. WHALEN AND B. WHALEN, *supra* note 5.

34. *See, e.g.,* Hill, *supra* note 3.

35. *See* P. BURSTEIN, at (Preface) x and 11-12.

consideration of later data would clearly have been appropriate.³⁶ Another limitation Burstein notes is that his study focuses only on blacks and women. It offers little direct insight into efforts to achieve equal employment opportunity for Hispanics, Native Americans or other minority groups.

Burstein is careful to point out that the struggle for equal employment opportunity and the struggle for passage of Title VII of the 1964 Civil Rights Act are not identical. Nevertheless, a further limitation of his account is his thin treatment of efforts to obtain equal employment prior to 1964 through state legislation, the civil rights movement, President Roosevelt's Executive Order 8802 (which prohibited discrimination by the federal government and defense contractors) and the Fair Employment Practices Committee.

A final limitation stems from the attempt to account for the passage of Title VII in isolation from the other titles of the 1964 Civil Rights Act. Burstein argues that although Title VII obtained passage as part of a larger act dealing with voting rights, public accommodations and education, the struggle for equal employment opportunity has a history of its own meriting independent study. Indeed, to a large extent, the struggle for equal employment does have a history of its own.³⁷ Nevertheless, Title VII was part of a package of civil rights reforms simultaneously ushered through Congress. It is impossible to explain with exactitude why Title VII was enacted when it was and says what it says without substantial consideration of factors such as the perceived urgency of the civil rights concerns embodied in other titles of the 1964 Act.

Despite these limitations, Burstein's study possesses considerable

36. Failure to consider more current trends is attributed to delays in publication of his book.

37. Once civil rights deficiencies in labor, housing, education, voting and public accommodations were unified for redress in pending legislation, their histories became, for some purposes, inextricable. The partial extricability of their histories is well-illustrated, however, by the 1959 *Report of the U.S. Commission on Civil Rights*. The general purpose of the Report was to transmit findings of an investigation into voting practices, public education, and housing to determine the extent to which the equal protection guarantees of the 14th Amendment were being abridged in and by the states. Whatever its members' views on private employment discrimination may have been, the Commission was not authorized to investigate allegations of labor-related discrimination. This meant proponents of equal employment were compelled to continue separately pursuing alternative means of bringing employment discrimination to the attention of Congress and the President. Opposition to federal government intervention in the private labor field appears to have been more virulent than opposition to intervention in other civil rights fields. This may explain why the rudimentary Title VII in the original Civil Rights bill sent to the House of Representatives by President Kennedy addressed equal employment but merely permitted the President to establish a commission to curb the discriminatory practices of firms having government contracts.

strengths. Chief among them is an inventive use of empirical data and politically sensitive analysis of that data to challenge leading theories and conventional assumptions about the efficacy and future of equal employment legislation.