

Michigan Law Review

Volume 85
Issue 5 *Issue 5&6*

1987

Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States since the New Deal

James L. Thompson
University of Michigan Law School

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Recommended Citation

James L. Thompson, *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States since the New Deal*, 85 MICH. L. REV. 1025 (1987).

Available at: <https://repository.law.umich.edu/mlr/vol85/iss5/13>

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DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL. By *Paul Burstein*. Chicago: University of Chicago Press. 1985. Pp. x, 199. Cloth, \$30; paper \$12.95.

Paul Burstein's¹ *Discrimination, Jobs, and Politics* is a historical, political, and sociological examination of America's struggle to equalize job opportunities for minorities and for women after World War II. Specifically, Burstein examines a variety of societal factors and the ways in which these factors influenced congressional consideration and eventual passage of equal employment opportunity ("EEO") legislation in 1964 and again in 1972. Thus, the entire analysis centers on Title VII of the Civil Rights Act of 1964² and the Equal Employment Opportunity Act of 1972.³

Burstein has divided the study into two unequal parts. The first section, comprising roughly two-thirds of the book's pages, contains the analytical substance. In this section, Burstein attempts to consider systematically all societal factors that may have had an impact on congressional consideration of EEO legislation. The analysis focuses upon factors such as public opinion, congressional leadership, violent and nonviolent civil rights protests (as well as anti-rights counter demonstrations), media coverage, lobbying, and elections. While not attempting to establish a solid causal link between any single factor, or group of factors, and congressional activity, Burstein does attempt to determine which factors contributed most substantially to congressional passage of EEO legislation.

In its study of congressional passage of EEO legislation, the work fits neatly into a crowded field of literature that analyzes the legislative history of equal employment legislation.⁴ Because it necessarily treats the 1960s civil rights movement as well, this study also contributes to a body of work describing the effect of civil rights protests and demonstrations on society.⁵

However, Burstein's analysis does more than simply trace the history behind the passage of two pieces of EEO legislation. In the last

1. Associate Professor of Sociology, University of Washington.

2. Pub. L. No. 88-352, 78 Stat. 244 (codified in various sections of 42 U.S.C.).

3. 42 U.S.C. §§ 2000e to 2000e-17.

4. See, e.g., R. BARDOLPH, *THE CIVIL RIGHTS RECORD* (1970); Bonfield, *The Origin and Development of American Fair Employment Legislation*, 52 *IOWA L. REV.* 1043 (1967); Kohl, *Equal Employment Opportunity in America: An Historical Past and Emerging Trends*, 36 *LAB. L.J.* 835 (1985).

5. See, e.g., J. BUTTON, *BLACK VIOLENCE: POLITICAL IMPACT OF THE 1960'S RIOTS* (1978); N. Schlei, *Foreword* to B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* at vii-xiii (1976).

portion of *Discrimination, Jobs, and Politics*, Burstein examines current statistics and, relying on conclusions made in the first portion of the work, attempts to provide predictions about future hopes for equality of employment opportunities in the United States. By noting current trends, Burstein reaches conclusions about attainable goals for, and probable limitations on, equality in employment opportunities.

At this second level, Burstein's work becomes one of more than historical significance; it serves as a guide to expectations concerning EEO. But just as the first section was not a radical departure from the subject of previous work, neither does the second section chart uncharted waters. Rather, Burstein's predictions fit nicely alongside those of Farley,⁶ Lazear,⁷ and others who attempt to determine what the future holds for groups who have traditionally been the victims of discrimination in the workplace.

What distinguishes Burstein's work from those that simply study the history of legislation or examine current trends is Burstein's use of the single case study as a vehicle to facilitate an examination of the democratic process. Among political theorists, a substantial division has arisen concerning the importance of public opinion as a factor influencing political decisionmaking. Simplifying the complex arguments to a great extent, the basic disagreement is between those who believe that public opinion *does* have a substantial effect on congressional activity,⁸ and those who adhere to the notion that Congress basically follows a hidden agenda, the contents of which are determined by the wealthy and by well-organized interest groups.⁹ According to this latter hypothesis, any similarity between the wishes of the public and congressional activity is largely coincidental. By examining the strength of the relation between changes in public opinion and shifts in congressional activity, Burstein is able to determine that, at least in the case of EEO legislation in the 1960s and 1970s, public opinion played a major, if not the crucial, role in producing legislative action.

Before examining a portion of Burstein's argument in detail, it is important to understand the basic methodology of the study. The first section, which reaches the conclusions about the relative importance of factors, relies almost exclusively upon the use of statistics and statistical analysis. Burstein first gathered as much data as was available

6. Farley, *Trends in Racial Inequalities: Have the Gains of the 1960's Disappeared in the 1970's?*, 42 AM. SOC. REV. 189 (1977).

7. Lazear, *The Narrowing of Black-White Wage Differentials is Illusory*, 69 AM. ECON. REV. 553 (1979).

8. While this view is modified and slightly different for each adherent, Burstein cites Kingdon, *Models of Legislative Voting*, 39 J. POL. 563 (1977), and R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956), among others, as supporters of this position.

9. See, e.g., I. KATZNELSON & M. KESSELMAN, *THE POLITICS OF POWER* (1975); C. MILLS, *THE POWER ELITE* (1956).

about each variable included in the study. Then, primarily through the use of cross-tabulations and regression analyses, Burstein compared the selective variables in order to determine which had the strongest correlations with levels of congressional EEO-related activity. Precise and plentiful information was not available for each variable and this forced the author to use some data that may not have precisely represented the concepts being examined.¹⁰ However, at least enough data was available to make these statistical comparisons numerically significant.

The general thrust of the statistical conclusions is that, while a variety of factors contributed to Congress' eventual decision to pass EEO legislation, by far the most important factor was public opinion. On the surface this seems to be a less than startling conclusion, but it does challenge some traditional interpretations.

Perhaps the most convincing and persuasive portions of Burstein's analysis center on his treatment of the effect of civil rights protest activities.¹¹ The author first examines the statistical relationship between congressional support for EEO legislation and the level of civil rights activity (and accompanying counter-activity and media attention). While admitting that civil rights activities had an effect on congressional consideration, especially in increasing the salience of equality issues, Burstein's statistics indicate that "[t]he primary determinant of congressional activity was public opinion. The civil rights movement (and the associated anti-rights activity and media coverage) seems to have had only a slight direct effect on congressional support for EEO"¹²

Burstein buttresses these statistical conclusions with other convincing evidence. First, Burstein notes that EEO legislation was not anything "new" to the 1960s; bills suggesting equality of job opportunity had been sponsored in Congress during every session since 1941-42 (pp. 32-34). Second, while sponsorship did increase during the early 1960s, prior to passage of the Civil Rights Act of 1964 and in conjunction with extensive protest activity, congressional sponsorship of EEO legislation reached its highest levels in the early 1970s. This

10. See text following note 14 *infra*.

11. It is important to note that there is a distinction between broad civil rights demonstrations and those more focused, usually smaller, demonstrations concerned exclusively with EEO. While Burstein notes that congressional support was strongly correlated with highly focused EEO protests, it is his conclusions concerning broader civil rights protests, pushing generally for equality among the races, that are discussed here. Pp. 82-96.

12. P. 90. This point would be less striking if, as Garrow indicates, the civil rights movement itself caused public opinion to change. D. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 178 (1978). However, Burstein finds that "the civil rights and women's movements were neither a major cause nor a direct consequence of changes in public opinion." P. 89. Overall, the author concludes that "[i]t is fairly obvious (and statistical analysis confirms) that over the entire period the relation of collective action and media coverage to pro-EEO activities is zero." P. 88.

high level of congressional support occurred even though civil rights protest activities were not nearly so common in the 1970s (pp. 84-85). Third, Burstein notes that virtually all civil rights protest activity pushed for equality among the races, thus providing no key as to why the eventual legislation also extended protection to individuals suffering from discrimination based upon national origin, religion, and sex (p. 94). Finally, the content of the legislation that Congress eventually passed is noticeably similar to much of the earlier legislation that was sponsored but never adopted (p. 38). The civil rights movement therefore did not have a highly significant effect on either the timing or the content of EEO legislation (p. 94).

What makes this conclusion so interesting is that many analysts see the equality-related legislation of the mid-1960s as a direct outgrowth of the crisis brought to the public's attention by civil rights protest activities.¹³ Burstein's analysis indicates that at least one section of this Act, Title VII, was more a response to shifts in nationwide opinion than a result of protest activities. Burstein concedes that the civil rights movement was in large part responsible for focusing the public's attention on the problems of inequality and for convincing Congress of the salience of equality issues. However, he is persuasive in arguing that the passage of EEO legislation in 1964, and especially in 1972, was more a result of long-term alterations in public attitudes and perceptions than of concentrated demonstrations by civil rights activists.¹⁴

While a paucity of hard data may not completely undermine the validity of Burstein's findings, one must examine and question the statistics used to represent the chosen variables before accepting the conclusions with any confidence. In many situations, it is unclear that the statistics chosen by Burstein adequately represent the concept being defined. For example, as a measure of congressional responsiveness to EEO, Burstein uses the number of senators and representatives sponsoring EEO legislation in each session. While congressional sponsorship is probably a fairly accurate indicator of the level of congressional support in most instances, it is not difficult to imagine situations in which senators or representatives might opt not to sponsor legislation while still supporting the cause. Perhaps a larger statistical flaw centers on the data used to indicate levels of support for EEO among the general public. Because often little or no data on this specific issue is

13. J. BUTTON, *supra* note 5; W. GAMSON, *THE STRATEGY OF SOCIAL PROTEST* (1975).

14. Having shown that congressional action was primarily a result of a gradual shift in public opinion and that the civil rights movement did not produce this change in attitudes about EEO, the next logical step would be to explain what factors *did* cause this change. Although the question of what caused public opinion to shift over time becomes extremely relevant, Burstein does not attempt to deal with it. Instead, he notes that "at the moment we have few ideas and even less evidence about what *has* caused attitudes to change. This is an area that demands further research." P. 93.

available, Burstein frequently relies on general attitudes towards racial equality. The fit is not perfect, as people are much more apt to favor a general principle, like equality, than a specific remedy, like Title VII (p. 42). Thus, while the accumulated data is able to produce statistically significant results, there is some question as to whether the numbers used really do represent the variables being studied.

The second half of the study does not rely nearly so heavily upon statistical methods, and thus avoids the problem of disjunction between variable and data. In this section, Burstein examines data relating to several social factors in order to make predictions about the future of EEO. While Burstein notes that fewer members of the general public maintain discriminatory attitudes and the public is now more accepting of EEO legislation, he suggests that the gains made by blacks and women, relative to white males, will continue to be modest (pp. 175-76). Primarily because of differences in education, erratic enforcement of the EEO legislation, the structure of the economy, and generational gaps (the white males in the most socially desirable positions got their jobs before EEO legislation had been passed) the income gap is destined to close slowly (pp. 157-71).

The second section does not have the same problem with finding truly representational data as the first section, but it does nonetheless suffer from other serious flaws. Primary among these flaws is the datedness of the analysis. While the book was not published until 1985, it was the result of an extended period of research and statistical analysis. Thus, the statistics considered, the arguments made, and the authorities cited are all slightly outdated. Although the ratios of black and female earnings to those of white males have not changed dramatically since the late 1970s, (the period from which most of Burstein's figures come) the slight changes in the numbers, coupled with an economic situation much different from that of the late 1970s, makes a more up-to-date study preferable.¹⁵

A final drawback to this latter portion of the analysis is Burstein's almost total refusal to consider the role the courts play in determining how equal the employment opportunities will be. In chapter two, Burstein's initial hypothesis as to why the tide of public opinion began to change in the early 1940s rests upon a perceived (and actual) willingness on the part of the Supreme Court to sustain legal attacks against discrimination (pp. 16-17). Given this initial point, it is difficult to understand why Burstein, at the end of his analysis, fails to consider the critical role the current courts play, both in shaping public expectations and in enforcing the EEO legislation. Supreme Court decisions

15. See, e.g., Jeffries & McGahey, *Equity, Growth and Socioeconomic Change: Anti-Discrimination Policy in an Era of Economic Transformation*, 13 N.Y.U. REV. L. & SOC. CHANGE 233 (1985); Jones, *Some Reflections on Title VII of the Civil Rights Act of 1964 at Twenty*, 36 MERCER L. REV. 13 (1985).

such as *McDonnell Douglas Corp. v. Green*,¹⁶ *Griggs v. Duke Power Co.*,¹⁷ and *United Steelworkers v. Weber*,¹⁸ have established the basic and essential standards that employers must meet in order to be within the laws Burstein studies. Changes in the Supreme Court's interpretations will necessarily have dramatic effects on the development of EEO, but Burstein almost completely ignores this dynamic.

Burstein's work is undoubtedly engaging, largely because he challenges the easy assumptions one is inclined to make about congressional decisionmaking. He shows Congress may not always be swayed by only the well-heeled elite, and, at least in this instance, congressional decisions follow long periods of thoughtful consideration.

Nevertheless, the work fails to accomplish all that it could have. After meticulous statistical analysis leading to the fairly persuasive conclusion that public opinion does in fact influence congressional decisionmaking, Burstein fails to take the analysis one step further and discuss the factors producing these opinion changes. If, in fact, the most substantial factor in congressional decisionmaking is public opinion, the most fundamental inquiry then must be into the factors influencing public opinion. Burstein's primary goal in writing this book was to provide an answer to the question of why this nation chose to adopt EEO legislation. The analysis persuasively indicates that Congress adopted EEO legislation when it did because of public opinion. However, that begs the larger question. Why did public opinion change so significantly in the period between 1940 and 1964? This is the question that Burstein's study pushes inexorably towards, but fails to answer.

— James L. Thompson

16. 411 U.S. 792 (1973) (setting forth the relatively easy standards a plaintiff must meet in order to establish a prima facie case under Title VII).

17. 401 U.S. 424 (1971) (establishing the "disparate impact" theory under Title VII, which generally allows employers to be held liable whenever an employment policy has a disproportionately harmful effect on members of a protected group, regardless of the employer's intent).

18. 443 U.S. 193 (1979) (holding that Title VII does not prohibit employers from voluntarily adopting race-conscious affirmative action plans).