



The Taft Proposal of 1946 & the (Non-) Making of American Fair Employment Law

David Freeman Engstrom

FOR THOSE FAMILIAR WITH the evolution of American fair employment law, the years clustered around 1970 provide the most obvious opportunities to identify so-called “critical junctures” – those hinge moments in history when a number of different pathways of legal or political development remain open. It was during this period that federal appeals courts approved class-action lawsuits under Title VII of the Civil Rights Act of 1964, and that the Supreme Court’s *Griggs*¹ decision sanctioned a “disparate impact” standard, al-

lowing plaintiffs to prove job discrimination with something less than concrete evidence of discriminatory intent.² It was also around then that the Nixon Administration implemented the so-called “Philadelphia Plan,” prescribing “goals and timetables” for hiring minority workers by contractors bidding on federally assisted construction projects.³ Together, these developments transformed federal fair employment law from the “poor, enfeebled thing” that had emerged from the legislative compromises of 1964 into a potent set of anti-discrimination policies.⁴

David Engstrom is an associate, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. This piece draws on the author’s Ph.D. dissertation, titled “The Lost Origins of American Fair Employment Law: State Fair Employment Practices Bureaus and the Politics of Regulatory Design, 1943–1964.” The author gratefully acknowledges the support of the John M. Olin Program in Law, Economics, and Public Policy at Yale Law School during 2004–2005.

1 *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

2 See, e.g., John Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); ALFRED M. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY* (1993).

3 See Thomas J. Sugrue, *Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969*, 91 J. AM. HIST. 145 (2004); Paul Frymer & John David Skrentny, *Coalition-Building and the Politics of Electoral Capture During the Nixon Administration: African-Americans, Labor, Latinos*, 12 STUDS. AM. POL. DEV. 131 (1998); HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972* 287–97, 326–34 (1990).

4 The phrase “poor, enfeebled thing” is from MICHAEL I. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 205 (1966), though he was referring to the Equal Employment

But few know that the history of American fair employment law reached an equally critical juncture more than 20 years earlier, in 1946. It was in May of that year that Republican Senator Robert Taft of Ohio, perhaps the leading conservative voice in Congress at the time, privately approached an emerging coalition of civil rights, labor, religious, and civic groups with a draft bill – reproduced in its entirety at the end of this essay – that broadly prohibited job discrimination on the basis of race, creed, color, or national origin and empowered federal courts to oversee sweeping injunctive remedies, including the requirement that employers hire a particular quota of protected workers.⁵ The stunning details of that proposal, and its quiet rejection by the nascent liberal coalition, offer a window onto the early, pre-*Brown* politics of civil rights in the United States. What makes the Taft episode so intriguing, however, are the rich counterfactual possibilities it presents. Though the liberal coalition's rejection of the Taft bill prevented its formal introduction in Congress, a contrary response would have fundamentally altered the course of American fair employment law and the American civil rights movement along with it. More sweeping still, it is not at all implausible that enactment of the Taft measure would have transformed the post-war American party system, making Republicans, not the sec-

tionally challenged Democrats, the party of civil rights going forward. It is therefore surprising that Taft's offer has entirely escaped popular or scholarly treatment until now.



Taft had long been a thorn in the side of the broad coalition of groups lobbying for federal fair employment legislation in the immediate post-war period. The drive for fair employment had begun in 1941 when President Roosevelt, responding to a threat by civil rights groups to unleash a "March on Washington," signed Executive Order 8802 declaring a national policy against discrimination and establishing the President's Committee on Fair Employment Practice.⁶ But soon after it opened its doors, the Committee's limited reach became clear. Because it was authorized only to hold hearings and receive and "conciliate" discrimination complaints, but lacked any further enforcement authority where those efforts failed, many employers simply ignored the Committee's directives.⁷ Soon civil rights groups called for the vesting of the Committee with new powers modeled on the recently established National Labor Relations Board, including the authority to order that an employer "cease and desist" from discriminatory practices and take various types of action, including hiring,

Opportunity Commission (EEOC), not the entire regime. On Title VII's potency after 1970, see Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcements in U.S. Labor Unions, 1935–95*, 97 AM. POL. SCI. REV. 1 (2003); Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France*, 16 STUDS. AM. POL. DEV. 141 (2002). Finally, for the argument that judicial interpretation of Title VII went beyond the original statutory bargain, see Daniel Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

- 5 A Bill (undated) (NAACP Papers, Library of Congress, Part II, Box A258). See page 191 below.
- 6 Studies of the Committee include ANDREW KERSTEN, RACE, JOBS, AND THE WAR: THE FEPC IN THE MIDWEST, 1941–46 83 (2000); MERLE E. REED, SEEDTIME FOR THE MODERN CIVIL RIGHTS MOVEMENT: THE PRESIDENT'S COMMITTEE ON FAIR EMPLOYMENT PRACTICE, 1941–46 (1991); LOUIS RUCHAMES, RACE, JOBS, AND POLITICS: THE STORY OF FEPC (1953).
- 7 LOUIS COLERIDGE KESSELMAN, THE SOCIAL POLITICS OF FEPC: A STUDY IN REFORM PRESSURE MOVEMENTS 23 n.47 (1948); RUCHAMES, *supra* note 6, at 68; FAIR EMPLOYMENT PRACTICE COMMITTEE, FINAL REPORT II–23 (1946).

promotion, or backpay. Such hopes would be dashed in early 1946, however, when an awkward alliance of Southern Democrats and conservative Republicans, including Taft, slashed the Committee's budget, leaving just enough to liquidate its affairs.⁸

As lobbying efforts for and against a permanent and more powerful Fair Employment Practices Commission (FEPC) moved fair employment to the center of the American political stage, Taft's strategy was to press instead for a "voluntary" fair employment scheme that, like Roosevelt's Committee before it, vested a new federal commission with the power to receive and conciliate complaints, but otherwise lacked coercive powers. Anything more, Taft argued, would prove counter-productive in the delicate area of race relations. Taft's strategy derived its power from the peculiar political economy of the immediate post-war period. Referred to by allies and enemies alike as "Mr. Republican," Taft was the arbiter of a key voting bloc of a dozen northern Republican Senators on the key political issues of the day. Indeed, Taft's staunch refusal to support anything more than "voluntary" fair employment measures, when combined with the outright opposition of Southern Democrats to any bill that even mentioned civil rights, had proven just barely sufficient to defeat cloture votes during dramatic Senate filibusters in the previous Congress. All the while, Taft and his Republican allies seemed content to stand back as Democrats struggled to overcome the deepening sectional split within their ranks.⁹

The draft measure Taft put forward in 1946, however, was different from his previous offerings – and strikingly different from all other fair employment bills before or after. The bill's opening paragraphs carefully avoid-

ed creating any rights, instead establishing a "policy" against discrimination. The bill then provided for the creation of a five-member Fair Employment Practices Commission wielding a full complement of subpoena and investigatory powers. In each of these respects, it was not significantly different from many of the "voluntary" bills from before.

The clean break from past bills came in Section 9, titled "Preparation and Enforcement of Compulsory Plan." This Section directed the new Commission to make a "comprehensive study" of discrimination and prepare a "comprehensive plan" for eliminating discrimination. "Such plan," the bill continued, "may provide for additional employment throughout the area by increasing the number of persons of the group discriminated against to be employed by specified employers who employ more than fifty persons" and by requiring any union certified under federal labor law "to admit to membership persons of the group discriminated against."

The concluding paragraph of Section 9 and Section 10 provided the "teeth" that so thoroughly differentiated the bill from past bills. Once a compulsory plan had been in operation for at least six months, "any substantial failure" to implement the plan would trigger "compulsory enforcement." This would begin with a Commission order requiring that an employer "provide forthwith employment of specified character for the number of persons belonging to the group discriminated against" or that a union admit "members of such group." Any failure to comply with such an order, the bill continued, would result in the Commission's filing of a petition in federal court. Further, any person aggrieved by a failure of an employer or union to comply with a compulsory plan

8 ROBERT J. WEISS, *WE WANT JOBS!: A HISTORY OF AFFIRMATIVE ACTION* 39 (1997).

9 See Sean Farhang & Ira Katznelson, *The Southern Interposition: Congress and Labor in the New Deal and Fair Deal*, 19 *STUDS. AM. POL. DEV.* 1 (2005); REED, *supra* note 6, at 340.

could, after filing a written request with the Commission and waiting for 30 days, file suit in federal court to compel compliance.

Compared to previous Taft offerings, this new bill was shockingly broad. Unlike previous proposals, this one was fully enforceable, albeit after the various delays built into the scheme. Taft's scheme also provided individual claimants with more-or-less direct recourse to federal courts. Indeed, once a plan was in place, an individual needed only advise the Commission, wait 30 days, and then seek injunctive relief in court. Finally, its core provisions, centered as they were upon the creation of regional "comprehensive plans," seemed to contemplate widespread use of systemic, quota-based hiring.



One reason that the Taft proposal has not previously come to light¹⁰ is that Taft only privately communicated his offer to the National Council for a Permanent FEPC ("National Council"), the leading national organization lobbying in the fair employment area, and the National Council quietly and unceremoniously rejected it. Neither side, it seems, was willing to make public its consideration of the measure. But the National Council's decision to reject Taft's offer also occasioned heated internal deliberation, and it is here that the archival record offers a rare glimpse of the complex coalitional politics of civil rights at mid-century.

Founded by black labor leader A. Philip

Randolph in 1943, the National Council exemplified the broad set of interests that came to march beneath the fair employment standard in the immediate post-war period.¹¹ Among its member groups were more than a hundred different organizations, including unions like Randolph's all-black Brotherhood of Sleeping Car Porters, the United Auto Workers of the Congress of Industrial Organizations (CIO), and the International Ladies' Garment Workers Union of the American Federation of Labor (AFL); race advancement organizations such as the National Association for the Advancement of Colored People (NAACP) and the Urban League; religious groups such as the American Jewish Congress and the Catholic Interracial Council; and liberal civic groups like the Americans for Democratic Action. The real decision-making power, however, lay with the Council's Policy Committee, where only the more influential member organizations held seats. And it was here that the Taft proposal had to gain traction if it was ever to see the light of day.

As the Policy Committee members worked their way through the provisions of Taft's offer, Randolph was the first to weigh in, by way of a starkly worded telegram.¹² "Since no FEPC bill can get thru without bipartisan support," he pleaded, "I strongly urge acceptance of amended Taft bill since it has enforcement and investigatory powers." Moreover, Randolph conceded that it was not "just what Council and cooperating organizations may want" but was nonetheless

10 The sole mention of the Taft plan in any writing is the following sentence in KESSELMAN, *supra* note 7, at 39: "When Randolph suggested that the National Council accept a watered-down FEPC bill sponsored by Senator Robert A. Taft of Ohio to salvage something out of the 1946 legislative drive, White and Carey vigorously rejected the proposal, giving temporary credence to the National Council's claim that the responsibility for leadership had been broadened." No discussion follows.

11 KESSELMAN, *supra* note 7, at 29–32. On the rise of "racial liberalism" through groups like the National Council, see MARK BRILLIANT, *COLOR LINES: CIVIL RIGHTS STRUGGLES ON AMERICA'S "RACIAL FRONTIER," 1945–75* (2006), *esp.* Chapter One.

12 Telegram from A. Philip Randolph to Walter White (May 21, 1946) (NAACP Papers, Library of Congress, Part II, Box A258).

"a step in right direction." "Have spent some time in Washington lobbying for FEPC and I am familiar with political problems involved," Randolph concluded. "It is my considered judgment that it would be tragic blunder not to push Taft bill now with all our forces since there appears to be some possibility of getting passed. Kindly advise Council your reaction immediately."

Over the next two days, a series of telegrams, letters, and phone messages made their way into National Council headquarters.¹³ Two of these were guarded but favorable. The position of Charles Houston, perhaps the leading civil rights lawyer of his day, was that "we should accept compromise if it is best we can get since bill would at least establish policy." "Must however be assured," he continued, "of enactment this Congress." Another leading civil rights lawyer, Thurman Dodson, arrived at a similar conclusion: despite the bill's "terribly emasculated" state, he would "reluctantly consent to the proposal if we had a guarantee of its passage."

The remaining responses, however, were uniformly negative. Walter White, head of the NAACP, announced that the bill was "so weak it is tantamount to throwing in sponge." He continued, "Bill unsatisfactory in that it does not contemplate redress individual grievances but predicated upon discrimination against groups." When the "year or eighteen months" required to negotiate a compulsory plan was combined with the six-month waiting period prior to court action, the resulting delay would "virtually insure issue being dead one by that time." White also noted that Congress was due to adjourn in July,

leaving little time to enact even this "greatly weakened compromise measure." "Regret we cannot go along with you," he concluded.

Equally dismissive was the response of organized labor. The AFL's Boris Shishkin echoed many of the NAACP's concerns, objecting above all to the group ontology of the remedial scheme. "The individual is reached secondarily and may or may not be reached," Shishkin asserted, since the individual "does not have the right to go to court until the plan is in effect." Shishkin also decried the "time lag" built into the scheme, and then finished with a flourish: "If you deal with a right, you deal with the right of a man. [With the Taft bill, y]ou are improving a condition perhaps, but you are not making employment opportunity the basic right of an individual." A telegram from James B. Carey, Secretary-Treasurer of the CIO, was less detailed but just as emphatic in its conclusion: "Cannot endorse contents of amended Taft Bill. Believe we should push principles original program."

The remaining voices in the archival record were equally opposed. "This bill," George Hunton of the Catholic Interracial Council charged, "is a detailed procedural survey only," and its acceptance would make Council members "traitors to the people supporting us." A.S. Makover, a Baltimore lawyer consulted by the NAACP, noted the asymmetrical treatment of employers and unions, since increasing "the number of persons" discriminated against would not ensure that an aggrieved was actually given a job, but individuals denied union membership would be specifically admitted. Moreover, Makover

13 See Telegram from Leslie Perry to Walter White (May 22, 1946) (NAACP Papers, Library of Congress, Part II, Box A258); Memorandum, Reactions to Proposed Taft Bill (May 22, 1946) (NAACP Papers, Library of Congress, Part II, Box A258); Telegram from Walter White to A. Philip Randolph (May 22, 1946) (NAACP Papers, Library of Congress, Part II, Box A258); Telegram from James B. Carey, Secretary-Treasurer of the CIO to Walter White (May 24, 1946) (NAACP Papers, Library of Congress, Part II, Box A258); Letter from A.S. Makover to Anna Arnold Hedgeman (May 23, 1946) (NAACP Papers, Library of Congress, Part II, Box A258).

expressed concern about the plan's judicial review provisions, citing "past experience in other legislation" and warning of "the emasculation of any good in any plan proposed by the Commission by some of the District Court judges."



What impelled Taft to change course in 1946 and propose a fully enforceable fair employment scheme? The reasons surely include many of the same forces that drove fair employment to the top of the post-war political agenda in the first place: widening public concern about the deterioration of American race relations in response to a spate of war-time race riots; the moral authority conferred by African-American contributions to the war effort; the obvious disjunction between the political values projected abroad and those practiced at home as the Cold War chill set in; and a rapidly shifting electoral landscape with the migration of some three million southern African-Americans to pivotal northern industrial states. On the latter, Taft may have been looking to shore up his popularity among black voters as he eyed a presidential run in 1948. Firmer answers than these, however, are hard to come by, for Taft's own papers at the Library of Congress make no mention of his offer.

The mix of factors that explains the mostly negative reaction of various members of the fair employment coalition to the Taft offer is no less certain. As White at the

NAACP argued, there were strong pragmatic reasons that militated against throwing coalition support behind a new scheme so late in the congressional session. The Taft episode also came at a liminal moment in American political development. The *Lochner*-ism of recent decades meant that most regulatory architects saw courts as a brake on, not a spur to, social and political change.¹⁴ When combined with a cresting New Deal faith in administrative governance, this may have been enough to drive civil rights groups away from the hybrid agency-court Taft proposal and towards the more agency-centered FEPC approach.

There is strong evidence that political-organizational considerations played a role as well. The NAACP had long taken heat for its middle-class tenor and elite-litigation focus.¹⁵ Its preference for an individualized, agency-centered model without the Taft scheme's delays may have reflected an organizational imperative to support a scheme that could deliver rapid and concrete relief to particular complainants rather than more elite-level litigation. Similarly, much has been written documenting the famously ambiguous relationship of organized labor to the fair employment movement as stemming from pervasive rank-and-file racism and the differing economic incentives that faced the low- and semi-skill industrial unions of the CIO and the higher-skill and more exclusive craft unions of the AFL.¹⁶ But it is also clear that much of labor's support for fair employment was instrumental, conceived as much

14 The Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), has come to symbolize the anti-regulatory stance of the pre-New Deal judiciary. See Gary D. Rowe, *Lochner Revisionism Revisited*, 24 LAW & SOC. INQUIRY 221 (1999).

15 See, e.g., Risa Lauren Goluboff, 'Let Economic Equality Take Care of Itself': The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s, 52 UCLA L. REV. 1393, 1402-13 (2005); Beth Tompkins Bates, A New Crowd Challenges the Agenda of the Old Guard in the NAACP, 1933-1941, 102 AM. HIST. REV. 340 (1997).

16 See, e.g., DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 89-90, 95-97 (2001).

as an opportunity to win over black voters and fend off attacks on the New Deal state by Southern Democrats and conservative, Taftite Republicans as it was a principled stance on equality.¹⁷ Enactment of the Taft plan would have both exposed union locals to regulation and likely spelled the end of what was serving as a fruitful rallying point for labor's political organizing efforts.



Whatever its precise cause, the National Council's rejection of the Taft offer would critically shape the future course of the fair employment movement and perhaps post-war American law and politics more broadly. Fall-out from the Taft episode led to changes in leadership at the National Council and, after a careful effort to obtain buy-in from member groups, the final crystallization of the agency-centered FEPC model as the consensus choice of the fair employment coalition.¹⁸ The Taft episode also marked a pronounced centralization of the fair employment movement as a whole, including much more aggressive National Council oversight of state-level legislative campaigns.¹⁹ What emerged from this dual process of crystallization and centralization in the years after 1946 was an ironclad consensus in favor of the administratively enforced and highly individualized FEPC approach over other, more court-centered or

systematic alternatives. Ultimately, 21 of 23 states that enacted fully enforceable fair employment laws prior to 1964 created purpose-built bureaus to enforce them. No state enacting fair employment legislation opted for anything resembling the Taft plan.²⁰

If the short-run consequences of the National Council's rejection of the Taft proposal were significant, then the long-term consequences of that rejection are incalculable. It is clear, for instance, that the Taft plan would have yielded far more vigorous efforts to regulate job discrimination than anything seen until the 1970s, when expansive judicial interpretations of Title VII and the advent of affirmative action programs in public contracting transformed American fair employment law into a potent regulatory scheme. Fair employment groups would not be successful in their efforts to enact a federal-level fair employment law until 1964 – a full 18 years later – and even then would fail to win creation of a centralized administrative body armed with cease-and-desist authority. Similarly, in the years following the Taft episode, the delays that accompanied the adjudication of complaints by the fair employment practices commissions created by many states – and that, in 1946, were already operating in New York, New Jersey, and Massachusetts – often rivaled the year-and-a-half to two years that the NAACP worried would elapse prior to court enforcement of a compulsory plan under the Taft

17 KEVIN BOYLE, *THE UAW AND THE HEYDAY OF AMERICAN LIBERALISM, 1945–1968* 5 (1995); HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE* 186–87 (1978).

18 See Meeting Minutes of Policy Committee (November 8, 1946) (McLaurin Papers, Schomburg Center – New York Public Library, Box 7); Memorandum from Roy Wilkins to Walter White (November 20, 1946) (NAACP Papers, Library of Congress, Part II, Box A258); Meeting Minutes of Legal Committee (November 26, 1946) (McLaurin Papers, Schomburg Center – New York Public Library, Box 7).

19 See, e.g., KESSELMAN, *supra* note 7, at 57, 67; Letter from Albert J. Weiss to “Friend” (December 21, 1949) (NAACP Papers, Library of Congress, Part II, Box A256).

20 David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: State Fair Employment Practices Bureaus and the Politics of Regulatory Design, 1943–1964* 173–79 (unpublished Ph.D. dissertation, Yale Univ., 2005).

scheme.²¹ Finally, the concern that the Taft measure was insufficiently focused on individual-level remedies stands in stark contrast to a pervasive criticism of the state commissions in subsequent years: that the individual-complaint method at the core of the FEPC model hampered efforts to move more than trivial numbers of minorities into labor markets and unions.²² All of this compels the conclusion that implementation of the Taft plan would have improved the labor market position of African-Americans.

The most arresting counterfactual possibilities, however, go far beyond increased enforcement vigor and labor-market gains for African-Americans. For instance, the Taft scheme would have been the most significant policy intervention on behalf of African-Americans since Reconstruction. Its symbolism alone would have provided a powerful boost to early civil rights mobilizations a full eight years before *Brown v. Board of Education*,²³ and the Mississippi murder of Emmett Till a year later, catalyzed the movement.

The Taft plan's explicit authorization of quota-based relief could also have altered the trajectory of federal equal protection jurisprudence by forcing a much earlier reckoning with the constitutionality of preferential treatment under the Fourteenth Amendment. That issue would not be squarely before the

Supreme Court until more than 30 years later, in the 1978 *Bakke* case.²⁴ A decision upholding the Taft scheme might have made *Bakke*, as well as *City of Richmond*, *Adarand*, and the recent *Bollinger* cases, relatively straightforward as a precedential matter, reducing the political salience of affirmative action.²⁵ A contrary decision invalidating the systemic components of the Taft plan might have foreclosed development of the affirmative action programs at issue in these later cases in the first place. Either ruling could have excised a highly divisive issue from American politics in later decades.

This latter point hints at perhaps the most sweeping counterfactual possibility of all, for it is not a stretch to suggest that enactment of the Taft plan in 1946 would have fundamentally altered the post-war American party system. Indeed, Taft's apparent willingness to support a wide-open, highly systemic remedial scheme, and the rejection of that scheme by coalition members because it was insufficiently individualized, reverses the partisan valence of much recent debate over affirmative action. If Taft's offer was a legitimate one – and biographies of Taft himself, as well as his status as “Mr. Republican” in the Senate chamber, suggest no reason to believe he could not deliver the necessary votes – then Republicans stood ready to put into place a fully enforceable scheme

21 Herbert Hill, *Twenty Years of State Fair Employment Commissions: A Critical Analysis with Recommendations*, 14 *BUFF. L. REV.* 22, 24, 34 (1964–65); Elmer A. Carter, *Practical Considerations of Anti-Discrimination Legislation – Experience Under the New York Law Against Discrimination*, 40 *CORNELL L.Q.* 40, 53 (1955).

22 See, e.g., *Symposium, Toward Equal Opportunity in Employment: The Role of State and Local Government*, 14 *BUFF. L. REV.* 1 (1964); DUANE LOCKARD, *TOWARD EQUAL OPPORTUNITY* (1968), esp. Chapter 3; PAUL H. NORGREN & SAMUEL E. HILL, *TOWARD FAIR EMPLOYMENT* (1964), esp. Chapter 6; Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 *HARV. L. REV.* 526 (1960); Albert L. Alford, *FEPC: An Administrative Study of Selected State and Local Programs* (unpublished Ph.D. dissertation, Princeton Univ., 1953).

23 347 U.S. 483 (1954).

24 *Regents of the Univ. Cal. v. Bakke*, 438 U.S. 265 (1978).

25 *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

that would have advanced the clock by more than twenty years in providing for a systemic, group-based approach to remedying job discrimination.²⁶ At the dawn of American fair employment law, it was the fair employment coalition, not Republicans, that shied away from systemic remedies and insisted on the creation of individualized rights to be administratively enforced via case-by-case adjudication of complaints.

Here, the Taft episode also implicates a well-known storyline among students of post-war American politics: that the unraveling of the New Deal coalition flowed, at least in part, from the quickening of the civil rights movement after 1960 and the development by Republicans of a so-called “Southern strategy” that capitalized on a growing white backlash against anti-discrimination policies in employment, housing, and education.²⁷ How might enactment of the Taft plan have changed matters? One view is that the systemic remedies called for by the Taft plan – combined with an emboldened civil rights movement – would have spawned an earlier backlash. But this is by no means a given. A more aggressive approach to job discrimination might have just as easily defused the situation. Observers in 1964 believed as much, arguing that aggressive early implementation efforts by state FEPCs would have ensured that any backlash was “stimulated and met between 1945 and 1950,” setting “a different pattern ... for the administration of anti-bias legislation generally.”²⁸ On

this view, the opening of labor markets to black workers was a race against time before the civil rights movement turned to the more emotional questions raised by the desegregation of housing and schools.

Perhaps most important of all, enactment of the Taft measure might have dampened the later politics of backlash, either by preventing civil rights policy from traveling down the bitterly partisan road that it did, or perhaps even making Republicans, not Democrats, the party of civil rights going forward. Neither possibility is as implausible as it sounds. Race had been swept under the carpet during the period of Republican ascendance that stretched roughly from McKinley to Hoover, and even during the New Deal itself.²⁹ This decades-long silence on race issues meant that the partisan mantle on civil rights was largely up for grabs.

Further, while we are conditioned to think of African-Americans as thoroughly aligned with the Democratic party – in the 2000 and 2004 presidential elections, more than 90 percent of blacks voted Democratic – the movement of black voters away from the “party of Lincoln” and towards the Democratic party was far from complete in 1946. This was surely the case in the liberal Northeast, where moderate Republicans like New York Governor Thomas Dewey remained out front on civil rights issues, and in key cities like Philadelphia where Republican machines continued to hold power.³⁰ In the 1948 presidential election that pitted Tru-

26 See JAMES T. PATTERSON, *MR REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT* (1972). On advancing the clock, the Taft plan resembles in some of its particulars proposals as recent as 1991. See, e.g., David Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1654–56 (1991).

27 See generally THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1992).

28 Joseph B. Robinson, *Comment*, 14 BUFF. L. REV. 121, 123 (1964–65).

29 PAUL FRYMER, *UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA* 53 (1999); NANCY WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* xiv (1983).

30 Oscar Glantz, *Recent Negro Ballots in Philadelphia*, in Miriam Ershkowitz & Joseph Zikmund II, eds.,

man against Dewey, held just four months after President Truman integrated the military and civil service, and just one year after his high-profile Commission on Civil Rights set forth an aggressive civil rights agenda in *To Secure These Rights*, Truman could not muster more than 70 percent of black votes nationwide. (Just eight years later, in 1956, Democratic candidate Adlai Stevenson could garner only 60 percent in his second loss to Eisenhower.³¹) Enactment of the Taft plan two years before the 1948 election might have undercut Truman's civil rights efforts, stanching the flow of black voters away from the Republican party, putting Dewey in the White House in the short-term, and making racial appeals of the later, "Southern strategy" sort politically risky over the long-term.

Finally, because it retained strong judicial control over implementation, the Taft plan might have halted the growing partisan bent of American civil rights politics by unhitching Republican opposition to the New Deal administrative state from the fair employment issue. Here is a weakness of the few existing histories of early American fair em-

ployment law, which have too often strained to see in early legislative debates the development of a rhetorical template of racial reaction centered around quotas, preferential treatment, and reverse discrimination.³² Missing in this rush to uncover the historical antecedents to contemporary affirmative action debates, however, is an equally critical point: the choice of the FEPC model at the dawn of the fair employment movement delivered that movement – and the early civil rights movement more broadly – into the teeth of a larger, and mostly partisan, struggle over the legitimacy of the New Deal administrative state and its place within the post-war American legal and political order. If the Taft episode is any indication, Republican objections to fair employment regulation at the dawn of the movement were rooted at least as much in concerns about creeping administrative power as in race matters or racial preferences. Separating out regulatory concerns from civil rights issues might have further denied the partisan soil in which the later politics of backlash would take root and flourish.



BLACK POLITICS IN PHILADELPHIA 87 (1973); JAMES REICHLEY, *THE ART OF GOVERNMENT: REFORM AND ORGANIZATION POLITICS IN PHILADELPHIA* (1959).

31 For general discussion, see Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 34–37 (1994).

32 Anthony Chen, "This Law Would ... Result in the Hitlerian Rule of Quotas": *The Rhetoric of Racial Backlash and the Politics of Fair Employment Practice Legislation in New York State, 1941–1945* (forthcoming, J. AM. HIST., 2006); PAUL D. MORENO, *FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA, 1933–1972* (1999); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA* (1996).

A BILL

To establish a Fair Employment Practice Commission and to aid in eliminating discrimination in employment because of race, creed, color, or national origin.

1 Be it enacted by the Senate and House of Representatives of
2 the United States of America in Congress assembled, that this Act may be
3 cited as the "Fair Employment Practice Act."

4 FINDINGS AND DECLARATION OF POLICY

5 Sec. 2. The Congress hereby finds and declares--
6 (a) That the practice of denying employment opportunities
7 to, and discriminating in employment against, properly qualified
8 persons by reason of race, creed, color, or national origin is
9 contrary to the principles of freedom and equality of opportunity
10 upon which this Nation is built, is incompatible with the provisions
11 of the Constitution, forces large segments of the population

1 permanently into substandard conditions of living, foments
2 domestic strife and unrest, deprives the United States of the
3 fullest utilization of its capacities for production and defense,
4 substantially impairs and disrupts the market for goods in commerce,
5 and burdens, hinders, and obstructs commerce.

6 (b) That it is the policy of the United States to bring
7 about the elimination of discrimination because of race, creed, color,
8 or national origin in all employment relations which fall within the
9 jurisdiction or control of the Federal Government.

10 DEFINITIONS

11 Sec. 3. As used in this Act---

12 (a) The term "person" means an individual, partnership, asso-
13 ciation, corporation, legal representative, trustee, trustee in bank-
14 ruptcy, receiver, or any organized group of persons and includes any
15 agency or instrumentality of the United States or of any Territory or
16 possession thereof.

17 (b) The term "employer" means a person having in his employ
18 fifty or more individuals, or any other person acting in the interest
19 of such an employer, directly or indirectly.

20 (c) The term "labor union" means any organization in which
21 employees participate and which exists for the purpose, in whole or in
22 part, of dealing with employers, as above defined, concerning grievances,
23 or terms or conditions of employment.

24 (d) The term "commerce" means trade, traffic, commerce,
25 transportation, or communication among the several States; or between any
26 State or Territory, or the District of Columbia, and any place outside
27 thereof; or within the District of Columbia or any Territory; or be-

1 tween points in the same State but through any point outside thereof.

2 (e) The term "Commission" means the Fair Employment Practice
3 Commission created by Section 4.

4 FAIR EMPLOYMENT PRACTICE COMMISSION

5 Sec. 4. (a) There is hereby created a commission to be known as the
6 Fair Employment Practice Commission (hereinafter referred to as the
7 ("Commission")), which shall be composed of five members who shall be
8 appointed by the President, by and with the advice and consent of the
9 Senate. One of the original members shall be appointed for a term of
10 one year, one for a term of two years, one for a term of three years, one
11 for a term of four years, and one for a term of five years, but their
12 successors shall be appointed for terms of five years each, except that any
13 individual chosen to fill a vacancy shall be appointed only for the
14 unexpired term of the member whom he shall succeed. The President shall
15 designate one member to serve as chairman of the Commission. Any member
16 of the Commission may be removed by the President upon notice and hearing
17 for neglect of duty or malfeasance in office, but for no other cause.

18 (b) A vacancy in the Commission shall not impair the right
19 of the remaining members to exercise all the powers of the Commission
20 and three members of the Commission shall at all times constitute a
21 quorum.

22 (c) The Commission shall have an official seal which shall
23 be judicially noticed.

24 (d) Each member of the Commission shall receive a salary
25 at the rate of \$10,000 a year, and shall not engage in any other
26 business, vocation, or employment.

27 (e) When three members of the Commission have qualified

1 and taken office, the Committee on Fair Employment Practice estab-
2 lished by Executive Order Numbered 9346 of May 27, 1943, shall
3 cease to exist. All employees of the said Committee shall then be
4 transferred to and become employees of the Commission, and all
5 records, papers, and property of the Committee shall then pass into
6 the possession of the Commission.

7 (f) The principal office of the Commission shall be in
8 the District of Columbia, but it may meet and exercise any or all
9 of its powers at any other place and may establish such regional
10 offices as it deems necessary. The Commission may, by one or more of
11 its members or by such agents or agencies as it may designate, conduct
12 any investigation, proceeding, or hearing necessary to its functions
13 in any part of the United States.

14 (g) The Commission shall have power--

15 (1) to appoint such officers and employees as it deems
16 necessary to assist it in the performance of its functions;

17 (2) to cooperate with or utilize regional, State,
18 local, and other agencies and to utilize voluntary and uncompensated
19 services;

20 (3) to pay to witnesses whose depositions are taken
21 or who are summoned before the Commission or any of its agents or
22 agencies the same witness and mileage fees as are paid to witnesses
23 in the courts of the United States;

24 (4) to issue, from time to time, such regulations as
25 it deems necessary to regulate its own procedure and the appearance
26 of persons before it, and to amend or rescind, from time to time, any
27 such regulation whenever it deems such amendment or rescission

1 necessary to carry out the provisions of this Act;

2 (5) to serve process of other papers of the Commission,
3 at any place in the United States or any Territory or possession
4 thereof, either personally, by registered mail, or by leaving a copy
5 at the principal office or place of business of the person to be
6 served; and

7 (6) to make such technical studies as are appropriate
8 to effectuate the purposes and policies of this Act and to make the
9 results of such studies available to interested Government and non-
10 governmental agencies.

11 DUTIES OF THE COMMISSION

12 Sec.5. (a) It shall be the duty of the Commission to bring
13 about the removal of discrimination in regard to hire, or tenure, terms,
14 or conditions of employment, or union membership, because of race,
15 creed, color, or national origin,--

16 (1) by making comprehensive studies of such discrimina-
17 tion in different metropolitan districts and sections of the country and
18 of the effect of such discrimination, and of the best methods of
19 eliminating it;

20 (2) by formulating, in cooperation with other interested
21 public and private agencies, comprehensive plans for the elimination of
22 such discrimination, as rapidly as possible, in regions or areas where
23 such discrimination is prevalent;

24 (3) by publishing and disseminating reports and other
25 information relating to such discrimination and to ways and means for
26 eliminating it;

27 (4) by conferring, cooperating with, and furnishing tech-

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1 nical assistance to employers, labor unions, and other private and
2 public agencies in formulating and executing policies and programs
3 for the elimination of such discrimination;

4 (5) by receiving and investigating complaints charging
5 any such discrimination and by investigating other cases where it has
6 reason to believe that any such discrimination is practiced; and

7 (6) by preparing comprehensive plans as provided by
8 Section 9 hereof and enforcing the provisions of such plan.

9 (b) The Commission shall at the close of each fiscal year
10 report to the Congress and to the President describing in detail the
11 investigations, proceedings, and hearings it has conducted and their
12 outcome, the decisions it has rendered, and the other work performed
13 by it, and shall make such recommendations for further legislation as
14 may appear desirable. The Commission may make such other recommenda-
15 tions to the President or any Federal agency as it deems necessary or
16 appropriate to effectuate the purposes and policies of this Act.

17 INVESTIGATORY POWERS

18 Sec. 6. (a) For the purpose of all investigations, pro-
19 ceedings, or hearings which the Commission deems necessary or proper
20 for the exercise of the powers vested in it by this Act, the Com-
21 mission, or its authorized agents or agencies, shall at all reason-
22 able times have the right to examine or copy any evidence of any
23 person relating to any such investigation, proceeding, or hearing.

24 (b) Any member of the Commission shall have power to
25 issue subpoenas requiring the attendance and testimony of witnesses
26 and the production of any evidence relating to any investigation,
27 proceeding, or hearing before the Commission, its member, agent, or

11 agency conducting such investigation, proceeding, or hearing

2 (c) Any member of the Commission, or any agent or
3 agency designated by the Commission for such purposes, may administer
4 oaths, examine witnesses, receive evidence, and conduct investiga-
5 tions, proceedings, or hearings.

6 (d) Such attendance of witnesses and the production of
7 such evidence may be required, from any place in the United States or
8 any Territory or possession thereof, at any designated place of hearing.

9 (e) In case of contumacy or refusal to obey a subpoena
10 issued to any person under this Act, any district court of the United
11 States or the United States courts of any Territory or possession or the
12 District Court of the United States for the District of Columbia, within
13 the jurisdiction of which the investigation, proceeding, or hearing is
14 carried on or within the jurisdiction of which said person guilty of
15 contumacy or refusal to obey is found or resides or transacts business,
16 upon application by the Commission shall have jurisdiction to issue to
17 such person an order requiring such person to appear before the Com-
18 mission, its members, agent, or agency, there to produce evidence if so
19 ordered, or there to give testimony relating to the investigation, pro-
20 ceeding, or hearing; any failure to obey such order of the court may
21 be punished by it as a contempt thereof.

22 (f) No person shall be excused from attending and testi-
23 fying or from producing documentary or other evidence in obedience to
24 the subpoena of the Commission, on the ground that the testimony or evi-
25 dence required of him may tend to incriminate him or subject him to a
26 penalty or forfeiture; but no individual shall be prosecuted or sub-
27 jected to any penalty or forfeiture for or on account of any trans-

1 action, matter, or thing concerning which he is compelled, after
2 having claimed his privilege against self-incrimination, to testify
3 or produce evidence, except that such individual so testifying shall
4 not be exempt from prosecution and punishment for perjury committed
5 in so testifying.

6 DISCRIMINATION IN EMPLOYMENT BY THE FEDERAL GOVERNMENT

7 Sec. 7. The Commission shall make a study and investigation of
8 discrimination in regard to hire, or tenure, terms, or conditions of
9 employment, in the departments and agencies of the Federal Government
10 because of race, creed, color, or national origin, and shall recommend
11 to the Congress a specific plan to eliminate it and such legislation
12 as it deems necessary to eliminate it.

13 INCLUSION OF ANTIDISCRIMINATION CLAUSE IN GOVERNMENT CONTRACTS

14 Sec. 8. (a) Every contract to which the United States, or any
15 Territory or possession thereof, or any agency or instrumentality of
16 any of the foregoing, is a party (except such classes of contracts as
17 the Commission may by regulation issue under section 10 exempt from the
18 scope of this section) shall contain a provision under which—

19 (1) the contractor agrees that during the period re-
20 quired for the performance of the contract he will conform to any plan
21 promulgated by the Commission under Section 5 hereof; and

22 (2) the contractor agrees that he will include a pro-
23 vision in each subcontract made by him for the performance of any work
24 required for the performance of his contract a provision under which
25 the subcontractor agrees—

26 (A) that during the period required for the
27 performance of the subcontract, the subcontractor will conform to any

11 plan promulgated by the Commission under Section 5 hereof; and

12 (B) that the subcontractor will include in
13 each subcontract made by him provisions corresponding to those re-
14 quired in subparagraph (A) and this subparagraph.

15 PREPARATION AND ENFORCEMENT OF COMPULSORY PLAN

16 Sec. 9. In accordance with the provisions of paragraph (2) of
17 Section 5, whenever the Commission finds that there is discrimination
18 against any particular group by reason of race, creed, color, or
19 national origin in any region or area or by any common carrier, it
20 shall make a comprehensive study of such discrimination and of the
21 best manner in which employment of persons in such group can be made
22 adequate and nondiscriminatory. It may then prepare a comprehensive
23 plan by which such employment would be increased in amount and improved
24 in character so that there may no longer be such discrimination. Such
25 plan may provide for additional employment throughout the area by in-
26 creasing the number of persons, of the group discriminated against to
27 be employed by specified employers who employ more than fifty persons,
by encouraging the formation of new enterprises to give increased em-
ployment, by requiring any labor union which is certified under the
National Labor Relations Act, and also the National Mediation Board,
as a representative of employees to admit to membership persons of the
group discriminated against so that the rules of the union shall in no
way prevent full employment opportunities for the members of such group,
and by all other means which seem to the Commission helpful in securing
the necessary result.

When such plan has been completed, it shall be publicly pro-
mulgated in the area affected and copies shall be sent to all persons

1 directly affected thereby. Within sixty days thereafter, any person
2 may file a protest with the Commission against the plan or against
3 any special feature of the plan, and the Commission shall give hearings
4 to those who file protests. After such hearings, the Commission shall
5 further consider the plan and may proceed to adopt it as the official
6 plan of the Commission, either in its original form or with such amend-
7 ments as may result from the aforesaid hearings.

8 After such plan has been adopted, it shall be the duty of all
9 persons affected thereby to put such plan into effect.

10 If, after six months, the Commission finds that there is any sub-
11 stantian failure to put such plan into effect and that discrimination
12 still continues against any group or groups with regard to employment
13 in such region or area or by such common carrier, the Commission may de-
14 clare that it is necessary to proceed with a compulsory enforcement of
15 such plan. Thereupon, the Commission may issue an order (1) to any
16 employer who employs more than fifty persons, requiring such employer
17 to provide forthwith employment of specified character for the number
18 of persons belonging to the group discriminated against, as provided
19 by the plan, with due allowance for the total employment permitted by
20 the then condition of his business, and (2) to any labor union which
21 discriminates against members of such groups requiring such labor union
22 to permit the admission of members of such group as members of such union,
23 so that there may be no hindrance to their employment by the rules of
24 such union. If the order is not promptly complied with, the Com-
25 mission may apply to the United States District Court for the enforce-
26 ment thereof. The Court shall have jurisdiction to consider questions
27 of fact and of law, questions relating to the reasonableness of the

1 plan and the particular provision thereof sought to be enforced, and
2 allother matters relating thereto; and all persons who might be
3 affected by any order which the Court might enter shall have the right
4 to be heard and present evidence regarding the facts of the alleged
5 discrimination or the efficacy or reasonableness of the plan or order
6 designed to eliminate same. The findings of the Commission as to the
7 facts shall be conclusive unless it appears to the satisfaction of the
8 Court that the findings of fact are not supported by competent, material
9 and substantial evidence. The Court after hearing and submission may
10 approve the plan and the particular order sought to be enforced, or it
11 may otherwise modify the plan or order so as to establish a reasonable
12 method of eliminating any discrimination by the employer or the union
13 which the Court may find to exist against any group of workers because
14 of race, creed, color, or national origin.

15 Sec. 10. Any person aggrieved by the failure of the employer or
16 union to obey the cease and disist order issued by the Commission may
17 file written request to the Commission to apply to the United States
18 District Court for enforcement of its order as provided in Section 9.
19 If the Commission does not make application to the Court within thirty
20 days after receipt of the request and if the cease and dis^eist order has
21 not at that time been complied with, the person aggrieved may apply to
22 any United States District Court having jurisdiction as provided in
23 Section 9, joining the Commission and the employer or union against whom
24 the order is directed, to compel the Commission to seek enforcement of
25 its order. If the Court finds that the Commission has unreasonably
26 failed or delayed in seeking enforcement of its order it shall proceed
27 with the case as if it had originally been brought by the Commission

1 with costs taxed against the Commission.

2 Sec. 11. In case the Commission shall find after notice and hear-
3 ing that discrimination exists in employment or conditions of employment,
4 in the service of the Federal Government or any territory or dependency
5 thereof, against any group of workers because of race, creed, color,
6 or national origin, it shall proceed first by conciliation to attempt
7 to eliminate such discrimination. If conciliation fails the Commission
8 shall refer the matter to the President or to Congress for appropriate
9 action.

10 SEPARABILITY CLAUSE

11 Sec. 12. If any provision of this Act or the application of such
12 provision to any person or circumstance shall be held invalid, the re-
13 mainder of such Act or the application of such provision to persons or
14 circumstances other than those to which it is held invalid shall not be
15 affected thereby.

16 WILLFUL INTERFERENCE WITH COMMISSION AGENTS

17 Sec. 13. Any person who shall willfully resist, impede, or inter-
18 fere with, any member of the Commission or any of its agents or agencies
19 in the performance of duties pursuant to this Act shall be punished by
20 a fine of not more than \$5,000 or by imprisonment for not more than one
21 year, or both.

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24 thereof, against any group of workers because of race, creed, color,
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