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Neil R. McMillen
University of Southern Mississippi, Neil.McMillen@usm.edu

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BELTWAY WARRIORS: THE SUBPRESIDENCY vs.
JIM AND JANE CROW

Neil R. McMillen


Include Hugh Davis Graham among those scholars who believe that history, even civil rights history, can be written from the top down. His kind of inside-the-beltway administrative study, as he acknowledges, has been out-of-fashion in recent decades. Influenced by the sensibilities of the 1960s, and by forces as disparate as the English working-class historiography of E. P. Thompson and computer-based research methodology, American historians since the 1970s have generally emphasized social over political history, studies of community activism over those of public policy formation and implementation. As scholarly interest in national political elites waned, civil rights historians focused on the movement: initially on the more dramatic southern crusades of the major protest organizations and the charismatic figure of Martin Luther King, Jr., and then increasingly in the 1980s on the unsung local black leadership that mobilized and sustained the grassroots freedom struggle. Except for such exemplary studies as Carl Brauer’s John F. Kennedy and the Second Reconstruction (1977) and Steven F. Lawson’s Black Ballots (1976) and In Pursuit of Power (1985)—and despite a recent surge of interest in “policy history”—the more notable historical analyses of the black rights revolution have been written from “the bottom up,” from the vantage point of the excluded.

The resulting portrait of the civil rights years, however revealing, is incomplete. Now, with the advantage of “a generation of perspective between us and the 1960s” and a newly opened “mother lode of documents produced by the decision makers,” Graham directs his inquiry to the “other side of the battle for civil rights,” to a “policy revolution” that was made in Washington by national elites (p. 481). In this book he tells the story of “a rare event in America: a radical shift in national social policy.” He is sensitive to the linkage between social movements and public policy, and he understands that the precondition for this “paradigm shift in social policy and administration” was
a broader social revolution—"the black civil rights movement that surged up from the South, followed by the nationwide rebirth of the feminist movement" (p. 3). But Graham's interest here centers almost exclusively on Washington insiders, on top-level executive and judicial policy formulators, congressional deal makers, and bureaucratic infighters, and particularly on those otherwise obscure but remarkably autonomous mandarins of the "subpresidency" and the "permanent government" who implement and just as often, as he reveals, subvert the congressional will. Although it addresses broader issues of civil rights, including the issues of gender discrimination and voting rights, *The Civil Rights Era* is essentially a history of the origin and development of the Equal Employment Opportunity Commission (EEOC) and of how this regulatory agency, with the assistance of the Warren and Burger courts, the civil rights lobby, and even the Nixon Administration, fundamentally transformed federal employment policy from one of color-blind egalitarianism into one of color-conscious affirmative action. The book's great strength is to be found in the depth and intelligence of its analysis of the full cycle of federal policy, from the formulation and enactment of employment law to the more obscure, complicated, and ultimately more significant phases of implementation.

Appearing as it does amid a conservative anti-affirmative action counteroffensive—within weeks of the veto of what President Bush called the "quota bill" of 1990—this volume could not be more timely. Professor of History and Policy Sciences at the University of Maryland, Baltimore County, and author most recently of a revealing study of federal education policy in the 1960s, Graham has an unsurpassed understanding of executive agency behavior and history. In *The Civil Rights Era* he has written a book notable for its prudent, credible insights and its calm detachment in pursuit of a subject that seems to invite little but strident advocacy and opposition, for its command of the bewildering mass of manuscript materials in federal archives and presidential libraries and of a virtual mountain of secondary literature, much of it the work of nonhistorians, and not least for its analytic clarity, its anecdotal riches, and its exhaustive exploration of a complicated and vitally important subject.

More is the pity! For this massive, daunting work of many pages, small print, seemingly infinite detail, and languid prose will very likely not enjoy the wide readership it deserves. Graham's slice of civil rights history—overloaded with the names of myriad policy makers and with extended and carefully nuanced explanations of such "arcane entities" and "crucial obscurities" as Titles VI and VII, Section 5 preclearance and 707 suits, BFOQs (bona fide occupational qualifications), and a bewildering spate of executive orders including "wonderfully bureaucratic inventions like 'Revised Order No. 4'" (which should not be confused with "Order No. 4")—could well stagger all
but the sturdiest and most knowledgeable readers. He argues persuasively that these “gray contrivances of the statutory law and the bureaucratic imagination,” though less compelling, are probably more important “in the long run of policy continuity and its aggregated impact” (p. 8) than street crusades in Birmingham or ghetto riots in Detroit. Precisely because one is so persuaded, one wishes that Graham had found a way to write a more accessible policy history.

Graham organizes his book chronologically, naming its three major parts after the three presidents who served between 1960s and 1972. During these dozen years he finds unexpected continuities amid remarkable change. Unambiguously numbering himself among the “discontinuitarians,” he dismisses as “presentist and gloomy” the argument that the civil rights reforms of the 1960s were essential but not fundamental, that the overall black condition was little touched by reforms that were essentially formalistic and procedural rather than substantive. In his interpretation, “the civil rights movement stands out from the continuity of workaday government as a rare and stunning achievement of liberation” that “utterly destroyed the biracial caste system in the South” and that delivered impressive black gains in political participation, education, economic opportunity, and public opinion. While he understands that the reforms of the civil rights era produced “mixed results” in black economic life—“a booming black middle class and a devastated black underclass”—he nevertheless believes that the “iron grip” of discrimination and the “historic correlation between race and poverty” were broken, and that the era was marked by significant economic changes: “discontinuities of heartening magnitude” (pp. 450–54). “The events of the 1960s shattered the old mold,” Graham concludes, “and by 1972 the fundamental attributes of the new order were set in place” (p. 5).

More central to Graham’s argument than these generalities is his extended analysis of a “sea-change” in federal employment policy. He divides the twelve years after 1960 into two periods, what he calls the “two phases of the civil rights era.” In Phase I—the enactment phase which resulted in the Civil Rights Act of 1964 and the Voting Rights Act of 1965—Congress mandated a national policy of nondiscrimination, one premised on the individualistic ideal of personal liberty, equal opportunity, and “classical liberalism’s core command against discrimination” (p. 456). In Phase II—the implementation phase that took increasingly definitive shape during the years from 1966 to 1968, but that would not emerge full-blown until 1972—the executive enforcement agencies “fundamentally transformed” that mandate, moving the nation beyond the proscription of “mere” discrimination to a radically different policy of “preferential treatment for minorities,” a policy and program of affirmative action based on the collectivist idea of material equality, pro-
portional representation, and "new theories of compensatory justice and group rights" (p. 4).

Phase I rights, Graham emphasizes with a favorite gaming metaphor, were traditional "positive sum rights" of inclusion. Radical as they seemed to many in the early 1960s, they were nevertheless deeply rooted in the American creed and, in the abstract at least, fundamentally noncontroversial because they affirmed the rights of individuals to improve themselves through personal merit. Phase II rights approximated "a zero-sum game" (p. 116), commanding not a new age of perfect equity but a new "benign" inequity against some so that others, themselves the victims of past inequities, might overcome the weight of history and the inertia of institutional racism. They were controversial because they posited that rights inhered not in individuals but in groups, because they derived from a "race-triggered theory of compensatory justice that would necessarily penalize the innocent for the sins of their forebears" (p. 114).

Graham relates this policy evolution to a larger change occurring within the American administrative state: "a quiet revolution" in authority and power, one that had been determined more in the federal courts and the agencies of the permanent government than in the White House or the halls of Congress, and one that since 1965 has shifted government authority from elected officials to the appointed bureaucrats or "new social regulators." Suggestive though it is, Graham's consideration of this "massive, unanticipated, and largely unperceived" transfer of power to the regulatory agencies of the "subgovernment" is too brief to be fully convincing. But he leaves little doubt that the policy of affirmative action, as it was understood by 1972, was a product of neither congressional intent nor presidential initiative but of the "Weberian tendencies" of the relatively autonomous executive branch agencies to reinterpret imaginatively their legislative charters, refine their mission, and enhance their power to regulate. Stripped of its many subtleties, it is Graham’s contention that the EEOC, along with sympathizers in other executive agencies and particularly with the assistance of federal courts—and in defiance of the 1964 act's explicit statutory ban on compensatory quotas and racial-balance requirements—adopted an "effects based definition of discrimination" and transformed the meaning of equality from equal treatment to equal results (pp. 462-63).

Among Graham’s other significant contributions are his telling assessments of the "sex-race analogy" and of the relative continuity of policy and leadership emanating from the White House and the Supreme Court during a period otherwise notable for its striking change. Women’s rights, as Graham takes pains to demonstrate, figured importantly in policy deliberations of the civil rights era, but not until relatively late in the period did the issue of gender
equality win the same respect accorded that of race. The EEOC was a reluctant and belated convert to feminism, partly because the general public, including most women, tended to perceive civil rights in narrowly racial terms, partly because few policy makers understood the magnitude of sex discrimination, and partly because the women’s movement itself was torn by a class-based split that separated cultural feminists who defended special protective legislation for blue-collar and pink-collar women and egalitarian feminists who reflected business and professional women’s support for an Equal Rights Amendment. Although the EEOC eventually fought sex discrimination with “the same zeal and the same weapons” (p. 473) it devoted to race discrimination, Graham demonstrates that the paths to inclusion for women and blacks diverged sharply after 1965. Having healed their “ancient rift” and united under the banner of ERA, second-wave feminists embraced the equal rights doctrine just as the black rights establishment began to turn from it. Sometime during Phase II, “the two great engines of the civil rights movement passed metaphorically like trains in the night” (p. 474).

The court and the presidency, on the other hand, generally moved in tandem and the transition from Warren to Burger and from Kennedy-Johnson to Nixon was marked more by continuity than by change. Conservative expectations notwithstanding, the federal bench under Warren Burger, Graham argues, continued in the Warren Court tradition of expanding and extending the reach of social regulation; and in Griggs v. Duke Power Co. (1971) and similar test cases the high court “embraced the compensatory argument to justify . . . preferential treatment of minorities” (p. 461).

Much the same was true of Richard Nixon, who for all his political demagoguery, Graham believes, confirmed, legitimized, and made permanent the Kennedy-Johnson legacy in civil rights law in “the same way that Eisenhower had confirmed the New Deal—not by embracing it, but by accommodating to it” (p. 4). Of the three presidents, Graham admires Johnson the most, characterizing him as a “liberal incrementalist” possessed of “deep-seated resentment against . . . unfair handicaps” and “an almost total lack of [racial] bias” (p. 23). Calling LBJ the “unanticipated hero in this story,” he concludes that the Texas president “confronted his battles honestly, carried them aggressively to the Congress and the public, fought them courageously, and won most of them ” (p. 6). Distracted by Vietnam and burned by a firestorm of opposition to racial quotas, however, he retreated from a controversial plan to integrate Philadelphia’s discriminatory construction industry. Ironically, then, it was the “putatively more conservative” Nixon (p. 278) who completed Johnson’s failed Phase II initiative. The “real Nixon,” in Graham’s interpretation, was more than a quota-bashing southern strategist. He was also “the expedient and successful defender” of a revised and expanded Philadelphia
Plan (which mandated proportional minority hiring), the "quiet enforcer" of southern school desegregation, and the "architect of judicial empowerment for the EEOC" (p. 447).

Adumbrated as it is here, Graham's analysis may sound more conservative than it is. In fact, he is both evenhanded and ambivalent. He believes that, in deference to the conservative votes necessary for passage, the statutory language of 1964 was too restrictive and that the enforcement powers Congress expressly granted the EEOC were unequal to the task. A crippling legacy of discrimination, as he suggests, would not readily yield to a policy of "well-intentioned but 'mere' nondiscrimination" (p. 460). Yet Graham is also uneasy with what he thinks to be "the apparent illogic and illiberalism of fighting discrimination with counterdiscrimination" (p. 6). The question raised by "benign discrimination," as he says, is "a vital and unresolved question," one that "will continue because it is not resolvable through logic and evidence alone" (p. 462).

Indeed! In fact, though Graham's careful volume is likely to stand the test of time, the last chapter in the history of affirmative action remains to be written. Yale historian John Blassingame is currently at work on a study that is likely to be different both in tone and in emphasis. And, of course, "reverse discrimination" still resonates with undiminished controversy—and not simply in the campaign rhetoric of such bottom-feeders of the far right as Jesse Helms and David Duke. Despite current White House waffling on the issue of minority scholarships, affirmative action promises to figure in the Republican platform of 1992. Yet there is comfort here for liberals too. In the 1960s, as Graham has written, "a century of liberal thought and reform in racial relations" (p. 116) was fulfilled and equal rights became a settled legal issue; today even such opponents of the Civil Rights Act of 1964 as Ronald Reagan and George Bush resort to the language of egalitarianism in their attacks on such zero-sum mechanisms as preferential quotas and minority-conscious hirings.