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Book Review: The Longest Debate: A Legislative History of the 1964 Civil Rights Act. by Charles Whalen and Barbara Whalen.

Michael R. Belknap

National Endowment for the Humanities. One of the eight essayists, L. Peter Schultz, is described as "working for the National Endowment for the Humanities." The Endowment, its staff, and its grantees (and their editors) should, I think, be more careful to observe the proprieties and to avoid the appearance of backscratching in matters such as this.

In short, this volume offers less than it should. It has its strengths—the essays of Ceaser, Gwyn, and Wilson—but it all adds up to less than the sum of the parts. The best advice I could give a reader interested in the kind of institutional reform propounded here would be to take a look at James Sundquist's *Constitutional Reform and Effective Government*, published in 1986 by the Brookings Institution. It, too, suffers from some degree of institutional formalism and a neglect of extrainstitutional political processes, but it is far more knowing about the realities of policymaking and institutional life. In the battle of the Washington think tanks, score this round for Brookings.

THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT. By Charles Whalen[1] and Barbara Whalen.[2] Cabin John, Md.: Seven Locks Press. 1985. Pp. xx, 289. $16.95.

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For years lawyers and historians have needed a good history of the Civil Rights Act of 1964, which is probably the most important civil rights statute ever enacted by Congress. Scholars have chronicled the enactment of the less significant Civil Rights Acts of 1957,[4] 1960,[5] and 1968,[6] and the Voting Rights Act of 1965.[7] But the gi-

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4. *See* J. ANDERSON, EISENHOWER, BROWNELL AND THE CONGRESS (1964); R. BURK, THE EISENHOWER ADMINISTRATION AND BLACK CIVIL RIGHTS 204-26 (1984); S. LAWSON, BLACK BALLOTS 140-202 (1976).

5. *See* M. BELKNAP, FEDERAL LAW AND SOUTHERN ORDER 53-69 (1987); D. BERMAN, A BILL BECOMES A LAW (2d ed. 1966); S. LAWSON, *supra* note 4, at 220-49.

6. *See* M. BELKNAP, *supra* note 5, at 205-28; J. HARVIE, BLACK CIVIL RIGHTS DURING THE JOHNSON ADMINISTRATION 36-57 (1973); S. LAWSON, IN PURSUIT OF POWER 43-88 (1985).

7. *See* D. GARROW, PROTEST AT SELMA 31-132 (1978); S. LAWSON, *supra* note 4, at 307-25.

gantic piles of documents that record the progress of the 1964 measure through the legislative process have long intimidated potential historians of that law. Just reading the published Senate debates on an act that was filibustered for a record 534 hours promised to take years. Not until Charles and Barbara Whalen's *The Longest Debate* had anyone dared to attempt a legislative history of this statute. They deserve applause for undertaking such a herculean task. Unfortunately, the book that their labors have yielded is for a number of reasons disappointing.

Although neither trained as historians nor experienced in historical research, the Whalens have done a competent job of tracing the progress through Congress of the bill that became the Civil Rights Act of 1964. They follow H.R. 7152 from the House Judiciary Committee, through the House Rules Committee (chaired by that arch foe of civil rights legislation, "Judge" Howard Smith of Virginia), to passage on the House floor, then on through a seemingly interminable filibuster to victory in the Senate, back to the House again, and finally up to the White House, to be signed by President Johnson in the presence of legislators from both parties, Justice Department officials, and leaders of the civil rights movement, all of whom had helped to bring about its passage.

The Whalens' focus is perhaps a bit too narrow. A really complete history of the Civil Rights Act of 1964 would devote some attention to the bills introduced in the Senate that never reached the floor there, as well as to the House measure that was ultimately enacted.

They are careful, however, to relate the progress of the legislation that they do discuss to developments outside Congress. Pointing to the way that the nation reacted to the violence that segregationists used to resist civil rights demonstrations in Birmingham, Alabama, the Whalens assert that, "In the spring of 1963, events unleashed such a public clamor, such a torrent of indignation that, at last, the President and Congress were forced to confront the national disgrace of racial discrimination. The result was passage of the Civil Rights Act of 1964." Of course, that law was not enacted until after the president who introduced it, John F. Kennedy, had been assassinated. The Whalens also emphasize the impact of public reaction to Kennedy's death on what had been during its first session a notably unproductive 88th Congress. "Mourning the murder of the charismatic young president, Americans turned their wrath on the body of stubborn old men who had denied him his requests. Congress found itself in trouble with the people who really counted — the people at home." Their constituents prodded

reluctant legislators into enacting the civil rights bill. Particularly effective, the Whalens contend, was the lobbying done by church groups. It won over legislators from states where civil rights organizations had few members and also placed opponents of the legislation on the defensive with respect to what the clergymen effectively managed to define as a moral issue.[8]

The Whalens occasionally resort to a tired cliché; in describing Howard Smith's unsuccessful efforts to stave off defeat at the hands of insurgents in his own Rules Committee, for example, they report that "[t]he judge had gone down swinging." Generally, however, they write well. Typical is a sentence that brilliantly captures the situation created by more than a dozen weeks of southern filibuster against H.R. 7152: "On the Hill that Wednesday afternoon, as so often happened in the Senate, everyone was all talked out but no one knew how to stop." Particularly well-written are the Whalens' sketches of some of the principal characters in the congressional battle, especially Judge Smith, Representative William McCulloch, Representative Emanuel Celler, and Senator Mike Mansfield.

The authors also do a marvelous job of describing the drama of the lengthy legislative struggle. Their readers will share the "happiness and heartbreak" of Hubert Humphrey, the Senate floor manager of the bill, who learned, just as he was about to achieve the greatest triumph of his legislative career, that his son Robert had been stricken with cancer. Even more gripping is the picture that the Whalens paint of the dying Senator Clair Engel being pushed into the Senate chamber in a wheelchair to cast his vote to end the southern filibuster. "Engel, unable to speak, feebly lifted his hand three times and pointed toward his eye," they report. " 'I guess that means aye,' murmured the clerk." After the Senate vote for cloture, the reader shares a poignant moment with the leader of the defeated southern Senators, Richard Russell, and the lobbyist for the NAACP, Clarence Mitchell. As these two old adversaries, one representing a vanquished segregationist South and the other an advocate for the triumphant forces of the civil rights movement, left the Senate together

> Russell praised Hubert Humphrey for his fairness, his willingness to permit opponents of H.R. 7152 to have their say, and his refusal to use parliamentary tactics that might have embarrassed southern senators. Russell told Mitchell that without the lengthy floor fight which, thanks to Humphrey's patience, he and others were

8. In emphasizing the importance of lobbying by church groups, the Whalens have the support of historian Carl Brauer. He writes: "The clerical lobby would prove particularly valuable in winning over Congressmen and Senators from districts and states where blacks and labor groups lacked influence." C. BRAUER, JOHN F. KENNEDY AND THE SECOND RECONSTRUCTION 275 (1977).

able to wage, the bill would not be enforceable in the South. But, he felt, having seen their senators defeated in a fair legislative battle, Southerners would now accept Congress's verdict and abide by the law which would soon be enacted.

The Whalens provide some valuable insights into the legislative process. Charles, a former member of Congress, is somewhat cynical about the body to which he once belonged, characterizing it at one point as a "535-headed creature, whose strongest interest was self-preservation . . . ." Yet his years on Capitol Hill taught Whalen much about how the creature functions. He carefully explains such matters as how House committees went about "marking up" a bill in 1963 and what eight steps a bill had to go through to achieve passage by the Senate.

The Longest Debate also provides interesting insights into the particular legislative process that produced the Civil Rights Act. One factor which the authors highlight is the interrelationship between that statute and Kennedy's tax bill, which was also pending in Congress when he died. Representative Celler, who chaired the House Judiciary Committee, repeatedly stalled action on the civil rights measure in order to prevent the alienation of southerners, whose support the administration needed to secure enactment of the tax proposal.

The Whalens also include some excellent descriptions of how the sensibilities and personalities of legislators affected the progress of H.R. 7152 through the House and Senate. The book's first real high point is a discussion of Attorney General Robert Kennedy's disastrous appearance before a subcommittee of the House Judiciary Committee. During his testimony, Kennedy curtly informed Representative John Lindsay, a New York Republican, who had himself introduced a public accommodations measure even before the administration sent its legislation to the Hill, that his time was too valuable to be wasted reading bills submitted by members of Congress. "Kennedy's political instincts failed him," the Whalens observe. "His thoughtless remarks damaged his brother's bill, which would need 50 or 60 Republican votes to get through the House."

The Attorney General's gaffe forced the Justice Department to enter into negotiations with William McCulloch, the ranking Republican on the Judiciary Committee. McCulloch, a fellow Ohioan, is the hero of the Whalens' story. They relate how he worked with Justice Department leaders to construct a bill that Republican leaders could support. After Judiciary Committee Chair Emanuel Celler almost destroyed chances for passing the legislation by toughening it to the point where it could never have secured suffi-

cient votes, McCulloch rewrote it with Lindsay's assistance, helped Celler ram the revised version through their committee, and then held a series of meetings to reconcile the differences among his fellow Republicans. He also demanded and got from the administration, as the price of his support, a veto over any changes that might be proposed in the Senate. In this way, according to the Whalens, McCulloch prevented Lyndon Johnson and the Justice Department from trading away provisions adopted by the House in order to get southerners to halt their filibuster in the upper chamber. Thus, he saved the 1964 civil rights bill from being gutted, as its 1957 and 1960 predecessors had been.

The Whalens' treatment of Celler is as contemptuous as their description of McCulloch is laudatory. They characterize the venerable Brooklyn liberal as an inept schemer, whose Machiavellian maneuvering nearly killed the statute in its cradle. As the Whalens tell the story, Celler agreed to have a subcommittee which he controlled add to the Kennedy administration's bill a number of strengthening amendments demanded by civil rights lobbyists. He intended to get credit for supporting these additions, then use them for trading purposes with Republicans and southern Democrats on the full committee. To his surprise, rather than being whittled back as he anticipated, the strengthened bill nearly wound up being sent to the floor by a coalition of liberals, who liked the changes, and conservatives, who knew that these would offend so many members that the bill could not pass the House. McCulloch and lawyers from the Justice Department saved the day by fashioning a moderate compromise capable of being passed.

In addition to presenting Celler in an extremely unflattering light, the Whalens also deflate considerably the legend of Senate Minority Leader Everett Dirksen's miraculous conversion to the cause of civil rights. Dirksen's assistance was essential to supporters of the bill, for without it they lacked the two-thirds majority needed to halt the southern filibuster with cloture. At first he opposed H.R. 7152, objecting to both Title II (Public Accommodations) and Title VII (Equal Employment). Then in mid-May of 1964 he negotiated a compromise with the administration and Senate supporters of the legislation. More than that, Dirksen suddenly became an evangelistic champion of civil rights legislation, melodramatically proclaiming to reporters, "No army is stronger than an idea whose time has come." While this turnaround appeared as sudden and complete as a religious conversion, "[a]ctually Dirksen's conversion was no conversion at all. It was simply the last scene in a script whose ending he had written several months

before." The minority leader lacked the flexibility to make any significant changes in the House-approved bill. Yet he had to rewrite it in order to reassure the conservative members of his own party. At the same time, he had to do this in a way that would retain the substance of the original measure, or risk losing the backing of GOP liberals. His "conversion" was part of an elaborate flim-flam, the objective of which was to bring to the Senate floor as a loudly-heralded "Dirksen substitute" what was really the "old H.R. 7152 in disguise."

While excellent at analyzing the motives and maneuvers of congressional actors and at recreating the drama of the legislative struggle that produced an historic law, the Whalens have written a book which probably will fail to satisfy most scholars. Although Charles was able to draw on his congressional experience, neither he nor his wife has formal training in law or history. It shows. The book's first deficiency is that it lacks a bibliography. This might be tolerable if the notes were adequate, but they are not. The Whalens have included endnotes at the back of the book, but no numbers in the text to guide the reader to the source of particular material there. Instead, notes begin with a page number and a few words from somewhere on that page. Although they are apparently intended to clarify what is being documented, these confusing entries generally serve only to initiate frustrating hunts through the text in search of the few words that will link an endnote to the passage that it documents. Another disturbing aspect of the Whalens documentation is the fact that they occasionally make assertions about what particular individuals were thinking, which could not possibly be based on any source they cite in their notes.

These faults make assessing their research difficult. So does the fact that they do not know how to cite properly material in the White House Central Files at the Kennedy and Johnson presidential libraries. So far as one can determine, however, the Whalens appear to have consulted most of the appropriate manuscript collections in those repositories (the principal exception being the papers of Assistant Attorney General Burke Marshall at the Kennedy Library). They have also travelled the country from Athens, Georgia to Minneapolis, Minnesota, doing research in the collections of Richard Russell, William McCulloch, Everett Dirksen, Hubert Humphrey, the Leadership Conference on Civil Rights, and the NAACP. In addition, the Whalens have made extensive use of oral histories and have interviewed many of the principal actors in the H.R. 7152 drama. They have also exploited unpublished as well as published congressional records.

While their primary research seems generally sound, their secondary research is inadequate. They have managed to overlook the single most obvious book on their subject, Carl M. Brauer's *John F. Kennedy and the Second Reconstruction* (1977). Although discussing how Howard Smith's efforts to defeat H.R. 7152 led the House to add to the list of types of employment discrimination forbidden by Title VII a prohibition of any discrimination based on sex, they fail to cite Brauer's important article on that subject.[9] The Whalens apparently did not peruse Schlesinger's *Robert Kennedy and His Times* (1978), and while citing most of the major biographies of John Kennedy, they seem to have examined none of those on Lyndon Johnson. They discuss the civil rights record of President Dwight Eisenhower, yet fail to cite the best work on that subject.[10] Nor do the endnotes offer any hint that they are aware of the major works on the principal civil rights organizations that were available when they wrote.[11]

It may seem a bit pedantic to fault nonprofessionals for their lack of familiarity with the scholarly literature of American history, but the Whalens' inadequate secondary research has produced a book that is marred by factual errors. For example, they erroneously attribute passage of the 1960 civil rights act to publicity about lunch counter sit-ins[12] and claim that the 1957 act was due to public indignation over the Montgomery bus boycott.[13] Their lack of historical expertise is particularly evident in their Introduction, which is a sort of background chapter. They misquote the Emancipation Proclamation[14] and offer generalizations about Reconstruction[15]

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9. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the Civil Rights Act*, 49 J. SOUTHERN HIST. 37 (1983).

10. *See* R. BURK, *supra* note 4.

11. *See, e.g.*, C. CARSON, IN STRUGGLE (1981) (on the Student Non-violent Coordinating Committee); A. MEIER & E. RUDWICK, CORE (1973) (on the Congress of Racial Equality); H. ZINN, SNCC (1965) (also on the SNCC); E. Schmeidler, Shaping Ideas and Action (1980) (U. of Mich. Ph.D. dissertation on CORE, SNCC, and the Southern Christian Leadership Conference).

12. *Contra* M. BELKNAP, *supra* note 5, at 56-59, 64-66; S. LAWSON, *supra* note 4, at 221-22, 231-32, 236, and 247.

13. *Contra* S. LAWSON, *supra* note 4, at 142-54, 165-66, 199-200; R. BURK, *supra* note 4, at 206-10, 218-19, 225-26.

14. According to the Whalens, the Proclamation stated simply: " 'All persons held as slaves . . . shall be . . . forever free.' " The most grievous distortion here is their failure to indicate that it applied only to slaves in those states and parts of states still in rebellion against the Union government as of January 1, 1863. They create the impression that the Emancipation Proclamation freed all of the slaves in the United States, which it clearly did not.

15. "A vindictive Congress set up a Reconstruction program designed to humiliate the white people of the South." This assertion is contradicted by the whole vast body of revisionist scholarship on Reconstruction published since the early 1960s. *See generally* K. STAMPP,

and the economic impact of the New Deal on blacks[16] that scholars have long since refuted. Their inadequate secondary research produced errors of omission as well as of commission. For example, the Whalens fail to point out that initially President Kennedy was inclined to request a fairly restrained public accommodations bill because he thought that was all he could get Congress to approve. At the last minute, however, he took the advice of Speaker of the House McCormack, who recommended sending up a broad measure and, if necessary, letting legislators whittle it down. The Whalens could easily have obtained this highly relevant information by reading Brauer's book.[17]

Their lack of legal expertise has also led them into error. For example, without giving a citation for the case, the Whalens misquote[18] the Supreme Court's opinion in *Plessy v. Ferguson*. Lawyers are likely to be even more disappointed by their failure to address the important constitutional and legal issues associated with the legislative history of the Civil Rights Act of 1964. The basic problem is that the Whalens' interest is in *how* Congress passed that law. They are not very concerned with *what* it enacted. Thus, while noting that bipartisan "team captains" thoroughly explained each title of H.R. 7152 in the Senate, they do not bother to share any of these explanations with their readers. Nor are the Whalens much interested in the constitutional authority of Congress to pass the Act. They entirely ignore the controversial decision of the Justice Department to base the bill's public accommodations provisions (Title II) on the commerce clause, rather than on the fourteenth amendment.[19] To find out that the head of the department's Civil Rights Division proposed this approach because of the Supreme Court's 1883 decision in the *Civil Rights Cases*, one must turn to Brauer's book. Likewise, one must consult Brauer to learn that liberal Republicans on the House Judiciary Committee insisted that Title II should be based on the fourteenth amendment, only to have the

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THE ERA OF RECONSTRUCTION, 1865-1879 (1965); K. STAMPP & L. LITWACK, RECONSTRUCTION (1969).

16. "Blacks benefitted economically from the New Deal . . . ." *But see* R. WOLTERS, NEGROES AND THE GREAT DEPRESSION 78-79, 213-15 (1970); Kirby, *The Roosevelt Administration and Blacks: An Ambivalent Legacy*, in TWENTIETH CENTURY AMERICA 265, 273-75 (B. Bernstein & A. Matusow 2d ed. 1972).

17. C. BRAUER, *supra* note 8, at 266.

18. They quote the Court as saying "that there should be . . . 'separate but equal facilities' for white and Negro." Although the name later given to the rule of the *Plessy* case, the phrase "separate but equal" does not appear in the *Plessy* opinion. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 454 (1986).

19. The Supreme Court upheld Title II as a constitutionally proper exercise of the congressional power to regulate interstate commerce in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

committee's ranking GOP member, William McCulloch, brush aside their objections to use of the commerce clause as "superficial." The Whalens also fail to mention the probing discussion of the constitutional issue in the Senate Commerce Committee, for a synopsis of which interested lawyers must still look to Gerald Gunther's constitutional law casebook.

These authors also ignore several other legal issues. For example, *The Longest Debate* provides no evidence about whether Lino Graglia was right when he charged that the legislative histories of Titles IV and VI show that the Department of Health, Education and Welfare and the federal courts violated the intent of Congress when they interpreted the Act as requiring action to achieve racial balance in the public schools.[20] Nor does this book shed any light on the issue of whether an agreement to deprive someone of rights created by Title II can be punished as a violation of the civil rights conspiracy statute.[21]

These are questions that have troubled judges and legal scholars, but they are not the sorts of things which interest the Whalens. Consequently, their book is likely to be dismissed by lawyers as useless, while it is rejected by historians as incompetent. These passionate amateurs have recreated the drama of one of the great congressional battles of the twentieth century, but they have not written a satisfactory legislative history of the Civil Rights Act of 1964. Apparently, such a book is, as Senator Everett Dirksen might have said, an idea whose time has not yet come.

POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW. Edited by Myres S. McDougal[1] and W. Michael Reisman.[2] Dordrecht, Netherlands: Martinus Nijhoff. 1985. Pp. xi, 460. $96.00.

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These essays were written to honor Eugene Rostow on his 70th birthday and imminent retirement (in 1984) from the Yale Law

20. L. GRAGLIA, DISASTER BY DECREE 47-51 (1976).

21. The FBI thought that it could be, but the United States District Court for the Middle District of Georgia ruled otherwise in United States v. Guest, 246 F. Supp. 475, 485 (M.D. Ga. 1964). *See generally* Belknap, *The Legal Legacy of Lemuel Penn*, 25 HOW. L.J. 467, 480, 508 (1982).

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