

RACE, SEX, AND RULEMAKING: ADMINISTRATIVE
CONSTITUTIONALISM AND THE WORKPLACE, 1960 TO
THE PRESENT

*Sophia Z. Lee**

INTRODUCTION.....	800
I. SITUATING ADMINISTRATIVE CONSTITUTIONALISM	806
II. CREATIVE INTERPRETATION	810
A. <i>The FCC Implements Equal Employment Rules</i>	811
1. <i>FCC Attorneys Creatively Expand State Action</i>	811
2. <i>The FCC Adopts Equal Employment Rules</i>	821
3. <i>The FCC Enforces Its Equal Employment Rules</i>	837
B. <i>The FPC Rejects Equal Employment Rules</i>	844
1. <i>The PCEEO Creatively Expands State Action</i>	844
2. <i>The FPC Creatively Narrows State Action</i>	847
III. SELECTIVE INTERPRETATION	857
A. <i>The Supreme Court Narrows State Action</i>	858
B. <i>The Supreme Court Avoids Administrators' Creative</i> <i>Interpretations</i>	861
C. <i>The FCC Selectively Interprets State Action</i>	870
IV. RESISTANT INTERPRETATION.....	872
A. <i>The Supreme Court Restricts Affirmative Action</i>	873
B. <i>The FCC Resists a Reviewing Court's Constitutional</i> <i>Interpretation</i>	875
CONCLUSION.....	880

* Assistant Professor of Law, University of Pennsylvania Law School. For helpful comments and careful reads, special thanks to Bruce Ackerman, Kevin Arlyck, Rachel Barkow, Cary Coglianese, Drew Days, William Eskridge, Barry Friedman, Sarah Barringer Gordon, Seth F. Kreimer, Jerry Mashaw, Gillian Metzger, Dara Orenstein, Stephen Porter, Robert Post, Christopher Schmidt, Alan Schoenfeld, Reuel Schiller, Vicki Schultz, Reva Siegal, Barbara Welke, R. Owen Williams, Christopher Yoo, faculty workshops at the Yale Law School and University of Pennsylvania Law School, as well as the participants in the 2007 Hurst Summer Institute in Legal History and the NYU Legal History Colloquium. This Article benefitted from generous assistance by the research staff at the National Archives and Records Administration at College Park, the Library of Congress Manuscripts and Archives Division, and the University of Notre Dame Archives.

INTRODUCTION

IN 1977, the Associate General Counsel for the Federal Communications Commission (“FCC”), J. Clay Smith Jr., defended his agency’s rules requiring broadcasters to ensure “equal employment,” a term whose meaning was still being made.¹ Smith argued that the FCC “has the authority and responsibility to consider the provisions of the United States Constitution and the public policies established thereunder.”² Accordingly, the FCC had ample authority, Smith asserted, to deny licenses to broadcasters with discriminatory hiring practices. In fact, Smith continued, the Fifth Amendment likely *obligated* the FCC to require equal employment.³

Smith’s view was not anomalous. Civil rights advocates began pressing African Americans’ constitutional right to join unions and access decent jobs before administrative bodies in the 1940s.⁴ By the 1960s, administrators began to make similar arguments from *within* government, setting off debates among officials about the constitutional duties of administrative agencies and the businesses they oversaw.

Administrators like Smith argued that equal protection obligated agencies to require that the companies they regulated ensured equal employment. These officials also asserted that regulated companies were themselves constitutionally compelled to

¹ J. Clay Smith, Jr., Assoc. Gen. Counsel, FCC, Speech at the Annual Meeting of the National Citizens Committee for Broadcasting (June 25, 1977) (Leadership Conference on Civil Rights Papers, LCMD, part I, box 101, “FCC - FCC, 1978” folder) (all archival sources are on file with author). Equal employment has come to be defined narrowly by employment discrimination litigation under Title VII of the 1964 Civil Rights Act. Pub. L. No. 88-352, 42 U.S.C. § 2000(e) (2006). The reader is invited to hear in this term not what it has come to mean under Title VII, but the multiple and contested meanings it retained during the events chronicled here. Likewise, the limited meaning of equal protection and its correlate, discrimination, in current constitutional doctrine had not been consolidated during the period this Article recounts. See Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over *Brown*, 117 Harv. L. Rev. 1470, 1537–38 (2004). The current legal definition of discrimination is not capacious enough to express the constitutional obligations and remedies recounted here. I hope the reader will be able to imagine a time when it was.

² Smith, *supra* note 1, at 14.

³ *Id.* at 14–15.

⁴ See generally Sophia Z. Lee, Hotspots in a Cold War: The NAACP’s Postwar Workplace Constitutionalism, 1948–1964, 26 Law & Hist. Rev. 327 (2008).

achieve equal employment. As a result, they claimed that regulators must demand—and regulated firms must establish—affirmative action policies that required anything from recruiting and training underrepresented workers to achieving statistically proportional hiring at all job levels by race, sex, and ethnicity. Other officials rejected such a broad and affirmative version of equal protection.

Administrators' fundamental differences about the meaning and scope of equal protection led the FCC to adopt rules requiring that the broadcasters and common carriers it oversaw implement equal employment policies, while administrators at the Federal Power Commission ("FPC") considered and rejected similar rules. This Article compares the history of equal employment rulemaking at the FCC and the FPC to examine how federal officials in a range of administrative offices, including executive departments, independent agencies, and executive committees, adopted or rejected a broad and affirmative understanding of equal protection.

Smith's speech, as well as administrators' many statements favoring or opposing equal employment rulemaking, demonstrates an unexamined aspect of constitutional governance and administrative lawmaking that I call *administrative constitutionalism*: regulatory agencies' interpretation and implementation of constitutional law. This Article focuses primarily on the relationship between administrative and court constitutionalism. For the most part, administrative constitutionalism involves what I term *creative interpretation*. Administrators creatively extended or narrowed court doctrine in the absence of clear, judicially defined rules. They also directly interpreted the Constitution and relied on administrative sources of constitutional authority that were alien to court constitutionalism. At times, however, administrators practiced what I call *selective interpretation*: in the presence of directly relevant, but unfavorable, Supreme Court precedent, they ignored the unfavorable decisions. Finally, this history also includes administrators practicing what I term *resistant interpretation*: faced with appellate-level judicial review of their policies, administrators acqui-

esced in a court's judgment, but did not embrace the constitutional principle underlying that judgment.⁵

This Article emphasizes the relationship between administrative and court constitutionalism; nonetheless, it also attends to the relationship between the executive and legislative branches on the one hand, and administrators' interpretation and implementation of the Constitution on the other. This history suggests that administrative constitutionalism cannot be reduced to an instance of legislative or executive constitutionalism. Instead, separation of powers and the resulting fractured oversight of administration, as well as administration's sheer scope, created opportunities for administrators to act with some independence from Congress and the President.⁶ The

⁵ Cf. William N. Eskridge, Jr. & John Ferejohn, *A Republic of Statutes*, pt. 1 at 3, ch. 1 at 10–13, 54, 65 (forthcoming 2010). Eskridge and Ferejohn use the term “administrative constitutionalism” to refer to the process by which legislators, executives, and administrators work out “America’s fundamental normative commitments,” a process that “include[s] but [is] not limited to Constitutional analysis.” See also Gillian Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 *Colum. L. Rev.* 480, 485 (forthcoming 2010) (using the term “administrative constitutionalism” to refer to judges using administrative law to require that administrative agencies consider constitutional concerns when designing or implementing policy).

⁶ Agencies' independence from both the President and Congress is hotly contested. Debates about presidential control tend to center on control over the removal of agency heads, agency litigation, and regulatory action. See, e.g., Stephen G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008) (arguing that departmentalist constitutional theory supports a unitary executive who retains the right to remove agency heads at will, notwithstanding statutory language to the contrary); Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 *Cal. L. Rev.* 255, 260–61, 264 (1994) (noting the wide variation in agencies' authority to represent themselves before the lower courts and arguing that, even before the Supreme Court, there are circumstances under which agency lawyers, rather than the Solicitor General, should be authorized to litigate on the agency's behalf); Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245, 2253 (2001) (arguing for the further elaboration of presidential control over agencies' regulatory activities). As a practical matter, however, much of the day-to-day operation of agencies occurs free from presidential direction. See Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 *Mich. L. Rev.* 47, 47–52 (2006) (finding weak empirical support for presidential control of agencies); Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696, 704–05 (2007) (arguing that regulatory action proceeds, and should remain, independent of presidential direction). Likewise, empirical studies find Congress to have limited, but hardly comprehensive, control of agencies. See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 *Va. L. Rev.* 889, 967–71 (2008) (finding that transitions in the partisan control of Congress have some influence on agency

opportunities may have been contingent, partial, and constrained; indeed, there are many examples of executive and legislative influence in the form of both nudges and threats. The opportunities for independent action were nonetheless real: some of administrators' most significant actions occurred *despite*, not *because of*, presidential or congressional action. This Article revisits a forgotten period of administrative constitutionalism, analyzing administrators' interpretive modes, how they embedded their constitutional interpretations in administrative policy, and the relationship of administrative constitutionalism to the executive, legislative, and judicial branches.⁷

Administration grew explosively in the mid-twentieth century.⁸ Yet currently, neither constitutional nor administrative law scholarship examines the constitutional interpretations of administrative agencies.⁹ This Article uses the history of equal employment rulemaking to provide what is, as far as I know, the first effort to document and analyze administrators' constitutional practices. It

action); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 *J. Legal Stud.* 413, 445–46 (1999) (finding some effective congressional use of agency design to control agency decisionmaking but finding that control limited).

⁷ Some officials discussed herein interpreted the law for other administrative offices, some advocated within government, and still others implemented laws. All three types of officials—interpreters, advocates, and implementers—administered equal protection in ways that creatively extended, diverged from, and even directly disagreed with court doctrine. This Article, which outlines the general phenomenon of administrative constitutionalism and recovers the particular constitutional doctrines embraced during this episode of it, emphasizes these regulators' common participation in this form of constitutional governance. Future work could productively explore differences in the administrative constitutionalism regulators produce, for instance by administrative function (for example, interpreters versus advocates) or institutional location (for example, executive departments versus independent agencies).

⁸ State, local, and federal governments regulated economic actors long before the New Deal. See Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (2009); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996); Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 *Yale L.J.* 1568, 1628–33 (2008). The New Deal, however, marked a sea change in the scope and depth of economic regulation.

⁹ Cf. Reuel E. Schiller, *The Administrative State, Front and Center: Studying Law and Administration in Postwar America*, 26 *Law & Hist. Rev.* 415, 422–23 (2008) (noting that administrators' role as constitutional actors is little-studied by legal historians).

traces administrators' interpretation of several aspects of equal protection—primarily the state action doctrine, affirmative equality rights,¹⁰ and affirmative action—to show how they advanced constitutional policies that imaginatively extended or retracted, increasingly diverged from, and even contradicted courts' constitutional doctrine.¹¹

This history supports several conclusions. First, in the late twentieth century equal protection followed a notably different path in administrative agencies than it did in the courts. Second, this lost episode of equal protection history suggests some general features of administrators' constitutional practice, particularly that administrators are guided, but not always bound, by court doctrine. Third, administrative constitutionalism is likely a recurring aspect of the modern American state.¹² To the extent that administrative consti-

¹⁰ In general, negative rights entitle the right-holder to be free from certain forms of government interference. In contrast, affirmative (or positive) rights entitle the right-holder to a good or service. See Mark Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1392–94 (1984). In practice, the line between affirmative and negative rights can blur. See Susan Bandes, *The Negative Constitution: A Critique*, 88 *Mich. L. Rev.* 2271, 2278–308 (1990) (arguing that the affirmative/negative distinction is neither a coherent nor useful distinction because the precepts underlying it are too indeterminate and imprecisely descriptive); see also *infra* notes 369–74 and accompanying text.

¹¹ This Article also expands scholarship on administrators' central role in developing civil rights policy during the 1960s and 1970s by demonstrating that the Constitution was a source for these policies. See, e.g., Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (1990); John D. Skrentny, *The Minority Rights Revolution* (2002). For earlier instances of administrative civil rights, see Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920*, at 344 (2001); Anthony S. Chen, "The Hitlerian Rule of Quotas": Racial Conservatism and the Politics of Fair Employment Legislation in New York State, 1941–1945, 92 *J. Am. Hist.* 1238 (2006); Timothy M. Thurber, *Racial Liberalism, Affirmative Action, and the Troubled History of the President's Committee on Government Contracts*, 18 *J. Pol'y Hist.* 446 (2006).

¹² Early examples ripe for further exploration include the Freedmen's Bureau, which implemented its understanding of such constitutionally resonant concepts as "free labor" and "equal rights." See, e.g., Robert J. Kaczorowski, *The Politics of Judicial Interpretation: The Federal Courts, Department of Justice, and Civil Rights, 1866–1876*, at 31–32, 200–01 nn.23–24 (1985) (describing briefly how Freedmen's Bureau officials enforced "equal protection of the laws" as well as the First Amendment); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 35–39 (1998) (discussing how Freedmen's Bureau officials created, rather than merely implemented, the meaning of free labor). Administrative constitutionalism has involved subjects other than civil rights. See Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 *Va. L. Rev.* 1, 3–4, 101 (2000) (examining how judicial defer-

tutionalism differs from court constitutionalism, a complete account of the substance and scope of constitutional governance must consider the constitutional practice of administrative agencies.

Moreover, this Article provides a case study about specific agencies at particular moments in time. As a result, it opens a number of areas for future research. Most notably, it invites further investigation of administrative constitutionalism's prevalence, legality, desirability, and theoretical basis.

Part I situates this history in administrative and constitutional law scholarship. The remaining Parts narrate the origins and fate of equal employment rulemaking and analyze the administrative constitutionalism that shaped it. Part II explores how, during the 1960s and early 1970s, administrators at the FCC and the FPC creatively expanded or narrowed Supreme Court doctrine to arrive at interpretations of state action that had yet to be adopted by the legislative, executive, or judicial branches. By 1972, the FCC had issued and dramatically enforced rules requiring the companies it regulated to implement equal employment, while the FPC had rejected a similar equal employment policy. Part III explains how, during the 1970s, the Supreme Court repudiated the broad state action theories informing the FCC's equal employment rules. Nonetheless, those theories persisted, as the FCC's Associate General Counsel selectively ignored unfavorable Supreme Court decisions.

Part IV brings administrative constitutionalism and equal employment rulemaking to the present day. Administrative supporters of equal employment rules had long argued that their affirmative action policies implemented equal protection. During the 1980s and 1990s the Supreme Court repeatedly held that equal protection constrained rather than compelled affirmative action programs. Nonetheless, the FCC maintained the view that its equal employment rules implemented the Constitution—even after the D.C. Circuit struck down the FCC's broadcaster rules as a viola-

ence to agency interpretation of statutes gives agencies a de facto role in determining the scope of First Amendment protections); cf. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *Stan. L. Rev.* 553, 568 (2007) (describing how Congress and the Post Office developed communications privacy based on nonconstitutional principles, a policy the Supreme Court later incorporated into its interpretation of the Fourth Amendment). In addition, administrative constitutionalism is not only a historical phenomenon. See *infra* Section III.B.

tion, not a vindication, of equal protection. The Conclusion offers an empirical sketch of administrative constitutionalism and considers its implications for future scholarship and practice.

I. SITUATING ADMINISTRATIVE CONSTITUTIONALISM

That the Constitution influences administrative action is hardly a novel or remarkable observation, but the Constitution is familiar as a constraint on administration, most prominently through judicial review of administrative action.¹³ In addition, administrative law scholars and courts recognize that agencies often need to design and implement policy with an eye to the Constitution.¹⁴ Yet most scholars debate what level of review courts should give administrators' constitutional interpretations,¹⁵ and how conservative agencies

¹³ Canonical instances include *Perry v. Sindermann*, 408 U.S. 593 (1972), which held that the First and Fourteenth Amendments limit state officials' ability to terminate some employment contracts, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which found a Fourth Amendment cause of action against federal agents, and *Goldberg v. Kelly*, 397 U.S. 254 (1970), which ruled that due process requires that welfare agencies not terminate recipients without first providing them with a hearing. For an illuminating account of state judges' post-World War II development of constitutional checks on administration, see William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980*, at 240–68 (2001).

¹⁴ See, e.g., Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation, 57 *Admin. L. Rev.* 501, 507–08 (2005) (noting the multiple ways administrative actors must take the Constitution into consideration, including providing due process and conforming with search and seizure restrictions); David A. Strauss, Presidential Interpretation of the Constitution, 15 *Cardozo L. Rev.* 113, 113–14 (1993) (noting that administrators are often called on to implement the Constitution).

¹⁵ Compare, e.g., William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 *Geo. L.J.* 1083, 1092, 1180–81, 1184 (2008) (arguing that courts should not defer to agencies if their statutory interpretations raise serious constitutional problems), and Cass R. Sunstein, Beyond *Marbury*: The Executive's Power to Say What the Law Is, 115 *Yale L.J.* 2580, 2608–10 (2006) (accord), with Kenneth A. Bamberger, Normative Canons in the Review of Administrative Policymaking, 118 *Yale L.J.* 64 (2008) (arguing that courts should review agencies' compliance with constitutional norms with the same deference they do agencies' interpretation of statutes). To the extent that agencies' policies raise serious constitutional questions, courts generally will not defer to them. See, e.g., *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001) (holding that where an administrative interpretation of a statute raises significant constitutional questions Congress did not expressly intend for the statute to raise, the court is not required to defer to the interpretation); *Williams v. Babbitt*, 115 F.3d 657, 661–63 (9th Cir. 1997) (finding that

should be when calibrating their actions to the courts' constitutional doctrines.¹⁶ These scholars have not examined how agencies actually go about interpreting and implementing the Constitution, or how administrators' interpretations affect what it means to be governed by the Constitution.

Constitutional law scholars, for their part, have shown a vigorous interest in non-court actors' roles in making constitutional law. This literature, however, has not addressed the interpretations of the most pervasive aspect of government: administrative agencies. Scholarship on extra-court constitutionalism has followed along two sometimes overlapping but nonetheless analytically distinct tracks: popular constitutionalism and departmentalism.¹⁷ The popular constitutionalism literature generally examines how non-court actors (including social movements, Congress, and the President) interpret the Constitution in ways that diverge from the courts and how these divergent interpretations filter through democratic institutions and eventually affect judicial doctrine.¹⁸ From these descrip-

courts should deny an agency action *Chevron* deference if, on skeptical review, it raises "serious" constitutional concerns). But cf. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811–12 (2009) (declining to "apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties").

¹⁶ Compare Sunstein, *supra* note 15, at 2608–10 (arguing that administrators should interpret their powers conservatively unless expressly directed by Congress to do otherwise), with Mashaw, *supra* note 14, at 508–09 (contending that agencies should not avoid constitutional questions), Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 *Colum. L. Rev.* 1189 (2006) (arguing that in some circumstances executive branch officers should not employ the avoidance canon even if a court would), and H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 *Ind. L.J.* 1313 (2006) (arguing against the executive branch, including administrative agencies, interpreting statutes so as to avoid constitutional problems).

¹⁷ Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 *Cal. L. Rev.* 1027, 1031–32 (2004) (distinguishing between popular constitutionalist and departmentalist claims, but noting that they can, at times, overlap). But see Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *Law & Contemp. Probs.* 105, 111 (2004) (describing popular constitutionalism as a strain of departmentalism).

¹⁸ Because of this emphasis on elective government as a filter for popular constitutional norms, this literature, while it studies Congress and the President, is best understood as popular constitutionalism. Cf. Bruce Ackerman, *The Living Constitution*, 120 *Harv. L. Rev.* 1737, 1805–12 (2007) (arguing that the interaction of judicial and democratic processes can produce fundamental changes in the Constitution itself, not merely in Supreme Court doctrine). The popular constitutionalism literature is extensive. See, e.g., Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (2009)

tive accounts, some scholars posit a normative claim: that these filtering processes enhance the democratic legitimacy and robustness of courts' constitutional holdings.¹⁹

The departmentalism literature also focuses on the interpretive authority of non-court actors, most prominently Congress and the President, and often emphasizes the interplay among all three branches. However, unlike popular constitutionalists, who emphasize the impact of interbranch dialogue on courts, departmentalists focus on the coordinate interpretive authority of Congress and the President, including spheres in which the political branches have nonreviewable interpretive independence.²⁰ Also in contrast to popular constitutionalists, departmentalists' arguments generally (though not exclusively) proceed from the Constitution's structural provisions rather than positive constitutional theory.²¹ But neither

(contending that the Supreme Court harmonizes its opinions with popular views over time); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) (arguing that initially the people and their elected representatives, not the courts, had final interpretive authority, and positing that the later turn toward judicial supremacy has been bad for democracy and constitutional law); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) (arguing that constitutional law emerges from a conversation among political actors that is permeable to popular and democratic forces); Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *Fordham L. Rev.* 489, 533–35 (2006) (updating their theory of partisan entrenchment through which electoral politics and judicial appointments shape doctrine); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv. C.R.-C.L. L. Rev.* 373, 374 (2007) (arguing that “the authority of the Constitution depends on its democratic legitimacy,” which is forged from popular contest over constitutional meaning and elected officials who “resist and respond to these citizen claims”).

¹⁹ See, e.g., H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* 6 (2002) (arguing that recognizing constitutional law as “historically conditioned and politically shaped” gives it “integrity and coherence”); Post & Siegel, *supra* note 18, at 374–79.

²⁰ Again, this literature is quite extensive and dates back to the early days of the republic. See Calabresi & Yoo, *supra* note 6, at 23; see, e.g., Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 *Geo. L.J.* 347, 348 (1994) (arguing for a moderate theory of departmentalism based on institutional competency); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Geo. L.J.* 217 (1994) (contending that, within the spheres of the President's governing powers, her authority cannot be bound by the other branches). Johnsen, *supra* note 17, has a useful discussion of this literature at 116–18.

²¹ Post & Siegel, *supra* note 17, at 1032. As Post and Siegel point out, Larry Kramer is an example of a popular constitutionalist who also embraces strong departmenta-

the departmentalists nor the popular constitutionalists have studied administrators' constitutional interpretations.

To the extent that either administrative or constitutional law scholarship addresses administrators' constitutional practices, it provokes important questions about how administrators interpret the Constitution but does not yet provide answers. For instance, administrative law scholars who have recognized that administrators must interpret the Constitution in their day-to-day work have not studied these practices or their relationship to court-based constitutionalism.²² Also, while several extra-court constitutionalism scholars have looked at executive branch interpretations, they have focused exclusively on the work of the President's closest legal advisors, including the Solicitor General, the Attorney General, and the Office of Legal Counsel ("OLC").²³ The constitutionalism they

lism. *Id.* at 1031; see also Kramer, *supra* note 18, at 109. Likewise, departmentalists who emphasize interbranch dialogue and rely on history share much in common with popular constitutionalists. See, e.g., Calabresi & Yoo, *supra* note 6, at 22–29.

²² Reuel Schiller demonstrates that when agencies' animating statutes use constitutionally significant terms, courts' deferential review can give agencies a *de facto* role in determining the scope of these constitutional categories. Schiller, *supra* note 12, at 4–5; Schiller, *supra* note 9, at 422. His work opens the question of how agencies make use of this deference. *Bob Jones University v. United States*, 461 U.S. 574, 586–95 (1983), which allowed the IRS to take equal protection values into consideration in meeting its statutory duty, also invites work on how agencies actually use the Constitution. Strauss, *supra* note 14, at 115, surmises that most government attorneys apply an "is it defensible" approach to deciding whether administrative action comports with the Constitution, and suggests some principles that should guide their constitutional interpretations. His work is intriguing, but it is not based on empirical analysis. Mashaw, *supra* note 14, at 507–09, recognizes that there is little empirical evidence of agencies' interpretive practices. His work importantly begins to develop evidence of agencies' statutory, but not constitutional, interpretation. Cf. Metzger, *supra* note 5, at 497 (arguing that courts should use administrative law to "foster[] a more affirmative and independent agency role in implementing constitutional requirements"); Ernest A. Young, *The Constitution Outside of the Constitution*, 117 *Yale L.J.* 408, 411–12 (2007) (arguing that most important constitutional questions are resolved not by courts applying constitutional text, but by a range of government actors, including administrators, considering subconstitutional norms).

²³ Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *Ind. L.J.* 363, 383–90 (2003) (demonstrating how President Reagan's Attorney General and Office of Legal Policy promulgated constitutional interpretations deeply at odds with Supreme Court precedent, but focusing on how these interpretations expanded presidential power and were used to affect judicial doctrine); Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 *Mich. L. Rev.* 676 (2005) (studying the interpretive practices of the OLC and Solicitor General); H. Jefferson Powell,

have documented is that of the President, not administrators. Thus, legal scholars, while providing rich empirical examples of social movement, as well as congressional and presidential constitutional interpretation, and gesturing at the constitutional practice of regulatory bodies, have not yet examined ordinary administrators as constitutional actors.

This Article draws on the extra-court constitutionalism and administrative law literatures, particularly their emphasis on how non-court actors interpret and implement the Constitution in ways that differ from courts, their interest in positive constitutional theory,²⁴ and their recognition of administrators' ineluctable constitutional role. At the same time, it takes these literatures in new directions by analyzing administrators' constitutional practice. To fully understand constitutional governance we must examine the Constitution's unexplored life in administrative agencies.

II. CREATIVE INTERPRETATION

In the absence of clearly defined judicial standards, during the 1960s and early 1970s, FCC officials and other administrators creatively expanded the Supreme Court's state action doctrine in order to justify, adopt, and enforce equal employment rules. During that same period, the FPC creatively narrowed the Court's state action doctrine to reject equal employment policies. These administrators also made creative use of authorities, directly interpreting the Con-

The President's Authority Over Foreign Affairs: An Executive Branch Perspective, 67 *Geo. Wash. L. Rev.* 527, 530 (1999) (basing his analysis in part on OLC and Attorney General opinions, with the exception of two State Department documents). But see Eskridge & Ferejohn, *supra* note 5, at 10–13, 44–45 (providing a welcome, if brief, look at how the Equal Employment Opportunity Commission considered equal protection, among other factors, in designing pregnancy discrimination policy). For my previous exploration of administrators' constitutional interpretations, see Lee, *supra* note 4.

²⁴ On the value of positive constitutional theory, see Jack M. Balkin, What *Brown* Teaches Us About Constitutional Theory, 90 *Va. L. Rev.* 1537, 1576 (2004), and Barry Friedman, The Importance of Being Positive: The Nature and Function of Judicial Review, 72 *U. Cin. L. Rev.* 1257 (2004). On the particular need for empirically grounded theories of executive branch (and by extension administrative) constitutionalism, see Pillard, *supra* note 23, at 679–80.

2010]

Race, Sex, and Rulemaking

811

stitution and relying on executive and administrative constitutional interpretations.²⁵

A. The FCC Implements Equal Employment Rules

In the early 1960s, agency lawyers adopted broad theories of state action, arguing that the Constitution authorized, and perhaps even compelled, agencies and the businesses they regulated to adopt equal employment policies. During the 1960s, these lawyers' creatively expansive state action theories spread throughout administration, spurring the FCC to adopt and enforce equal employment rules governing the broadcasters and common carriers that the Agency oversaw.

1. FCC Attorneys Creatively Expand State Action

Administrative constitutionalism flourished in the early 1960s, encouraged by President Kennedy. Upon taking office, Kennedy used his executive authority to order administrators to implement civil rights and improve their own civil rights records.²⁶ In doing so, he frequently asserted that the Constitution demanded no less. For instance, his executive order barring discrimination in federal employment and in work conducted under federal contracts declared such discrimination "contrary to the Constitutional principles and

²⁵ That these administrators creatively expanded or narrowed Supreme Court doctrine is unlikely to come as a surprise. Indeed, Strauss, *supra* note 14, at 133, surmises that administrators do not cleave cautiously to Supreme Court precedent when considering the constitutionality of their actions. Strauss suspects that administrators instead feel constrained by judicial opinions only insofar as they adopt positions that they could credibly defend in court. Strauss's account may not fully capture administrators' creative interpretations: this history shows administrators espousing arguments they have been advised a court would not likely adopt and relying on sources a court would not likely consider. Either way, this history suggests that in practice administrators' creative interpretations can yield unexpected and widely divergent results, making this seemingly unremarkable practice appear far more significant. Whether administrators' creative interpretations are surprising in the abstract, they are essential to understanding administration's effect on what it means to be governed by the Constitution.

²⁶ See Carl M. Brauer: *John F. Kennedy and the Second Reconstruction 67–75*, 315–16 (1977); see also Marvin Weisbord, *Civil Rights on the New Frontier*, *Progressive*, Jan. 1962, at 15. But see Nick Bryant, *The Bystander: John F. Kennedy and the Struggle for Black Equality* (2006) (emphasizing Kennedy's weak commitment to civil rights in the early years of his administration).

policies of the United States” and asserted that the government had a “plain and positive obligation” to ensure equal employment opportunity.²⁷ Kennedy also invoked the Constitution in his 1962 order barring discrimination in federally assisted housing and described the order as “sound, public, constitutional policy.”²⁸ Kennedy’s executive orders suggested that government officials had an affirmative constitutional obligation to implement the Constitution’s equality guarantees.

Kennedy’s legal advisors, however, questioned the wisdom of this approach. The White House requested a formal opinion from the OLC outlining the legal authority for the President’s equal employment order.²⁹ At first the OLC hinted, as had the President’s order, that the government might have an affirmative constitutional “duty” to ensure equal employment. According to the OLC’s draft opinion, the Supreme Court’s equal protection cases indicated that there was a “fundamental policy that the powers of the government shall not be used to promote or perpetuate discrimination.”³⁰ Even this elliptical suggestion, however, was ultimately rejected. Ralph Spritzer, an attorney in the Solicitor General’s office, found the draft opinion’s suggestion that the government was constitutionally obligated to require nondiscrimination from its contractors “unnecessary and troublesome” as well

²⁷ Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

²⁸ John F. Kennedy, Press Conference in Washington, D.C. (Nov. 20, 1962), available at http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Press+Conferences/003POF05Pressconference45_11201962.htm [hereinafter Kennedy Press Conference]; see also Exec. Order No. 11063, 27 Fed. Reg. 11,527 (Nov. 20, 1962) (declaring discrimination in federally financed housing “unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws”). It is unclear whether Kennedy meant that the policy was constitutional because it implemented, or because it did not violate, the Constitution. The transcript of his oral comment inserts commas between the four words, emphasizing the latter meaning, but a transcription without the commas would emphasize the former.

²⁹ The OLC was the Department of Justice (“DOJ”) office tasked with providing legal advice to the executive and to administrative agencies.

³⁰ Memorandum from Nicholas deB. Katzenbach, Assistant Attorney Gen. (“AAG”), OLC, DOJ, to Mr. MacGuiness, AAG, Civil Division, DOJ 11 (Aug. 4, 1961) (Department of Justice Records, National Archives and Records Administration at College Park, John F. Kennedy Library, micro-copy NK-2, roll 91, “Employment” [hereinafter DOJ micro-copy]) (enclosing draft opinion).

as “highly vulnerable.”³¹ OLC staff was also worried that the opinion suggested “that the government is constitutionally bound to prohibit discrimination in all activities supported by federal funds.”³² When the opinion was issued in September 1961, its affirmative language had been all but eliminated,³³ and the constitutional basis for the order had been downplayed in favor of policy arguments about “effective use of the nation’s manpower resources.”³⁴

The reticence of the President’s legal advisors did not extend to the administrators at the President’s Committee for Equal Employment Opportunity (“PCEEO”), who were tasked with implementing the President’s order, or to their colleagues at the FCC. Instead, these administrators took seriously their affirmative obligation to implement equal protection. In doing so, they creatively stretched Supreme Court doctrine.

In 1963, FCC attorneys circulated to the PCEEO’s Special Counsel a memo arguing that the Constitution’s equal protection guarantees not only authorized but also *required* the FCC to deny licenses to broadcasters who discriminated in employment. The FCC attorneys offered both a statutory argument that turned on the Constitution and a direct constitutional argument that the FCC and its licensed broadcasters had to ensure nondiscrimination. The FCC attorneys first noted that the Communications Act required the FCC to license only broadcasters who would serve the “public interest, convenience and necessity.”³⁵ In determining which broadcasters would serve these purposes, the FCC attorneys reasoned that the Agency “ha[d] the authority and *duty*” to consider whether an applicant had violated the Fifth Amendment “and the public

³¹ Memorandum from Ralph S. Spritzer, Assistant to the Solicitor Gen., to Nicholas deB. Katzenbach, AAG, OLC (Aug. 8, 1961) (DOJ micro-copy).

³² Memorandum from James L. Morrisson to Nicholas deB. Katzenbach, AAG, OLC (Oct. 8, 1961 (file date)) (DOJ micro-copy).

³³ Opinion from Robert F. Kennedy, Attorney Gen., to Lyndon B. Johnson, Vice President (Sept. 26, 1961) (DOJ micro-copy). The final opinion, unlike the draft, did not mention a “duty” not to discriminate. *Id.* at 11–12.

³⁴ Memorandum from James L. Morrisson to Nicholas deB. Katzenbach, *supra* note 32.

³⁵ Memorandum from N. Thompson Powers, Special Counsel, PCEEO, to Norbert A. Schlei, AAG, OLC, DOJ 1 (July 8, 1963) [hereinafter Powers Memo] (DOJ micro-copy) (enclosing FCC memo).

policies established thereunder.”³⁶ This included “the policy of the United States Government against racial discrimination” as expressed, for instance, in President Kennedy’s housing discrimination executive order.³⁷ Accordingly, the FCC attorneys concluded, the FCC should refuse to license broadcasters who practiced racial discrimination because licensing such broadcasters “would not be in the public interest.”³⁸

In addition to a statutory argument that turned on administrators’ Fifth Amendment duties, the FCC attorneys argued that the Constitution directly compelled the FCC to deny licenses to racially discriminatory broadcasters. They reasoned further that broadcasters were also state actors constitutionally barred from discriminating. In doing so, the FCC attorneys adopted versions of the state action doctrine that had uncertain support in Supreme Court doctrine.

During the 1940s, 1950s, and early 1960s, the Supreme Court expanded the reach of the state action doctrine, finding an increasing range of public involvement with traditionally private activity sufficient to trigger constitutional rights.³⁹ Most famously, *Shelley v. Kraemer* held that even where the discrimination itself was not state action, court enforcement of private discrimination (in this case a racially restrictive covenant) was unconstitutional.⁴⁰ The FCC attorneys, in arguing that the Fifth Amendment “compelled [the FCC] to consider whether an applicant practices racial discrimination,” reasoned from a different set of Supreme Court

³⁶ Id. (emphasis added).

³⁷ Id.

³⁸ Id.

³⁹ In 1883, in the *Civil Rights Cases* the Supreme Court determined that the Constitution’s equality guarantees only constrained actions taken by the state and its agents. 109 U.S. 3, 23–25 (1883). The decision struck down Section 1 of the Civil Rights Act of 1875, which Congress had passed pursuant to its Fourteenth Amendment enforcement powers. Section 1 prohibited discrimination against African Americans by the owners of public conveyances and accommodations. Id. at 19. By deeming these businesses’ decisions quintessentially private, the Supreme Court established that economic decisions were outside the Fourteenth Amendment’s reach. For historical treatment, see Welke, *supra* note 11, at 336–43, and William E. Nelson, *The Fourteenth Amendment: From Principle to Judicial Doctrine* 194–95 (1988).

⁴⁰ 334 U.S. 1, 20 (1948); see also *Barrows v. Jackson*, 346 U.S. 249, 253–54 (1953) (holding that court awards of damages for the violation of a racially restrictive covenant were state action in violation of the Fourteenth Amendment).

cases.⁴¹ The FCC attorneys first asserted that granting a license to an applicant who practiced racial discrimination “would be tantamount to the sanctioning of the discriminatory practices.”⁴² Lacking any precedent that merely sanctioning (as opposed to *Shelley*-like enforcing) discrimination was unconstitutional, the FCC attorneys cited *Public Utilities Commission v. Pollak* as a somewhat analogous case.⁴³ *Pollak* stated, in what is arguably dicta, that a government commission’s general regulation of streetcar companies, and its dismissal of an investigation into the streetcar company’s challenged policy, created “a sufficiently close relationship between” the government and the policy to consider the policy’s constitutionality.⁴⁴ In doing so, the FCC attorneys elided the arguably significant difference between a government agency directly approving a challenged policy and failing to prohibit it or generally empowering the entity that adopted it.

The FCC attorneys also argued that “the relationship between the FCC and its licensees” requires that the licensed broadcasters’ actions “be measured by the standards of the Constitution.”⁴⁵ In support of the claim that broadcasters were state actors, the FCC attorneys noted a recent Supreme Court decision, *Burton v. Wilmington Parking Authority*.⁴⁶ *Burton* found that the particular relationship between a government agency and a privately owned restaurant to which it leased property rendered them “joint participant[s].”⁴⁷ As a result, “the proscriptions of the Fourteenth Amendment,” the *Burton* Court ruled, “must be complied with by the lessee as certainly as though they were binding covenants writ-

⁴¹ Powers Memo, supra note 35, at 2.

⁴² Id. This Article uses the term “sanctioning” as did the historical actors whose words it captures: to mean to “encourage by . . . implied approval.” Oxford English Dictionary 441 (2d ed. 1989).

⁴³ 343 U.S. 451 (1952); Powers Memo, supra note 35, at 2.

⁴⁴ Powers Memo, supra note 35, at 2 (quoting *Pollak*, 343 U.S. at 462). The FCC attorneys misquoted *Pollak*, which used the term “relation” rather than “relationship.” Regardless of phrasing, the portion of *Pollak* on which the FCC attorneys relied was dicta, as the Court ultimately assumed state action was present and upheld the challenged policy on the grounds that even so, the policy would not violate the First or Fifth Amendments. *Pollak*, 343 U.S. at 462–65.

⁴⁵ Powers Memo, supra note 35, at 3.

⁴⁶ 365 U.S. 715 (1961).

⁴⁷ Id. at 725.

ten into the [restaurant's lease] agreement itself."⁴⁸ The *Burton* Court also went out of its way to limit its opinion to the facts of the case, cautioning that "the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested."⁴⁹ Instead, the Court held only that equal protection adhered when a "[s]tate leases public property in the manner and for the purpose shown to have been the case here."⁵⁰ The FCC attorneys ignored *Burton's* limiting language, baldly asserting that a broadcaster whose FCC license allowed it to use publicly owned airwaves was "equivalent to a 'lessee' of Government property."⁵¹ As such, the licensee, like the government, had to comply with the Fifth Amendment's equal protection guarantees. The FCC attorneys concluded by pointing out that the FCC could avoid these "serious constitutional questions" by interpreting the Communications Act's public interest standard to prohibit discrimination by FCC licensees.⁵²

The PCEEO had grand ambitions for the FCC attorneys' constitutional theories, ambitions that vastly stretched these theories' already tenuous connection to Supreme Court doctrine. The FCC attorneys' reasoning creatively expanded Supreme Court doctrine either by ignoring the Court's limiting language or by relying on loosely relevant precedent. The FCC attorneys' arguments were strongest when made, as they were, about broadcasters. The FCC had a uniquely close relationship to broadcasters, not only author-

⁴⁸ Id. at 726.

⁴⁹ Id. at 725.

⁵⁰ Id. at 726. *Burton* contained language, and cited lower court opinions holding, that government actors had an affirmative duty to ensure that those with whom they participated afforded equal protection. See *infra* note 70. Interestingly, the FCC attorneys did not rely on these precedents when arguing that the FCC must consider the employment practices of its regulated industries.

⁵¹ Powers Memo, *supra* note 35, at 3. The FCC attorneys did not discuss lower court precedent. The most relevant case they could have cited would probably have been *Betts v. Easley*, 169 P.2d 831 (Kan. 1946) (finding unions certified by a federal labor board to be state actors); cf. *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1963) (finding that, under *Burton*, private hospitals that received significant public funds and were part of a "joint or intermeshing state and federal . . . program[]" were state actors); *Baldwin v. Morgan*, 287 F.2d 750, 755 (5th Cir. 1961) (finding private entities to be state actors when they perform a public function).

⁵² Powers Memo, *supra* note 35, at 3.

izing their use of public airwaves at regular intervals, but also providing ongoing regulation of broadcast content to ensure that it met community needs and standards, much like the Public Utilities Commission in *Pollak*. However, the PCEEO wanted to use the FCC memo to support a broad plan to “ask all regulatory agencies to consider whether they have power to require that the companies they regulate follow a policy of non-discrimination in employment.”⁵³ Other regulated businesses, like the phone companies regulated by the FCC and the gas and electric utilities regulated by the FPC, experienced less substantive and ongoing government oversight. As a result, whatever the merits of the FCC attorneys’ state action arguments with respect to broadcasters, they were arguably much weaker with respect to telephone and power companies.

If the PCEEO was eager to stretch the FCC attorneys’ broad state action theories even further, these theories received a much cooler reception from executive branch lawyers, Supreme Court justices, and members of Congress. In anticipation of discussing the PCEEO’s plan for broad regulatory action, its Special Counsel asked the OLC for its view of the FCC attorneys’ state action theories. This was not an easy request to fulfill. Indicating the questionable doctrinal support for the FCC memo, the head of OLC, Norbert Schlei, responded that the memo raised “difficult and far-reaching questions.”⁵⁴ “Conceivably, the conclusion which it reaches is correct,” Schlei conceded, but determining as much would take some time.⁵⁵

Even as Schlei sent off his cautious and lukewarm response, events far from Washington embroiled the Supreme Court, Congress, and the President’s closest legal advisors in a searching debate over the state action theories on which the FCC attorneys relied. Sit-in protests were spreading throughout the South, inundating state and federal courts with constitutional challenges to the protesters’ arrests and spurring Congress into action. As a result, all three branches of government had to determine whether equal protection barred businesses from discriminating against Af-

⁵³ *Id.*

⁵⁴ Memorandum from Norbert A. Schlei, AAG, OLC, to N. Thompson Powers, Special Counsel, PCEEO (circa July 8, 1963) (DOJ micro-copy).

⁵⁵ *Id.*

rican-American customers or cities from arresting and prosecuting those who protested their exclusion. All three branches entertained, but either refused to adopt or outright rejected, licensing and sanctioning theories of state action similar to those advanced by the FCC attorneys.

In the summer and fall of 1963, Attorney General Robert F. Kennedy testified before Congress about proposed civil rights legislation that would prohibit discrimination in public accommodations like those targeted by the sit-in protests. Congress was considering grounding the law in its power to enforce the Fourteenth Amendment's equal protection provisions. The bills under consideration relied on a broad state action theory much like that advanced by the FCC attorneys: that the Fourteenth Amendment reached any business operating under state or local authorization, permission, or license. Attorney General Kennedy urged Congress to reject this approach. The licensing theory of state action, Kennedy cautioned, took Congress "to the full limits of the constitutional power contained in the 14th amendment."⁵⁶ Echoing Schlei's response to the PCEEEO, the Attorney General warned that expanding state action in this way would raise "very far-reaching and grave issues."⁵⁷ Even if the Supreme Court might ultimately endorse a licensing theory of state action, Kennedy thought this approach unadvisable. "Passing and upholding a bill solely upon the licensing theory or some variation would have vast Constitutional implications," he warned.⁵⁸ Doing so would unwisely convert a range of traditionally private entities, including private schools and universities, charitable organizations, and licensed professionals, into state actors.⁵⁹

Kennedy expressed similar skepticism about whether, as the FCC attorneys had argued, government sanctioning of otherwise private discrimination triggered Fourteenth Amendment protec-

⁵⁶ Hearing on H.R. 7152 Before the H. Comm. on the Judiciary, 88th Cong. 2656 (1963) (statement of Robert F. Kennedy, Attorney Gen. of the United States) [hereinafter Kennedy House Statement].

⁵⁷ Hearing on S. 1731 Before the S. Judiciary Comm., 88th Cong. 5 (1963) (statement of Robert F. Kennedy, Attorney Gen. of the United States) (MGLI 13.2479, Howard A Glickstein Papers, University of Notre Dame Archives, Notre Dame, IN [hereinafter Glickstein Papers]).

⁵⁸ *Id.*

⁵⁹ *Id.*

tions. One bill proposed that Congress prohibit discrimination that was “sanctioned” by the state under its Fourteenth Amendment powers.⁶⁰ Kennedy testified that the term “sanction” could be misleading because, in fact, the state would have to “take some overt action to bring about segregation” in order for the discrimination to fall within Congress’s Fourteenth Amendment enforcement authority.⁶¹ When asked if mere *sanctioning* would be enough state action, Kennedy replied, “I don’t think so.”⁶² In his congressional testimony, the Attorney General publicly cast serious doubt, even outright rejected, the broad state action theories formulated by the FCC attorneys and considered by the PCEEEO.

Both Congress and the Supreme Court followed the Attorney General’s lead. When Congress passed the Civil Rights Act of 1964 the next summer, it excluded both the licensing and sanctioning state action theories. Instead, the law defined businesses whose discrimination or segregation “is supported by State action” to include only discrimination required by the state, taken under color of law, or taken under color of an officially enforced custom.⁶³ The actions of licensed broadcasters would not fall within this congressionally defined ambit.

The Supreme Court, for its part, dodged these “far-reaching” constitutional questions, but it was clear that the Justices were bitterly split over the fate of the state action doctrine. Decided days before the Civil Rights Act was signed into law, *Bell v. Maryland* involved a constitutional challenge to Maryland’s conviction of civil rights sit-in protesters.⁶⁴ The Justices, after much agonizing, decided the case on nonconstitutional grounds. Nevertheless, the concurring and dissenting opinions indicated that Chief Justice Warren and Justices Douglas and Goldberg were prepared to find that the convictions amounted to unconstitutional state enforcement of discrimination, while Justices Black, Harlan, and White were strongly opposed to expanding *Shelley’s* enforcement theory of state action to include the protesters’ convictions.⁶⁵ In addition

⁶⁰ Kennedy House Statement, *supra* note 56, at 2698–700.

⁶¹ *Id.* at 2699.

⁶² *Id.*

⁶³ Civil Rights Act of 1964, 42 U.S.C. § 2000a(b), (d) (2006).

⁶⁴ 378 U.S. 226 (1964).

⁶⁵ *Id.* at 242, 286, 318.

to narrowly defining what constitutes state enforcement, the dissenters also rejected the FCC attorneys' licensing theory of state action, cautioning, "to hold that a State must be held to have participated in prejudicial conduct of its licensees is too big a jump for us to take."⁶⁶

Over the next few years, the Court inched its way towards a more expansive state action jurisprudence. The Court indicated that *Burton* should not be read narrowly to apply only to public leases, clarifying that whenever there was significant involvement between the state and an otherwise private entity, or an entity's discriminatory acts, there was sufficient state action to trigger Fourteenth Amendment protections.⁶⁷ In *Reitman v. Mulkey*, the Court also held that not only state *enforcement*, but also mere active *encouragement*, of private discrimination was unconstitutional.⁶⁸ These decisions led one hopeful court watcher to predict that the "radical changes in society . . . even now are tolling the demise of state action."⁶⁹ By the mid-1960s, however, the FCC attorneys' "far-reaching" licensing and sanctioning theories of state action had been rejected by the Attorney General, passed over by Congress, and had yet to be accepted by the Supreme Court.

Administrators did not abandon the FCC attorneys' broad state action theories, despite their cool reception in the legislative, executive, and judicial branches. Instead, administrators continued to embrace their affirmative duty to implement the Constitution.⁷⁰ At

⁶⁶ Id. at 333.

⁶⁷ See *United States v. Price*, 383 U.S. 787, 794–95 n.7 (1966) (stating that *Burton* and *Pollak* stood for the principle that state action existed anytime a state had so insinuated itself with a private actor as to have become a joint participant); *Evans v. Newton*, 382 U.S. 296, 301–02 (1966) (holding that a privately deeded but publicly managed and funded park had become so imbricated with the state that it would be unconstitutional to revert it in order to restore it to the segregated use the testator had required).

⁶⁸ 387 U.S. 369, 380–81 (1967) (declaring unconstitutional an amendment to the California State Constitution that annulled a state law banning discrimination in housing because it "significantly encourage[d] and involve[d] the State in private discriminations").

⁶⁹ John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 *Colum. L. Rev.* 855, 855 (1966).

⁷⁰ The idea that administrators are affirmatively obligated to implement the Constitution proved less controversial than the FCC attorneys' state action theories. Alexander Bickel lauded Kennedy's promise to commit his administration "to 'equal protection' as a rule of independent, self-starting political and administrative action,

the same time, the indeterminacy of the Court's multifaceted state action doctrine and the other branches' reticence about resolving the far-reaching issues the FCC attorneys had raised left administrators leeway to extend the state action doctrine without directly contradicting the Court, Congress, or the President. With the government under pressure to do more to address discrimination by federally regulated industries from trucking to television, the PCEEO's and FCC's idea of taking regulatory action against employment discrimination remained attractive.

2. The FCC Adopts Equal Employment Rules

From 1967 to 1970, the idea that administrators should affirmatively implement their understanding of the Constitution's equal protection commands spread. When the FCC proposed and adopted equal employment rules, the Agency heard from a variety of administrators that equal protection demanded no less. In justifying their position, these administrators imaginatively extended court doctrine, drew on administrative and executive authorities, and offered their own interpretations of the Constitution.

During the 1960s, public administration underwent a revolution in form. Traditionally regulating via adjudication, by the late 1960s, administrators increasingly used rulemaking instead.⁷¹ When governing by adjudication, agencies, like courts, responded to the case at hand. Rulemaking, in contrast, provided administrators with a means to make broad, proactive, and prospective policy.⁷² Agencies

rather than merely as an obligation to uphold the courts." Alexander Bickel, *The Civil Rights Act of 1964*, 38 *Comment.* 33, 33 (1964). *Burton* also implied that a city agency had an affirmative obligation to ensure that its lessee did not discriminate. See *supra* note 50. Charles Black thought the Court was verging on holding that the Constitution required those within its state action orbit to take affirmative steps to end racial discrimination. Charles L. Black, Jr., Foreword: "State Action," *Equal Protection*, and California's Proposition 14, 81 *Harv. L. Rev.* 69, 97-98 (1967).

⁷¹ Jerry L. Mashaw, *The Story of Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Automobile Insurance Co.*: Law, Science and Politics in the Administrative State, in *Administrative Law Stories* 334, 339-42 (Peter L. Strauss ed., 2006); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 *Admin. L. Rev.* 1139, 1140 (2001).

⁷² Thanks to Alan Schoenfeld for emphasizing this distinction. See also Graham, *supra* note 11, at 465-66 (describing the rise of rulemaking as part of a "wholesale rather than retail" and "more legislative than adjudicatory" approach to administration).

had long been criticized for being captured by the industries they regulated. Rulemaking, with its open petition process and public comment requirements, unlocked businesses' hold on regulators and created avenues for new constituencies to assert themselves. Generally thought to be more fair and efficient, rulemaking was soon all the rage.

In April 1967, the United Church of Christ ("United Church") took advantage of this opening and petitioned the FCC for equal employment rules. United Church's petition advanced a version of the FCC attorneys' statutory argument for FCC action, albeit one that did not invoke a broad national policy against discrimination or link that policy to the Constitution. Employment discrimination was not in the public interest, as evidenced by a federal statute and an executive order, United Church argued.⁷³ Any broadcaster who discriminated in employment was not meeting the Communications Act's public interest requirement.⁷⁴ Accordingly, United Church asked the FCC to require all licensed broadcasters to affirmatively demonstrate that they did not discriminate in employment on the basis of race, color, religion, or national origin.⁷⁵

No sooner had United Church submitted its petition than the FCC began receiving pressure from other government officials, a broad array of liberal organizations, and the media. Over the next several months, statements of interest and support poured in from congressmen, unions, civil rights advocates, civil libertarians, and even from President Johnson.⁷⁶ Then, in January 1968, a number of

⁷³ Petition from Orrin G. Judd & Earle K. Moore, Goldstein, Judd & Gurfein, Counsel, Office of Communication, Board for Homeland Ministries, and Committee for Racial Justice Now of the United Church of Christ, to FCC, Docket No. 18244 ¶¶ 1-2 (Apr. 21, 1967) (Hearing Docket Files, FCC, Record Group 173, National Archives, FRC Box 2, Folder 1 [hereinafter FCC Docket 18244]).

⁷⁴ Id. ¶¶ 1-2.

⁷⁵ Id. ¶ 4.

⁷⁶ See, e.g., Letter from Alan Reitman, Associate Dir., American Civil Liberties Union ("ACLU"), to Hon. Rosel H. Hyde, Chairman, FCC (July 31, 1967) (FCC Docket 18244, FRC Box 2, Folder 1); Statement from Esteban E. Torres, Secretary-Treasurer, Washington Council of the League of United Latin-American Citizens, to FCC (June 15, 1967) (FCC Docket 18244, FRC Box 2, Folder 1); Statement from Leonard Lesser, General Counsel, Industrial Union Department, AFL-CIO, to FCC (June 13, 1967) (FCC Docket 18244, FRC Box 2, Folder 1); Memorandum from Hon. Edward M. Kennedy, U.S. Senate, to Congressional Liaison Office, FCC (Apr. 26, 1967) (FCC Docket 18244, FRC Box 2, Folder 1); see also Letter from Rev. Everett C. Parker, Dir., Office of Comm'n, United Church of Christ, to President Lyndon B.

prominent articles in periodicals like *TV Guide* and the *New York Times* detailed the prevalence and effects of employment discrimination in the broadcast industry.⁷⁷ The petitioners gathered these stories and started mobilizing congressional support again, this time calling for legislation requiring the FCC to act.⁷⁸ By April, United Church had succeeded. The proposed bill, H.R. 16586, would have amended the Communications Act to prohibit discrimination in employment by broadcast licensees. Significantly, unlike Title VII, which required *complainants* to prove an employer had discriminated, H.R. 16586 would put the burden on *broadcasters* to affirmatively prove that they did *not* discriminate.⁷⁹

All who wrote the FCC during this period offered versions of the public interest statutory argument without linking the public interest to the Constitution.⁸⁰ However, the Constitution crept back into the conversation, first implicitly and then explicitly. Robert L. Carter, the NAACP's General Counsel, did not cite the Constitution outright.⁸¹ Nonetheless, Carter's statement relied on administrators' constitutional interpretations, hinted at a version of the FCC attorneys' sanctioning theory of state action, and described administrators as having affirmative constitutional obligations. Carter had led the NAACP's constitutional advocacy before ad-

Johnson (June 7, 1967) (FCC Docket 18244, FRC Box 2, Folder 1) (using margin strikes to highlight the President's "strong endorsement" of the proposed rule).

⁷⁷ See, e.g., Art Peters, What the Negro Wants from TV, *TV Guide*, Jan. 20, 1968, (FCC Docket No. 18244, FRC Box 2, Folder 1); Douglas Robinson, New Media Charged With Giving False Image of Minorities, *N.Y. Times*, Jan. 18, 1968, at 28, (FCC Docket No. 18244, FRC Box 2, Folder 1).

⁷⁸ See, e.g., Letter from Hon. Charles E. Cobb, Executive Coordinator, Comm. for Racial Justice Now, to Sen. Clifford P. Case (Feb. 9, 1968) (FCC Docket No. 18244, FRC Box 2, Folder 1).

⁷⁹ H.R. 16586, 90th Cong. (1968). This bill probably did not put much pressure on the FCC, as it most likely was never considered by the House committee to which it was referred. Letter from Rep. Samuel N. Friedel to Hon. Rosel H. Hyde, Chairman, FCC 2 (Aug. 23, 1968) (FCC Docket No. 18244, FRC Box 2, Folder 1) [hereinafter Friedel Letter].

⁸⁰ See, e.g., Letter from Sen. John Conyers, Jr., to Hon. Rosel H. Hyde, Chairman, FCC, (July 13, 1967) (FCC Docket No. 18244, FRC Box 2, Folder 1) ("The airways are a public utility and they are leased to station managers to be used in the interest of the public. It is therefore incumbent upon the licensees to adopt the policies and practices of the federal government in employment.").

⁸¹ Statement from Robert L. Carter & Barbara A. Morris, Counsel for the NAACP, to FCC (June 9, 1967) (Papers of the NAACP, Library of Congress Manuscript Division ("LCMD"), Part V, Box 315, Folder 15 [hereinafter NAACP Papers]).

ministrative agencies in the 1950s and early 1960s.⁸² In 1964, Carter won a path-breaking decision before the National Labor Relations Board (“NLRB”), *Hughes Tool Co.*⁸³ Unlike the Attorney General, Congress, and the Supreme Court, which had all recently rejected or dodged the FCC’s licensing and sanctioning theories of state action, the NLRB embraced them. According to the NLRB, under the Fifth Amendment’s equal protection guarantees, it could not “countenance[]” (synonymous with sanction) or certify (akin to license) unions with racially discriminatory membership and bargaining practices.⁸⁴ Although the NLRB cited Supreme Court precedent to support its finding, the NLRB, like the FCC attorneys, creatively stretched those opinions “to the full limits . . . of the Fourteenth Amendment,” where none of the three branches of government had yet gone.⁸⁵ Carter now directed the FCC’s attention to *Hughes Tool*, emphasizing that “[o]ther federal agencies have felt compelled to insulate and protect federal machinery from supporting, protecting or condoning racial discrimination practiced by parties or groups that seek the right, privilege and protection which use of the federal machinery affords.”⁸⁶ The FCC, Carter urged, should do the same.

The FCC’s constitutional obligations were first explicitly argued not by a veteran movement lawyer, however, but by a government official exposed to the administrative constitutionalism of the Kennedy administration. The FCC’s General Counsel asked the Justice Department’s Civil Rights Division for its view of the FCC’s authority to issue United Church’s proposed rule. In May 1968, Stephen J. Pollak, the head of the Civil Rights Division, responded to the FCC’s request.⁸⁷ Pollak had begun his government service in the Solicitor General’s office during the Kennedy years, and had since held various general counsel posts in President Johnson’s

⁸² See generally Lee, *supra* note 4.

⁸³ 147 N.L.R.B. 1573, 1574 (1964); see Lee, *supra* note 4, at 329–30. See generally Michael R. Botson, Jr., *Labor, Civil Rights, and the Hughes Tool Company* (2005).

⁸⁴ *Hughes Tool*, 147 N.L.R.B. at 1574, 1577.

⁸⁵ Kennedy House Statement, *supra* note 56, at 2656.

⁸⁶ Statement from Robert L. Carter & Barbara A. Morris, *supra* note 81.

⁸⁷ Letter from Stephen J. Pollak, AAG, Civil Rights Division (“CRD”), to Hon. Rosel H. Hyde, Chairman, FCC (May 21, 1968), *in* *Nondiscrimination in Employment Practices of Broadcast Licensees*, App. A, 33 Fed. Reg. 9960, 9964–65 (July 11, 1968) (to be codified at 47 C.F.R. pt. 73) [hereinafter Pollak Letter].

2010]

Race, Sex, and Rulemaking

825

administration before taking charge of the Civil Rights Division earlier that year.⁸⁸ Whether Pollak had seen the FCC lawyers' memo during his years in government is unclear; in any case, he now made a version of that argument back to the FCC.

Pollak advised that the FCC had ample statutory and constitutional authority to adopt equal employment rules if it so chose. Like the FCC attorneys, Pollak identified a national policy against employment discrimination and advised the FCC that it could find that broadcasters who violated that policy failed to advance the public interest. Like other letter writers, Pollak did not connect this national policy to the Constitution. Unlike the other letter writers, however, Pollak added an explicitly constitutional argument akin to that advanced by the FCC attorneys before him.

Pollak, like his predecessors in the OLC and the Solicitor General's office, avoided stating that administrators had an affirmative constitutional *obligation* to demand equal employment from the businesses they regulated. Where his predecessors shied away from "far-reaching" state action theories, however, Pollak endorsed them. Echoing the FCC attorneys' licensing theory of state action, Pollak argued that broadcasters' use of the public airwaves gave them "enough of a 'public' character" that the FCC could "require the licensee to follow the constitutionally grounded obligation not to discriminate on the grounds of race, color, or national origin."⁸⁹

In advancing this expansive state action theory, Pollak employed two of administrative constitutionalists' standard tools: extrapolating broad readings of Supreme Court precedents to novel administrative contexts and relying on administrators' constitutional interpretations. Pollak recognized that there were "no cases directly in point" to support his constitutional advice.⁹⁰ Instead, like the FCC attorneys before him, Pollak stretched *Burton* to reach the case at hand. Pollak likened broadcasters' use of public airwaves to the restaurant's use of a public building in *Burton*. Constitutional obligations inhered in a federal agency's license, Pollak suggested, just as they did in the restaurant's lease.

⁸⁸ See A Conversation with Stephen J. Pollak, Bar Report, Dec./Jan. 2000, http://www.dcbbar.org/for_lawyers/resources/legends_in_the_law/pollak.cfm.

⁸⁹ Pollak Letter, *supra* note 87, at 9964.

⁹⁰ *Id.*

Pollak's letter also drew on a source of authority foreign to court-made constitutional law: other agencies' actions. Pollak noted that other "agencies have been permitted or required to prohibit racial discrimination by those they license or certify."⁹¹ Among the examples he cited was the NLRB's *Hughes Tool* decision.⁹² As Pollak's letter demonstrates, administrative constitutionalists readily ventured into constitutional territory unexamined by the courts. When doing so, they did not cleave cautiously to Supreme Court precedent. Instead, they viewed court doctrine more as a license than a constraint and relied on fellow administrators' constitutional interpretations.

Given Pollak's advice and the FCC attorneys' earlier memo, there was reason to expect bold FCC action. Then again, in the past, the FCC's Commissioners had proven themselves less eager than its attorneys to impose civil rights obligations on broadcasters. Around the time the FCC attorneys floated their 1963 memo, United Church sought to block the license of a southern television station that it accused of programming bias.⁹³ At the time, the FCC was chaired by Emil Henry, a southern racial progressive known as a champion of civil rights.⁹⁴ Nonetheless, the Commissioners rejected United Church's challenge. If anything, the prospects for bold action by the Commissioners had grown dimmer since. After Henry resigned in 1967, President Johnson appointed Rosel Hyde to chair the FCC. Hyde had worked for the FCC since the 1920s and had served as a Commissioner since the 1940s.⁹⁵ He was a Republican who preferred minimal government regulation and was generally considered the broadcasters' ally.⁹⁶ Hyde was expected to rein in the FCC after a period of turmoil.⁹⁷ To FCC-watchers, Hyde's appointment as chair "signaled the end of the New Frontier era."⁹⁸ Of course, President Johnson had also appointed Nicholas Johnson. A Democrat, Johnson had already earned a reputation as

⁹¹ *Id.*

⁹² *Id.*

⁹³ For a history of the challenge, see Kay Mills, *Changing Channels: The Civil Rights Case that Transformed Television* (2004).

⁹⁴ Gerald V. Flannery, *Commissioners of the FCC 1927-1994*, at 129-31 (1995).

⁹⁵ *Id.* at 75-76.

⁹⁶ *Id.* at 76-77.

⁹⁷ *Id.*

⁹⁸ *Id.*

2010]

Race, Sex, and Rulemaking

827

a brash young reformer and a friend of public interest groups.⁹⁹ This outspoken neophyte might offer civil rights groups a voice on the Commission, but he was unlikely to outweigh Hyde, a longtime insider.

In July 1968, the FCC issued its order and proposed rulemaking.¹⁰⁰ The FCC advised that the Justice Department's views had been especially influential, but where Pollak had advised the FCC that it *could* adopt equal employment policies, the FCC announced that it was *compelled* to do so. The FCC did not mention the Constitution outright. However, its reasoning resembled that in the FCC attorneys' 1963 memo. The FCC recognized a "national policy against discrimination in employment."¹⁰¹ This policy was "embodied in section VII of the Civil Rights Act" but was not limited to Title VII's provisions.¹⁰² Indeed, "even where no violation of a specific [antidiscrimination] statute is established or alleged," the FCC reasoned, "allegations may raise serious public interest issues."¹⁰³ This was because a federal license was subject to the same limits as a federal contract, limits that were independent of Title VII.¹⁰⁴ The FCC did not say from where these limits derived, but the FCC attorneys had argued in their 1963 memo that these limits arose out of government's equal protection obligations.¹⁰⁵ The FCC concluded that it could not find a broadcaster who violated this broad national policy to be operating in the public interest.¹⁰⁶

The FCC offered another more tentative reason that its equal employment authority could extend beyond technical violations of the existing antidiscrimination laws. A licensed broadcaster, the FCC noted, was a public trustee obligated to "ascertain the needs and interests of his public."¹⁰⁷ Broadcasters who discriminated in their employment might cut themselves off from the communities

⁹⁹ Id. at 147–48.

¹⁰⁰ Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg. 9960 (July 11, 1968) (to be codified at 47 C.F.R. pt. 73).

¹⁰¹ Id. ¶ 4.

¹⁰² Id. ¶¶ 4, 9.

¹⁰³ Id. ¶ 8.

¹⁰⁴ Id.

¹⁰⁵ Powers Memo, *supra* note 35.

¹⁰⁶ Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg.

¶ 9.

¹⁰⁷ Id. ¶ 10.

from which they refused to hire employees, “rais[ing] a question of whether the licensee is making a good faith effort to serve his entire public.”¹⁰⁸ Thus, the FCC linked broadcasters’ employment practices with their service provision.

If the FCC’s reasoning could be expected to please the petitioners, its proposed rule did not. United Church’s proffered rule required broadcasters to provide statistical proof that they did not discriminate. In contrast, the FCC stated that its existing policies already empowered it to entertain individual complaints of discrimination, a process that would place the burden of proof on workers, not employers.¹⁰⁹ Furthermore, the FCC stated that the racial proportionality of a broadcaster’s workforce alone could not prove discrimination.¹¹⁰ The only new rule the FCC proposed was a modest one requiring all broadcasters to post nondiscrimination notices in the workplace and on their employment applications.¹¹¹ Instead, the FCC made a plea to broadcasters’ consciences, asking that they follow not just the letter of the FCC’s policy, but its spirit as well, by inspiring and recruiting black men and women to become journalists.¹¹²

The rule’s proponents were dissatisfied, to say the least. Members of Congress, government officials, civil rights and labor organizations, and church groups all wrote to the FCC.¹¹³ Pollak’s letter seemed to have set off an administrative and constitutional firestorm. One after another, comments arrived at the FCC, arguing that the FCC and its licensees were constitutionally compelled to enforce equal employment.¹¹⁴ Again, the most developed consti-

¹⁰⁸ Id. ¶ 11.

¹⁰⁹ Id. ¶¶ 13–16. These differences encapsulated a larger debate about what, precisely, constituted “discrimination,” hiring disparities or employer motive, and whether it was a systemic problem needing broad remedies or an individual injury requiring case-by-case resolution.

¹¹⁰ Id. ¶ 14.

¹¹¹ Id. ¶ 17.

¹¹² See id. ¶ 21.

¹¹³ See, e.g., Friedel Letter, *supra* note 79, at 1–2; Letter from Clifford L. Alexander, Jr., Chairman, Equal Employment Opportunity Commission (“EEOC”), to Rosel H. Hyde, Chairman, FCC 1 (Aug. 20, 1968) (FCC Docket 18244, FRC Box 2, Folder 1).

¹¹⁴ See, e.g., Comment from Earle K. Moore & Edward A. Bernstein, Counsel for Petitioners, to FCC 3–4 (Oct. 7, 1968) (FCC Docket 18244, FRC Box 2, Folder 1); Comment from Robert L. Carter, Gen. Counsel, NAACP, to FCC 3 (Sept. 6, 1968) (FCC Docket 18244, FRC Box 2, Folder 1).

tutional case was made not by a public interest litigator, but by Howard Glickstein, the Staff Director of the United States Commission on Civil Rights (“Civil Rights Commission”). In writing to the FCC, Glickstein was fulfilling his Commission’s role as a civil rights advocate and watchdog within the federal government.¹¹⁵ Like Pollak, Glickstein had been immersed in the civil rights constitutional theories of the Kennedy and Johnson administrations. During the early 1960s, while serving in the Justice Department’s Civil Rights Division, Glickstein had considered the FCC attorneys’ memo as well as the PCEEEO’s plan for broad regulatory action.¹¹⁶ Since then he had served as the Civil Rights Commission’s General Counsel and then Staff Director. Glickstein’s letter to the FCC built on the broad state action and affirmative rights claims he had absorbed during his years in the Civil Rights Division.

Glickstein, like the FCC attorneys before him, made both a direct constitutional argument and a statutory argument grounded in the Constitution. Indeed, the Constitution was so central to Glickstein’s letter that he included a separate appendix containing an extended discussion of the FCC’s constitutional obligations, as well as those of the broadcasters the FCC regulated. Glickstein elaborated on the connection the FCC’s order had drawn between the hiring and service provision, and linked this statutory requirement to the Constitution. According to Glickstein, the FCC had a statutory duty, backed by a “Constitutional requirement[], to ensure that the programming of licensees serves the needs of all portions of the community.”¹¹⁷ Because broadcasters’ hiring affected their programming, the FCC had a statutorily imposed, but constitutionally derived, duty to require that “each licensee . . . take every action that is necessary to ensure” that its employees “reflect the population of the community it serves.”¹¹⁸ Like the FCC’s order, Glickstein emphasized that this duty was far broader than Title VII’s nondiscrimination mandate.¹¹⁹

¹¹⁵ Letter from Howard A. Glickstein, Acting Staff Dir., U.S. Comm’n on Civil Rights, to Hon. Rosel H. Hyde, Chairman, FCC A-2-A-5 (Sept. 9, 1968) (FCC Docket 18244, FRC Box 2, Folder 1) [hereinafter Glickstein Letter].

¹¹⁶ Powers Memo, *supra* note 35.

¹¹⁷ Glickstein Letter, *supra* note 115, at 3.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.*

Glickstein also argued that FCC-licensed broadcasters were state actors, directly bound by the Constitution's equal protection guarantees to ensure equal employment. In doing so, his citation of case law was thin and his readings were bold and broad. Citing *Burton*, Glickstein mainly relied on the "significant involvement" argument the Supreme Court seemed most comfortable with,¹²⁰ but he broadened it considerably. Where the Court had demanded *significant* involvement, Glickstein argued that the "Constitutional requirements of nondiscrimination . . . extend to all private action that has a *substantial tinge* of governmental involvement."¹²¹

Glickstein next propounded an astonishingly broad metric to determine whether private action had a "substantial tinge" of government involvement. He argued that, under *Burton*, government involvement should be measured by the extent of the "contacts between the governmental unit and private act of discrimination, or between the governmental unit and the private actor."¹²² There was nothing inherently sweeping in this sufficiency-of-contacts rationale. What gave the rationale its startling breadth were the "two primary contacts" Glickstein said would be "sufficient to render the Constitutional right to be free from discrimination applicable to private conduct."¹²³ Glickstein argued that under *Burton*, state action inhered anywhere a private entity served a public interest, and a government body had the power to regulate its conduct.¹²⁴ Glickstein cited cases, but he was not cautiously implementing courts' constitutionalism. Instead, Glickstein's version of state action was at least as expansive as the licensing and sanctioning theories that the Court had thus far refused to adopt. Lawyerly administrators like Glickstein and Pollak might invoke case law, but they treated it as persuasive yet flexible support rather than as constraining authority.

Finally, Glickstein argued that the FCC was directly bound by the Constitution to ensure that its licensees implemented equal

¹²⁰ See supra notes 65–69 and accompanying text.

¹²¹ Glickstein Letter, supra note 115, at A-2 (emphasis added). Glickstein also cited *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1963), described supra note 51. Glickstein Letter, supra note 115, at A-3.

¹²² Id. at A-2.

¹²³ Id. at A-4.

¹²⁴ Id.

employment. According to Glickstein, the FCC was under a “strong[] duty to enforce the Constitutional requirement” of non-discrimination.¹²⁵ Echoing the FCC attorneys’ sanctioning theory of state action, Glickstein argued that by failing to do so, the FCC “would be participating in [its licensees’] unconstitutional conduct.”¹²⁶ Glickstein did not rely on a broad reading of Supreme Court precedent to reach this conclusion. In fact, he did not cite any authority at all. Instead, Glickstein appeared to be directly interpreting the Constitution. Taken as a whole, Glickstein’s comment envisioned administrative agencies and broadcasters equally obligated by the Constitution to ensure equal employment.

Other administrators ignored the Supreme Court altogether, relying exclusively on administrative interpretations of the Constitution. The Office of Federal Contract Compliance (“OFCC”), the successor of the PCEEO, enforced the employment nondiscrimination clauses in all government contracts. This was the agency to which the FCC had likened its own equal employment duty and that implemented the “national policy against discrimination in employment” that the FCC now sought to enforce.¹²⁷ Ward McCreedy, the OFCC’s Acting Director, sent the FCC a letter reminding the FCC of the constitutional basis for both its duty and that national policy.¹²⁸ McCreedy did not cite courts for constitutional authority, relying instead on how equal protection governed his office’s policies.

McCreedy had been enforcing the government’s nondiscrimination contract clauses since the Kennedy years.¹²⁹ During the 1960s, his office justified its actions by relying on the government’s affirmative equal protection duties.¹³⁰ In 1963, attorneys from

¹²⁵ *Id.* at A-7.

¹²⁶ *Id.* at 2.

¹²⁷ Nondiscrimination in Employment Practices of Broadcast Licensees, 33 Fed. Reg. 9960, 9961 ¶ 4 (July 11, 1968) (to be codified at 47 C.F.R. pt. 73).

¹²⁸ Letter from Ward McCreedy, Acting Dir., Office of Fed. Contract Compliance, Dep’t of Labor, to Hon. Rosel H. Hyde, Chairman, FCC 1 (Nov. 12, 1968) (FCC Docket No. 18244, FRC Box 2, Folder 2) [hereinafter McCreedy Letter].

¹²⁹ See Catherine Harris, Recollections of John Rayburn, EEOC Employee, 1965–1984 (Dec. 10, 1999), http://www.eeoc.gov/eeoc/history/35th/voices/oral_history-john_rayburn-catherine_harris.wpd.html.

¹³⁰ See Graham, *supra* note 11, at 330–31 (describing a Department of Labor brief that defended OFCC’s affirmative action policy on the grounds that it fulfilled the

McCreedy's office had considered the FCC attorneys' memo as a template for arguing that the Constitution required equal employment in regulated industries.¹³¹ Offering a non-doctrinal blend of the FCC attorneys' licensing and sanctioning theories of state action, and echoing administrators' understanding of their affirmative constitutional obligations, McCreedy reminded the FCC that his office had "long concurred with the view that the licensing powers of Federal agencies should be employed . . . against discrimination in employment."¹³² McCreedy likened a government license to a government contract: according to McCreedy, "consistent with the constitutional principle underlying the Government's refusal to deal with contractors engaging in discriminatory employment," the government also could not license businesses that discriminated in employment.¹³³ Furthermore, he suggested that these were affirmative, not merely negative, constitutional commands. McCreedy reported that his office emphasized to employers that "passive non-discrimination does not fulfill the requirements of Federal law."¹³⁴ Demonstrating how administrative constitutionalism's modes of reasoning and argument differed from those of the courts, McCreedy did not advance his constitutional view in doctrinal terms. Instead, he relied directly on the Constitution and on his administrative office's interpretations of that document.

McCreedy's letter coincided with Richard Nixon's narrow victory over Democrat Hubert Humphrey in the 1968 presidential elections. Nixon's subtle race-baiting during his campaign suggested that he would not encourage administrators to continue to implement equal protection independently or to pursue civil rights aggressively.¹³⁵ Nonetheless, in June 1969, the FCC issued its order on the proposed rulemaking.¹³⁶ The FCC ignored its prior sugges-

President's equal protection obligations). See generally *supra* notes 26–53 and accompanying text.

¹³¹ See *supra* note 52 and accompanying text.

¹³² McCreedy Letter, *supra* note 128, at 1.

¹³³ *Id.*

¹³⁴ *Id.* at 2.

¹³⁵ Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* 326–70 (1995) (tracing the racial resonance of Nixon's "law and order" campaign).

¹³⁶ *Nondiscrimination in Employment Practices, Report and Order*, 34 Fed. Reg. 9284 (June 6, 1969).

tion that rules were justified because broadcasters' employment practices might impact their service provision, as well as Glickstein's constitutional argument to the same effect. Instead, the FCC used the strategy its attorneys had ultimately recommended in the early 1960s: interpreting the Communications Act so as to avoid the constitutional problems that would arise if the FCC failed to demand, and its licensees to implement, equal employment.¹³⁷ The FCC recognized that it had received comments relying on cases like *Burton*, that made a "substantial case . . . [that] the Commission," as a result of its relationship to broadcasters, "ha[d] a constitutional duty to assure equal employment opportunity."¹³⁸ But the FCC found that it "need not decide this point" because of its "independent responsibility to effectuate [the] strong national policy" demanding equal employment opportunity.¹³⁹

The Constitution shaped the FCC's statutory interpretation both explicitly and implicitly. The FCC's constitutional avoidance reasoning relied on the expansive state action theories and affirmative understanding of administrators' equal protection duties that had been percolating through government agencies since the early 1960s. Read in conjunction with the FCC attorneys' 1963 memo, it suggests that for the FCC, equal protection turned a statutory *can* into a constitutional *must*. The Constitution also worked its way less explicitly into the FCC's rule. The FCC found itself statutorily obligated to ensure broadcasters did not harm the public interest by violating the national policy against discrimination. As the FCC attorneys' 1963 memo and McCreedy's recent letter made clear, this national policy derived from the Fifth Amendment. Thus the FCC, as its attorneys had recommended in 1963, avoided directly violating the Constitution by fulfilling what the FCC saw as its statutory duty to ensure that the broadcasters it regulated did not violate the Fifth Amendment "and the public policies established thereunder."¹⁴⁰

The equal employment rule's scope also appeared to be shaped by the affirmative and sweeping constitutional theories that had

¹³⁷ Powers Memo, *supra* note 35.

¹³⁸ Nondiscrimination in Employment Practices, Report and Order, 34 Fed. Reg. at 9284.

¹³⁹ *Id.*

¹⁴⁰ Powers Memo, *supra* note 35.

poured into the FCC over the previous months. Reversing its earlier position, the FCC rejected the individual complaint approach, instead requiring all broadcasters to “establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice.”¹⁴¹ In addition, the FCC required broadcasters to submit annual data on the race and ethnicity of their employees. Quoting a federal circuit court, the order reasoned, “In the problem of racial discrimination, statistics often tell much.”¹⁴² Mirroring Glickstein’s and McCreedy’s constitutional advocacy and advice, the FCC defined discrimination as a systemic, not individual, problem that affirmatively required employers to ensure its elimination.

Over the next few months, Nixon appointed two Republicans to the FCC, including a new chair who, as a former campaign manager for Barry Goldwater, had championed the free market, denounced regulatory overreaching, and faced accusations of racism during his Senate confirmation process.¹⁴³ One might expect that Nixon’s personnel choices would derail the FCC’s civil rights policymaking, but they did not. Despite the change in leadership and committee makeup, in December 1969, the FCC announced another equal employment rulemaking, this time for the common carriers—telephone and telegraph companies—that it licensed and regulated. The proposed rule was essentially the same as the one that it had adopted for broadcasters: each carrier would be re-

¹⁴¹ Nondiscrimination in Employment Practices, Report and Order, 34 Fed. Reg. at 9286.

¹⁴² *Id.* at 9285 (quoting *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962)). The quote referred to the use of statistics in voting registration and jury composition cases. The FCC also requested comments on what forms it should use to satisfy its new rule’s reporting requirements. Nondiscrimination in Employment Practices, Further Notice of Proposed Rulemaking, 34 Fed. Reg. 9288 (June 12, 1969) (to be codified at 47 C.F.R. pts. 0, 1). During this period, a National Organization for Women (“NOW”) chapter requested that the FCC add sex to its nondiscrimination policy. Letter from Cindy Judd Hill, Pub. Relations Dir., Greater Pittsburgh Area Chapter of NOW, to Ben F. Waple, Sec’y, FCC (Sept. 25, 1969) (FCC Docket 18244, FRC Box 2, Folder 2). The following summer when the FCC announced its new rule, it did so. Non-Discrimination in Employment Practices of Broadcast Licensees, Report and Order, 35 Fed. Reg. 8825, 8825, 8827 (June 6, 1970) (to be codified at 47 C.F.R. pt. 73).

¹⁴³ Flannery, *supra* note 94, at 145, 154–55. Dean Burch became Chair October 31, 1969. *Id.* His predecessor, Rosel Hyde, was also not a movement activist. See *supra* notes 95–98 and accompanying text. Robert Wells was sworn in on November 6, 1969.

quired to “carry out . . . a positive continuing program of specific practices designed to assure equal opportunity,” provide annual employment statistics, and give information on its nondiscrimination program whenever it applied for a license, license renewal, or construction permit.¹⁴⁴ In addition, the FCC would consider individual complaints of discrimination.

As with broadcasters, the FCC asserted that it was compelled to implement a broad national policy against discrimination that transcended “the specific provisions of the Civil Rights Act.”¹⁴⁵ The FCC noted that many common carriers operated radio facilities, which brought them under the Communications Act’s public interest, convenience, and necessity requirements.¹⁴⁶ If these common carriers violated the national policy against discrimination, the FCC would have to deny them radio authorizations for failing to serve the public interest. The FCC acknowledged that there were “differences . . . in the public interest considerations” governing common carriers and broadcasters, but nonetheless concluded without explanation that “these differences do not affect the Commission’s responsibility to take what steps it can to eliminate discrimination by common carriers.”¹⁴⁷

The FCC also relied on a service provision rationale. The Agency reasoned that common carriers, by virtue of being granted a monopoly, had “a unique and peculiar public interest role” that barred them from discriminating in service provision.¹⁴⁸ Borrowing from their recent order proposing equal employment rules for broadcasters, the FCC linked carriers’ hiring practices with their service. According to the FCC, “a company which follows discriminatory employment practices would find it difficult to provide

¹⁴⁴ Communications Common Carriers, Non-Discrimination in Employment Practices, 34 Fed. Reg. 19200, 19200–01 (Dec. 4, 1969) (to be codified at 47 C.F.R. pts. 0, 1, 21, 23).

¹⁴⁵ *Id.* at 19200.

¹⁴⁶ *Id.* at 19200–01.

¹⁴⁷ *Id.* There were also potentially significant differences between the two industries in terms of a state action analysis. For instance, the FCC’s regulatory relationship with broadcasters was more involved than its relationship with common carriers. As a result, the argument that the FCC’s regulatees were state actors under a significant-involvement theory of state action was weaker for common carriers than for broadcasters.

¹⁴⁸ *Id.* at 19201.

nondiscriminatory service.”¹⁴⁹ The FCC did not attempt to explain this connection. Instead, it simply asserted that there was one.

Once again, the FCC did not explicitly cite the Constitution, but its justification for the proposed rule had undertones of constitutional compulsion. The FCC concluded that “because of the special position granted communications common carriers by the Government, and the relationship between service to the public and the carrier’s employment practices, it would be intolerable to countenance discriminatory employment practices.”¹⁵⁰ By using language that echoed the sanctioning theory of state action relied on in the FCC attorneys’ 1963 memo and the NLRB’s *Hughes Tool* order often cited to the FCC over the last two years, the FCC suggested that equal protection informed its proposed policies.

In August 1970, the FCC issued almost the exact rule it had proposed less than a year before.¹⁵¹ There was, however, one notable addition. In its proposed rules, the FCC set out a system of reporting and individual complaints, which would be primarily forwarded to federal, state, and local employment discrimination agencies. In its adopted rule, however, the FCC said it would also investigate a new kind of complaint: one “indicating a general pattern of disregard of equal employment practices.”¹⁵² The FCC did not say much more about the legal authority for its new rule, primarily incorporating its prior statements. The Agency did emphasize once again that it had an “independent responsibility to effectuate the strong national policy against discrimination in employment,” a national policy that had its roots in the Constitution.¹⁵³ To the extent that the FCC’s new rule was influenced by the Constitution, this administrative implementation of equal protection would target hiring disparities, not only intent, and would vindicate group, not only individual, rights.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Non-Discrimination in Employment Practices of Communications Common Carriers, Report and Order, 35 Fed. Reg. 12892, 12894 (Aug. 14, 1970) (to be codified at 47 C.F.R. pts. 0, 1).

¹⁵² *Id.* at 12895.

¹⁵³ *Id.* at 12893.

3. The FCC Enforces Its Equal Employment Rules

In the fall of 1970, the FCC had its new rules put to the test. AT&T requested a rate increase, which set off a storm of opposition from consumer groups.¹⁵⁴ If this sort of response was expected, one party's petition was not.¹⁵⁵ In an unprecedented move, the Equal Employment Opportunity Commission ("EEOC") sought to intervene on the grounds that AT&T discriminated in its employment practices.¹⁵⁶ According to the EEOC, "Overwhelming statistical evidence indicates that AT&T's operating companies have historically excluded and segregated and continue to exclude and segregate women, blacks and Spanish-surnamed Americans."¹⁵⁷ These statistics, the EEOC argued, were prima facie evidence that AT&T discriminated in violation of the Communications Act and the Fifth Amendment. Furthermore, the EEOC alleged that the FCC would violate this Act and the Fifth Amendment if it allowed the AT&T rate increase.¹⁵⁸ In addition to promoting a statistical and systemic definition of discrimination rather than an individual complaint- and intention-driven one, the EEOC joined the growing list of administrators enforcing broad state action and government's affirmative constitutional duties.

Lower courts were beginning to catch up with the administrative constitutionalists, giving the EEOC a more robust range of cases to cite. The EEOC referenced the same Supreme Court decisions as had the previous proponents of agencies' equal employment responsibilities. In addition, the EEOC bolstered its arguments with recent lower court decisions adopting the broad licensing and sanctioning theories of state action on which administrators had been

¹⁵⁴ See Petitions Opposing Proposed AT&T System Increased Tariff Schedules and for Other Relief (Jan. 6, 1971) (Docket 19129, Hearing Docket Files, FCC, Record Group 173, National Archives, FRC Box 1, Binder 1).

¹⁵⁵ See Elizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* 357 (2003) (dating 1967 to 1973 as the peak years of the consumer rights movement).

¹⁵⁶ Marjorie A. Stockford, *The Bellwomen: The Story of the Landmark AT&T Sex Discrimination Case* 19 (2004) (noting that the EEOC staff found no precedent for its inter-agency intervention).

¹⁵⁷ Memorandum in Support of EEOC Petition to Intervene from Stanley P. Hebert, General Counsel, & David A. Copus, Attorney, EEOC, to FCC 1 (Dec. 10, 1970) (EEOC v. AT&T, NAACP Papers, Part V, Box 353, Folder 1 [hereinafter EEOC v. AT&T Papers]).

¹⁵⁸ *Id.* at 2.

relying.¹⁵⁹ The EEOC extended the logic of these precedents to reach AT&T's hiring practices. Like the FCC's common carrier rules, the EEOC's broad state action reasoning emphasized the government's grant of monopoly status, rather than a license, to common carriers. The EEOC argued that, since "AT&T has grown to be the world's largest utility because of federal government sufferance," it "is subject to the due process clause of the Fifth Amendment."¹⁶⁰ Adopting a version of the sanctioning state action theory laid out in the FCC attorneys' 1963 memo, the EEOC also argued that the FCC's "[a]pproval of the rate increase would impliedly authorize the [AT&T] discrimination to continue"; this, the EEOC asserted, "clearly contravenes the [C]onstitution."¹⁶¹ In addition to this broad state action reasoning, the EEOC used *Burton* and subsequent lower court cases to support the proposition that government entities must take "affirmative steps to insure that those with whom they participate do not engage in practices which violate the [C]onstitution."¹⁶² Under this theory, agencies and their regulatees—in this case, the nation's largest corporation—were constitutionally required to end discrimination nationwide.

The EEOC crafted its constitutional argument by citing more cases and drawing more precise analogies to them than prior administrators had. This legalism may have reflected the Agency lawyers' general orientation towards court litigation, the new context of a court-like adjudication, or the simple fact that these administrative constitutionalists had a growing number of cases to draw on. At the same time, too much should not be made of the EEOC's relatively legalistic approach; its petition still embodied administrative constitutionalists' innovative and flexible use of court doctrine. The recent decisions the EEOC cited were mainly district and state court cases, hardly controlling authority for federal agencies. In addition, although the Supreme Court had yet to

¹⁵⁹ *Id.* at 33–34 (citing *Burton*, 365 U.S. 715 (1961); *Pollak*, 343 U.S. 451 (1952); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 964 (4th Cir. 1963) (en banc); *Irvis v. Scott*, 318 F. Supp. 1246, 1248 (M.D. Pa. 1970); *James v. Ogilvie*, 310 F. Supp. 661 (N.D. Ill. 1970); *Seidenberg v. McSorleys' Old Ale House*, 308 F.Supp. 1253 (S.D.N.Y. 1969); *Ethridge v. Rhodes*, 268 F. Supp. 83, 88 (S.D. Ohio 1967)).

¹⁶⁰ *Id.* at 35.

¹⁶¹ *Id.* at 47.

¹⁶² *Id.* (citing *Burton*, 365 U.S. at 725; *Potts v. Flax*, 313 F.2d 284, 289 (5th Cir. 1963); *Ethridge*, 268 F. Supp. at 87).

strike down an instance of sex discrimination and courts still deemed sex a reasonable basis for different treatment, the EEOC in no way sought to separate its claim that AT&T discriminated on the basis of sex from the rest of its constitutional argument.¹⁶³ At a time when women were demonstrating for their constitutional rights in the streets, politicians were planning legislative action to advance women's rights, and legal strategists were seeking sex discrimination test cases to bring in the courts, the EEOC petition put the Agency's constitutionalism and its AT&T action decidedly in the legal forefront.¹⁶⁴ Thus, even though the EEOC's petition relied more extensively on courts' decisions, its administrative constitutionalism creatively extended Supreme Court doctrine.

David Copus hatched the idea for this novel intervention. He was a recent hire at the EEOC, indicating that administrative constitutionalists' creatively broad state action theories were not simply held over from the Kennedy and Johnson administrations. Copus proposed the action to the EEOC's Chairman, William H. Brown, III, a Republican who had spent the first dozen years of his career as a top litigator at a successful all-black law firm in Philadelphia.¹⁶⁵ Brown had ties to the Johnson administration, initially serving as an interim appointee to the EEOC during Johnson's last months. Brown also had the endorsement of President Nixon, who made him Chair in 1969. He replaced Democrat Clifford Alexander, who resigned amid Republican accusations that he was too tough on business; many assumed Brown was hand-picked to in-

¹⁶³ The Supreme Court first considered the status of sex discrimination under its post-*Brown* equal protection doctrine in the fall of 1971. *Reed v. Reed*, 404 U.S. 71, 72–73, 77 (1971) (striking down a state law giving preference to males for appointment as administrators of a deceased's estate).

¹⁶⁴ On the popular constitutional claims the women's movement had made at their August 1970 Women's Strike for Equality, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L.J.* 1943, 1988–93 (2003). For a history of the feminist movement's constitutional strategy, see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 *Cal. L. Rev.* 755 (2004).

¹⁶⁵ Aaron Porter, Norris, Schmidt, Green, Harris, Higginbotham & Associates: The Sociological Import of Philadelphia Cause Lawyers, *in* *Cause Lawyering: Political Commitments and Professional Responsibilities* 151–52 (Austin Sarat & Stuart Scheingold eds., 1998).

stead go easy on employers.¹⁶⁶ That may be what Brown was hand-picked for, but it is not what he delivered.

Brown was intrigued by Copus's AT&T proposal, but cautious. The EEOC was a small, overburdened, and struggling agency known for its relative powerlessness. Taking on the nation's largest corporation would be risky. Nonetheless, Brown assigned Copus a pair of junior lawyers to see what kind of case they could make. Like Copus, his young colleagues took to the broad state action and affirmative rights constitutionalism percolating through the federal bureaucracy, adding to it their passion for women's rights. The EEOC petition was the fruit of their collective labors.¹⁶⁷

In January 1971, civil rights groups' petitions to intervene and in support of the EEOC's request streamed in to the FCC. Their filings incorporated the EEOC's petition and claimed that the FCC would violate the Communications Act and the Fifth Amendment if it approved AT&T's rate increase.¹⁶⁸ The FCC soon severed the EEOC-initiated action from the AT&T rate hearing, stating that it would instead consider the EEOC petition under the FCC's newly minted equal employment rules.¹⁶⁹

At first, the EEOC's petition had garnered only modest attention from the press, but once the FCC indicated that it would take action, newspapers took notice. "FCC Checking AT&T for Bias," read the front page of the *Washington Post*.¹⁷⁰ "It was the first time

¹⁶⁶ The Nixon Look: Regulatory Agencies Take Pro-Business Cast with New Nominees, *Wall St. J.*, Sept. 25, 1969, at 1, 16; see also Robert Young, Brown Sworn in Rights Job; Named Chief, *Chi. Trib.*, May 7, 1969, at A8.

¹⁶⁷ For a detailed account of the EEOC petition's origins, see Stockford, *supra* note 156, at 21–30.

¹⁶⁸ Petition from David Cashdan, Berlin, Roisman & Kessler, Counsel for Cal. Rural Legal Assistance, & The Mex. Am. Legal Def. and Educ. Fund ("MALDEF"), to FCC (Jan. 18, 1971) (In the Matter of AT&T Transmittal No. 10989, NAACP Papers, Part V, Box 352, Folder 8); Petition from David Cashdan, Berlin, Roisman & Kessler, Counsel for ACLU, to FCC (Jan. 18, 1971) (In the Matter of AT&T Transmittal No. 10989, NAACP Papers, Part V, Box 352, Folder 8); Petition from David Cashdan, Berlin, Roisman & Kessler, Counsel for NAACP, to FCC (Jan. 18, 1971) (In the Matter of AT&T Revision of Tariff FCC No. 263; AT&T Transmittal No. 11027, NAACP Papers, Part V, Box 353, Folder 1).

¹⁶⁹ Order of FCC (Jan. 21, 1971) (In the Matter of Petitions of the EEOC et al., Docket No. 19129, NAACP Papers, Part V, Box 352, Folder 8).

¹⁷⁰ Robert J. Samuelson, FCC Checking AT&T for Bias: FCC to Investigate Charges of Discrimination at AT&T, *Wash. Post*, Jan. 22, 1971, at A1; see also FCC Orders Hearing on Charges that AT&T Discriminates in Hiring: Accusations Were Made by

a national regulatory agency had decided to scrutinize the employment practices of the industry it oversees,” the article observed.¹⁷¹ Over the winter, the AT&T case continued to grab headlines. The *New York Times* reported that the EEOC had submitted a 20,000-page report supporting its claim of discrimination by AT&T and its subsidiaries.¹⁷² The EEOC answered AT&T’s claims of improved minority hiring with system-wide evidence that AT&T and its operating companies segregated women and minorities into the lowest-skilled, lowest-paid positions.¹⁷³ Then, in 1972, the FCC held what proved to be eye-catching public hearings in New York and Los Angeles. “AT&T Assailed as Racist Monopoly,” one headline ran.¹⁷⁴ The significance of the AT&T action seemed to be settling in as the case proceeded. As one former AT&T employee noted, the company was the nation’s largest corporation in terms of its assets and number of employees, and the third-largest defense contractor.¹⁷⁵ This one action could significantly alter the employment practices of an entire sector of the economy.

Then the EEOC got blindsided by another administrative office. The General Service Administration (“GSA”) oversaw compliance with government contracts’ nondiscrimination provisions on behalf of the OFCC. In the fall of 1972, just as the EEOC started to attack AT&T’s defense, AT&T and the GSA announced a headline-grabbing agreement that would have required AT&T to hire

Equal Employment Opportunity Unit Seeking to Block Rate Boost, *Wall St. J.*, Jan. 22, 1971, at 10.

¹⁷¹ Samuelson, *supra* note 170, at A1.

¹⁷² Christopher Lydon, *Job Bias at Bell Charged by Panel: 20,000-Page Report Finds Women Are Oppressed – Policy on Blacks Scored*, *N.Y. Times*, Dec. 2, 1971, at 1. AT&T had two dozen subsidiary operating companies, referred to as the “Bell System.” Phyllis A. Wallace, Introduction, *in* *Equal Employment Opportunity and the AT&T Case 1* (Phyllis A. Wallace ed., 1976).

¹⁷³ Lydon, *supra* note 172, at 30.

¹⁷⁴ Grace Lichtenstein, *AT&T Assailed as Racist Monopoly*, *N.Y. Times*, May 9, 1972, at 33. On the daily drama of the hearings, see Stockford, *supra* note 156, at 114–32; see also Benton Williams, *AT&T and the Private-Sector Origins of Private-Sector Affirmative Action*, 20 *J. Pol’y Hist.* 542, 550–52 (2008) (detailing the hearings’ “flood of angry testimony”).

¹⁷⁵ Sanford L. Jacobs, *Women Employees [sic] Call Bell System Duties Boring, Oppressive: Operators Tell Bias Hearings of Harassing by Supervisors, Discriminatory Leave Policy*, *Wall St. J.*, May 12, 1972, at 24; see also Wallace, *supra* note 172, at 1 (describing the Bell System, with close to 800,000 employees, as the “largest private employer in the country”).

women and minorities at one-and-a-half times their proportion of the population for about a year.¹⁷⁶ As far as the EEOC was concerned, the GSA had given AT&T a “sweetheart” deal, one that weakly defined equal employment and, the EEOC feared, would make it hard to achieve a more robust remedy in the FCC action.¹⁷⁷

William Brown was not going to be outmaneuvered that easily.¹⁷⁸ The EEOC cajoled a nervous OFCC to remove the AT&T matter from the GSA’s jurisdiction. A young OFCC attorney brought the various government offices that were looking into AT&T’s hiring practices together to negotiate a universal settlement with the company. It took four months of hard bargaining to reach an agreement, but in January 1973, the government announced a landmark settlement with AT&T.

The new settlement was far more extensive than the GSA’s. It set hiring goals and timetables for their fulfillment. Thanks to the EEOC’s persistence, it also opened management training to women for the first time and altered the existing qualifications for jobs that had traditionally been held almost exclusively by white men. Moreover, it included about a thirty-five-million-dollar payout, path-breaking for its size and for what it compensated: the largest ever back-pay award, an unprecedented restitution provision for employees who would have been promoted sooner or earned more absent company discrimination, and incentive payments to workers, male and female, to switch into nontraditional employment.¹⁷⁹ The first action under the FCC’s rules resulted not only in opening traditionally male jobs to women, but also further attacked gender stereotypes by encouraging men to do jobs long identified as women’s work. Equal employment rulemaking and

¹⁷⁶ Eileen Shanahan, *A.T.&T. in Accord on Minority Jobs: U.S. Accepts 15-Month Plan on Hiring and Promotion*, N.Y. Times, Sept. 21, 1972, at 29; *A.T.&T. Hiring Plan OKd*, Chi. Trib., Sept. 21, 1972, at B8; *AT&T Sets Equal-Hiring Accord With GSA To Increase Women, Minorities in Top Jobs*, Wall St. J., Sept. 21, 1972, at 5.

¹⁷⁷ Harvey D. Shapiro, *Women on the Line, Men at the Switchboard: Equal Employment Opportunity Comes to the Bell System*, N.Y. Times Mag., May 20, 1973, at 26, 77. For the backstory to the GSA’s agreement with AT&T, see Stockford, *supra* note 156, at 150–64.

¹⁷⁸ The bulk of this and the following paragraph are drawn from Stockford, *supra* note 156 at 150–199.

¹⁷⁹ *Id.* at 183, 188–89 (noting that it was EEOC negotiators who pressed AT&T to agree to open craft and other well-paying jobs to minorities and women, as well as to provide back pay and promotional pay).

the equal protection theories that informed it had affected an entire industry.¹⁸⁰

As the news reports dubbing the settlement “precedent-setting” and a “landmark” piled up, the EEOC rode the wave of media attention to new power and prominence.¹⁸¹ As one reporter noted, the EEOC’s “comparatively low profile . . . was strikingly altered” by the AT&T settlement.¹⁸² The case also attracted the attention of the business community. Equal employment consulting firms were said to be popping up everywhere, serving worried employers looking for advice. “[A]fter the A.T.&T. settlement, it’s clear that a number of employers are going to be held responsible for past actions—and it’s going to cost them a lot of money,” one article predicted.¹⁸³

If this was employers’ concern, they had reason to be worried. Over the summer, the price tag on the settlement grew to fifty million dollars.¹⁸⁴ Meanwhile, the EEOC filed 150 cases against major corporations and assembled a national team of lawyers to “do the same thing as AT&T [sic] all over again.”¹⁸⁵ William Brown had

¹⁸⁰ For disagreement about the settlement’s effectiveness, compare *id.* at 212–13, and Lois Kathryn Herr, *Women, Power, and AT&T: Winning Rights in the Workplace* 156–63 (2003) (emphasizing the settlement’s positive effect, particularly on women’s opportunities), with Venus Green, *Race on the Line: Gender, Labor, and Technology in the Bell System, 1880–1980*, at 237–42 (2001) (arguing that racism and sexism in the telecommunications industry changed little as a result of the AT&T settlement). Regardless of its long-term effects, the settlement is underappreciated in employment discrimination history. It preceded the better-known 1974 steel industry consent decree reached under Title VII. Judith Stein, *Running Steel, Running America: Race, Economic Policy, and the Decline of Liberalism* 170–76 (1998). Whereas Title VII had previously transformed southern textile mills, the EEOC’s action against AT&T accomplished in one fell swoop what had required workers to file hundreds of individual complaints in the textile industry. Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplace* ch. 3 (2006). Finally, the FCC adopted its equal employment rules, and the EEOC sought to enforce them, based, in part, on the Constitution, revealing a constitutional, as well as statutory, basis to private employers’ changed practices.

¹⁸¹ William Chapman, *AT&T Agrees to Pay Victims Of Alleged Discrimination*, *Wash. Post*, Jan. 19, 1973, at 1; Shapiro, *supra* note 177.

¹⁸² Douglas W. Cray, *Job Discrimination Charges Grow: Federal Agency’s Efforts Broaden*, *N.Y. Times*, Mar. 4, 1973, at 170.

¹⁸³ Shapiro, *supra* note 177, at 90.

¹⁸⁴ Jo Anne Levine, *Landmark Bias Case Settlement*, *Wash. Post*, Sept. 9, 1973, at G1.

¹⁸⁵ *Id.*

reason to call the AT&T deal “the most significant legal settlement in the civil rights employment history.”¹⁸⁶

The FCC’s equal employment rules and the administrative constitutionalism that helped the Agency conceive, adopt, and enforce them, had achieved an unprecedented triumph over employment discrimination. Regulatory relationships were used to impose equal employment nationwide. These administrators’ constitutionalism was influenced by, but also operated with some independence from, the presidency. Indeed, these administrative constitutionalists persisted despite the shift from a Johnson administration instructed to implement equal protection to a Nixon presidency with a mixed record on civil rights.¹⁸⁷ Nonetheless, administrators continued to assert a broad view of state action and an affirmative understanding of equal protection as they fulfilled their roles as interpreters, advocates, or policy implementers. At the same time, their constitutionalism was dynamic. Instead of being held over from the Kennedy-Johnson years, administrators’ constitutionalism evolved as Nixon-era officials used the Constitution to pursue novel administrative goals and new theories of sex discrimination.

B. The FPC Rejects Equal Employment Rules

The significance of administrators’ creative constitutional interpretations is all the more evident when the FCC is contrasted with the FPC. If the FCC outstripped the Court in how broadly and affirmatively the FCC viewed equal protection, the FPC moved against the trend of the Court’s decisions by creatively narrowing Court doctrine. As with the FCC, congressional nudging and executive actions influenced the FPC, but the FPC’s constitutional course cannot be reduced to an instance of legislative or executive constitutionalism.

1. The PCEEO Creatively Expands State Action

Utility companies had long bedeviled the administrators who enforced government contracts’ nondiscrimination provisions. Rather

¹⁸⁶ *Id.*

¹⁸⁷ On Nixon’s complicated civil rights record, see Graham, *supra* note 11, pt. 3, and Carter, *supra* note 135, ch. 13. For his earlier civil rights positions, see Thurber, *supra* note 11.

than agree to the government's antidiscrimination terms, utilities simply provided services without a contract. The PCEEO administrators who inherited this problem under President Kennedy were well aware that, practically speaking, their primary enforcement tool, cancelling power service to the federal government, was not an option. Instead, PCEEO administrators looked to the Constitution for novel ways to ensure that utilities provided equal employment. They quickly decided that a regulatory theory of state action was just the tool they needed.

In a 1961 memo, PCEEO attorneys argued that utilities' employment discrimination violated the Fifth and Fourteenth Amendments, irrespective of a government contract.¹⁸⁸ The memo did not offer much in the way of argument. Instead, it quoted at length from *Pollak* and from a lower court case that held that "[w]hen private individuals or groups are endowed by the State with powers or functions governmental in nature they become instruments of the State and subject to the same constitutional limitations as the State itself."¹⁸⁹ Making no effort to analogize utilities to the railroad station or streetcars at issue in these cases, the memo simply concluded that because utilities were franchised by a federal, state, or local government, they were clearly state actors under either the Fifth or Fourteenth Amendments.¹⁹⁰ The PCEEO memo also argued that government had a constitutional duty to ensure nondiscrimination. In so arguing, the memo relied not only on case law, but also on the fact that every president since Roosevelt had required "non-discrimination in Federal Employment by Executive Orders, based primarily on the due process clauses."¹⁹¹ Though the PCEEO attorneys cited case law, their approach to constitutional argument stretched holdings much further than any court, with little or no justification for doing so, and they relied on executive as well as judicial constitutional interpretations.

The PCEEO's Special Counsel asked the OLC for its opinion of his staff's memo. The head of the OLC, Nicholas deB. Katzenbach,

¹⁸⁸ Memorandum from Hobart Taylor, Jr., Special Counsel, PCEEO, to Nicholas deB. Katzenbach, AAG, OLC (Oct. 4, 1961) (DOJ micro-copy) (enclosing memo by PCEEO attorneys).

¹⁸⁹ *Id.* at 6 (quoting *Baldwin v. Morgan*, 287 F.2d 750, 755 n.9 (5th Cir. 1961)), 9–10.

¹⁹⁰ *Id.* at 6, 10.

¹⁹¹ *Id.* at 11.

thought the memo's constitutional theory sound, acknowledging that "the quasi-governmental nature of a public utility may well impose certain duties on public utilities in the employment field."¹⁹² He noted, however, that this question was "as yet unexplored in the courts."¹⁹³ Nonetheless, Katzenbach eventually sent the PCEEO attorneys' memo to the Civil Rights Division for a look.

Richard Berg, the Civil Rights Division attorney assigned to the task, also found the PCEEO attorneys' claim that public utilities were state actors "quite tenable."¹⁹⁴ He insisted that not all corporations were state actors, but conceded that utilities were different because they received special benefits such as monopoly privileges or eminent domain.¹⁹⁵ However, even if a utility was a state actor in some respects, Berg doubted "that all its actions are state actions."¹⁹⁶ Although a utility could not constitutionally discriminate in *service provision*, he thought it unlikely that its constitutional duties extended to *employment* discrimination because "as an employer it has no attributes of state power."¹⁹⁷ In other words, a utility might be a state actor for some purposes, namely those for which it received its franchise, but not others.

Katzenbach and Berg ultimately advised the PCEEO against testing its broad state action theory in the courts. They noted that the courts had not yet declared utilities' employment practices state action and "guess[ed] that they were not ready to go that far."¹⁹⁸ They agreed, however, that the PCEEO could use this argument in its negotiations with utilities and endorsed the PCEEO looking into regulatory agencies' authority to address the employment practices of their regulated industries.¹⁹⁹ The PCEEO memo is another instance in which administrators embraced state action

¹⁹² Letter from Nicholas deB. Katzenbach, AAG, OLC, to Hobart Taylor, Jr., Special Counsel, PCEEO 2 (Aug. 9, 1961) (DOJ micro-copy).

¹⁹³ *Id.*

¹⁹⁴ Memorandum from Richard K. Berg, Civil Rights Div. ("CRD"), DOJ, to Nicholas deB. Katzenbach, AAG, OLC (Oct. 10, 1961) (DOJ micro-copy).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Memorandum from Richard K. Berg, CRD, DOJ, to Files (Dec. 5, 1961) (DOJ micro-copy).

¹⁹⁹ Memorandum from Richard K. Berg, CRD, DOJ, to Nicholas deB. Katzenbach, AAG, OLC, *supra* note 194; Memorandum from Richard K. Berg, CRD, DOJ, to Files, *supra* note 198.

theories that, in the view of the President's closest legal advisors, courts had not and likely would not adopt. Several years would pass, however, before administrators revisited using the Constitution to reach utility companies' discriminatory practices.

2. The FPC Creatively Narrows State Action

At the time the FCC proposed its first equal employment rule in 1968, the FPC and EEOC were already working on employment discrimination in the FPC's regulated industries. The FPC and EEOC began by urging utility companies to voluntarily adopt equal employment policies.²⁰⁰ By early 1969, however, the FPC was also exploring the possibility of a more demanding regulatory approach. Internal memos by FPC attorneys recommended that the FPC state that it would not license or certify any business that discriminated in employment and that the FPC propose rules to this effect.²⁰¹ The FPC attorneys, like the FCC attorneys before them, advanced a statutory argument in favor of their policy recommendations that turned, in part, on the Constitution. The FPC's animating statutes required the Agency to regulate in the public interest and to assure just and reasonable rates.²⁰² The FPC attorneys argued that the FPC's public interest duties obligated the FPC to consider the national policy against discrimination when licensing or certificating utilities.²⁰³ This national policy, the FPC attorneys noted, derived from the Constitution.²⁰⁴ Because of this constitutional basis for the national policy against discrimination, the FPC attorneys reasoned, the FPC could demand equal employment even of utilities that were not technically violating Title VII; in

²⁰⁰ Memorandum from David J. Bardin, Deputy Gen. Counsel, Fed. Power Comm'n, to Lee C. White, Chairman, Fed. Power Comm'n (Apr. 17, 1969), *in* Responsibilities of the Federal Power Commission in the Area of Civil Rights: Hearings Before the Subcomm. on Civil Rights Oversight of the H. Comm. on the Judiciary, 92d Cong. 90 (1972) [hereinafter Responsibilities]; Federal Power Commission Oversight: Hearing Before the Subcomm. on Energy, Natural Resources, and the Environment of the S. Comm. on Commerce, 91st Cong. 35–36 (1970) (statement of John Nassikas, Chairman, Fed. Power Comm'n).

²⁰¹ Memorandum from David J. Bardin to Lee C. White, *in* Responsibilities, *supra* note 200, at 90.

²⁰² See, e.g., 16 U.S.C. §§ 797, 824, 824d (2006).

²⁰³ Memorandum from Robert A. Jablon to David J. Bardin, Deputy Gen. Counsel, Fed. Power Comm'n (Apr. 17, 1969), *in* Responsibilities, *supra* note 200, at 99–109.

²⁰⁴ *Id.* at 104 n.10, 109.

other words, Title VII embodied this constitutional policy, but did not delimit it.²⁰⁵ In fact, the FPC attorneys urged, the constitutional basis for the national policy against discrimination “may limit an agency’s discretion not to take affirmative action in furtherance of that policy.”²⁰⁶ The FPC attorneys did not provide any citations to support this conclusion. Instead, they used a broad, non-doctrinal, constitutional principle to support economic regulators’ affirmative equal employment duties.

The FPC soon had the opportunity to follow up on these suggestions. In March of 1969, a legal services organization asked to intervene in a west coast gas and electric utility’s license application, charging that the FPC should not approve the license until the company rectified what the lawyers described as abysmal minority hiring practices. That July, the FPC granted the organization’s request while at the same time signaling that it might join the FCC in proposing equal employment rules.²⁰⁷ The FPC’s Chairman, Lee C. White, had been a close legal advisor to Presidents Kennedy and Johnson, often working on civil rights issues, including equal employment policies. White announced that the FPC ought to address the issues raised by the legal services lawyers “in a general rule-making proceeding of the type recently initiated by the Federal Communications Commission.”²⁰⁸ The FPC’s Chair seemed to be on the same page as its legal counsel and willing to take policy cues from a coordinate agency.

Over the summer, the FPC chairmanship shifted from Lee White to John Nassikas, who was expected to be lenient toward the utilities.²⁰⁹ It was not immediately clear, however, if the shift from a Johnson to a Nixon appointee and from a Democrat to a Republican would end the FPC’s exploration of its employment discrimination regulatory powers; it certainly had not at the FCC. In September 1969, the FPC allowed the legal services lawyers to defend their claim.²¹⁰ The next January, signs of serious policy discussions

²⁰⁵ *Id.* at 106, 109.

²⁰⁶ *Id.* at 109.

²⁰⁷ *Pac. Gas & Elec. Co.*, 42 F.P.C. 243, 243–44 (1969).

²⁰⁸ *Id.* at 243.

²⁰⁹ *The Nixon Look: Regulatory Agencies Take Pro-Business Cast with New Nominations*, *Wall St. J.*, Sept. 25, 1969, at 1.

²¹⁰ *Pac. Gas & Elec. Co.*, 42 F.P.C. 645 (1969).

continued. The FPC's new General Counsel, Gordon Gooch, asked the Civil Rights Division for an advisory opinion on the issues the legal services lawyers had raised.²¹¹ Meanwhile, the FPC granted civil rights groups permission to file briefs on the pending west coast license.²¹² At the same time, Nassikas, when pressed by two questioners during a Senate hearing on unrelated matters, testified that his Agency would "try to assure" that utilities more rapidly improved equal employment opportunity, although he declined to say if the FPC had the power to demand that utilities do so.²¹³ Apparently, Nassikas's FPC was carefully considering its employment discrimination responsibilities.

Civil rights groups and senators were not the only ones pressuring the FPC to act. When the FCC began its rulemaking process, the Civil Rights Commission began asking the major regulatory agencies what *they* were doing to ensure that the firms they regulated were following equal employment practices.²¹⁴ Apparently, the Civil Rights Commission was not happy with what it found. In the fall of 1970, the Civil Rights Commission issued a scathing report detailing the nation's lack of progress on civil rights. An entire chapter was devoted to critiquing regulatory agencies' performance.²¹⁵ The Commission noted the FCC's early signs of promise. The Commission especially praised the FCC's common carrier rules, noting that the FCC's "regulatory relationship to broadcasting stations is much closer than to telephone and telegraph companies."²¹⁶ Other agencies might have deemed the FCC's reasons for requiring broadcasters to demonstrate equal employment practices peculiar because of the FCC's unusually close regulatory relationship to broadcasters. The FCC's regulation of common carriers, however, was more analogous to the other major agencies' regula-

²¹¹ Letter from Gordon Gooch, Gen. Counsel, Fed. Power Comm'n, to David L. Norman, AAG, CRD, Dep't of Justice (Sept. 29, 1971), *in* Responsibilities, *supra* note 200, at 67.

²¹² Pac. Gas & Elec. Co., 44 F.P.C. 1365, 1366 (1970).

²¹³ Fed. Power Commission Oversight: Hearing Before the Subcomm. on Energy, Natural Resources, and the Environment of the S. Comm. on Commerce, 91st Cong. 35-36 (1970) (statement of John Nassikas, Chairman, Fed. Power Comm'n).

²¹⁴ U.S. Comm'n on Civil Rights, Fed. Civil Rights Enforcement Effort: A Report of the Commission 813-45 (1970) [hereinafter Civil Rights Enforcement].

²¹⁵ *Id.*

²¹⁶ *Id.* at 837.

tion of their respective industries. Thus, while “the FCC’s action with respect to the broadcasting industry could be considered unique . . . , its extension of the rule to telephone and telegraph companies would have potentially far-reaching significance as precedent for other regulatory agencies.”²¹⁷

As for other agencies acting on this precedent, the Civil Rights Commission was decidedly disappointed. It acknowledged the FPC’s gestures of interest, but remained unimpressed with what it saw as the Agency’s foot-dragging.²¹⁸ Other agencies were skewered for denying that they had the authority to monitor regulated firms’ employment practices or for failing to consider the issue.²¹⁹ As the *New York Times* observed, the Civil Rights Commission had found that “the march toward full equality has bogged down in a morass of bureaucracy, lassitude, and indifferent leadership”²²⁰

The Civil Rights Commission clearly saw this as the beginning of the story, not the end. For any agency that doubted its authority to regulate businesses’ employment practices, the report explained each agency’s statutory obligation to regulate in the public interest, and thus to ensure that the businesses they regulated practiced equal employment. In addition, its authors underscored, “there is a serious question whether failure to do so places these agencies in the position of violating the United States Constitution.”²²¹ Emphasizing its view of government’s constitutional duties, the report provided a twenty-page appendix making the constitutional case for mandatory agency regulation.²²²

Like the Civil Rights Commission’s comment to the FCC, the report’s appendix adopted a version of the Supreme Court’s significant-involvement state action theory that was astonishingly broad. Instead of the *significant* involvement the Court required, the Commission extended the logic of cases such as *Burton* and *Pollak* to argue that equal protection duties adhered if there was

²¹⁷ *Id.*

²¹⁸ *Id.* at 838 & n.41.

²¹⁹ *Id.* at 838–39 & n.41, 840.

²²⁰ Jon Nordheimer, A Highly Critical View of Progress on Rights, *N.Y. Times*, Oct. 18, 1970, at E3.

²²¹ Civil Rights Enforcement, *supra* note 214, at 844.

²²² *Id.* at 1095–115.

merely “*some measure* of involvement or interdependence” between the state and otherwise private actors.²²³ Once again, the Commission argued that this involvement should be measured in terms of the contacts between the government and the private actor. Regulatory agencies exerted “extensive control over their respective industries,” including issuing licenses and certificates of authority, setting rates, and regulating the safety and quality of regulated firms’ services.²²⁴ According to the Civil Rights Commission, “[t]he pervasive presence of the agency in the most vital economic matters which a company must face . . . should satisfy any test based on sufficiency of contacts.”²²⁵

Like *Hughes Tool* and the FCC attorneys’ 1963 memo, the Civil Rights Commission also adopted a broad sanctioning theory of state action. Setting the bar for what constitutes sanctioning quite low, the Civil Rights Commission argued that regulatory agencies “are prohibited from permitting discrimination in their fields of regulation.”²²⁶ Under this theory, regardless of the degree of contacts between agencies and industries, an agency must issue equal employment rules because government inaction in the face of discrimination alone is unconstitutional.²²⁷ Relying on *Burton* and *Hughes Tool*, the Civil Rights Commission concluded that regulatory agencies “are under an affirmative duty to end any discriminatory practices (including employment) of . . . all who deal with the agency whether the relationship be grantee, contractor, or regulated licensee.”²²⁸ The Civil Rights Commission asserted that it was merely applying the “judicial interpretation of the Fifth and Fourteenth Amendments,” but both its sufficiency-of-contacts and sanc-

²²³ Id. at 1101 (emphasis added). For a discussion of *Burton* and *Pollak*, see *supra* notes 43–50 and accompanying text.

²²⁴ Civil Rights Enforcement, *supra* note 214, at 1102–04.

²²⁵ Id. at 1106.

²²⁶ Id. at 1101.

²²⁷ Id. at 1107.

²²⁸ Id. at 1107. In support, the Civil Rights Commission quoted broad language in *Burton* that the state, “[b]y its inaction[,] . . . made itself a party” to its tenant’s discrimination. Id. (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). The Commission overlooked subsequent decisions in which the Court stated that something more affirmative was required in order to bring discrimination within equal protection’s ambit. See *supra* notes 67–68 and accompanying text.

tioning theories of state action dramatically stretched Supreme Court doctrine.²²⁹

Thus far, creative administrative constitutionalists had not abjured court constitutionalism but imaginatively extended it, even as they supplemented it with other administrators' interpretations. Extending Supreme Court doctrine was not creative interpreters' only approach, however. With Nassikas at the helm and a new General Counsel in place, the FPC soon demonstrated a different kind of creative interpretation: narrowly reading court precedents and rejecting administrative authorities to reach entirely different constitutional conclusions.

If the significance of the FPC's change in chairmanship had seemed unclear at first, by the end of 1970 this was no longer the case. The FPC granted the west coast utility's license and denied the legal services lawyers' petition.²³⁰ In its order, the FPC recognized the "national policy that discrimination in employment is to be eliminated by all elements of our society, public and private."²³¹ The FPC even recognized that this policy arose out of the Constitution.²³² However, it otherwise rejected the FPC attorneys' prior statutory and constitutional analysis. The Agency now found that Congress had given the FPC no statutory command or even discretionary leeway to require equal employment from the utilities it regulated.²³³ The FPC arrived at this latter conclusion by applying a novel nexus argument. The FPC contended that employment discrimination was not sufficiently related to any of the Agency's legitimate regulatory purposes to fall within the FPC's jurisdiction.²³⁴ The FPC assured that it would continue to cooperate with the EEOC and to urge utilities to adopt equal employment policies. The FPC's primary job, the order reminded, was nonetheless to ensure equal provision of *services*, not of employment.²³⁵

²²⁹ Civil Rights Enforcement, *supra* note 214, at 1095–96, 1101–03.

²³⁰ *Pac. Gas & Elec.*, 44 F.P.C. 1365 (1970).

²³¹ *Id.* at 1368.

²³² *Id.*

²³³ *Id.* at 1366–67. If the petitioners had argued that the FPC had a constitutional obligation to regulate licensees' employment practices, the FPC did not acknowledge it.

²³⁴ *Id.*

²³⁵ *Id.* at 1368. Unfortunately, the National Archives do not have the records for this license petition, and I have been unable to find the petitioners' arguments in other archives.

Meanwhile, the Civil Rights Commission fulfilled its watchdog role by putting public and political pressure on the FPC to act. In May 1971, it issued another report lambasting the FPC and other regulators for their continued inaction.²³⁶ Six months later, it published a *third* evaluation of federal agencies' civil rights record.²³⁷ It was not a favorable one. "Rights Panel Again Assails Efforts by U.S. Agencies," the *New York Times* proclaimed. Equal employment rulemaking made front-page news once again.²³⁸

As 1971 turned to 1972, equal employment rulemaking continued to be aired and debated publicly, this time on the Senate floor. Over the summer, Congress began considering contentious reforms to the 1964 Civil Rights Act.²³⁹ In the midst of this wrangling, the Senate debated an amendment which would have made EEOC complaints, Equal Pay Act claims, state fair employment actions, some Justice Department lawsuits, and individual Title VII cases workers' exclusive remedies for employment discrimination.²⁴⁰ Proponents of the "Exclusive Remedy" Amendment wanted to shut down the equal employment rulemaking campaign. "This amendment is only intended to eliminate actions brought before agencies or forums such as the NLRB, ICC, and FCC," its sponsor testified.²⁴¹ The amendment's supporters argued that such actions were counter to congressional intent, led to harassed businesses defending similar charges in multiple forums, and allowed the EEOC to use other agencies "as mere rubber stamps for the application of sanctions . . ."²⁴² Opponents argued, in contrast, that the existing multiple remedies "are needed to implement the promise we make

²³⁶ U.S. Comm. on Civil Rights, *The Federal Civil Rights Enforcement Effort: Seven Months Later* (May 1971).

²³⁷ U.S. Comm. on Civil Rights, *The Federal Civil Rights Enforcement Effort: One Year Later* (Nov. 1971).

²³⁸ Paul Delaney, *Rights Panel Again Assails Efforts by U.S. Agencies*, *N.Y. Times*, Nov. 17, 1971, at 1.

²³⁹ For a fuller history of these events, see Graham, *supra* note 11, at ch. 12.

²⁴⁰ 118 Cong. Rec. 3959 (1972).

²⁴¹ *Id.* at 3961. The Interstate Commerce Commission ("ICC") was considering an equal employment rulemaking petition of its own, as well as its fellow administrators' view that the Constitution obligated it to ensure equal employment. See, e.g., William H. Brown III et al., *EEOC, to ICC 9* (Dec. 1, 1971) (In the Matter of Ex Parte No. 278 Equal Opportunity in Surface Transportation, NAACP Papers, Part V, Box 303, Folder 8).

²⁴² 118 Cong. Rec. 3960 (1972).

under the Constitution to prevent discrimination in employment.²⁴³ The amendment's opponents won the vote.²⁴⁴ The door remained open for the FPC to adopt equal employment rules.

This was not a door the FPC chose to walk through. Instead, administrative constitutionalists at the FPC engaged in their own creative interpretation, narrowly reading Supreme Court decisions and repudiating administrative authorities to dispute the FPC's equal employment obligations. In September 1971, the Civil Rights Division finally addressed what was then a more than year-old request for advice on the FPC's authority to monitor utilities' employment practices. David Norman had succeeded Pollak as head of the Division. The FPC's request was spurred by the long-since dismissed challenge to the west coast utility's license. Nonetheless, Norman responded, assuring the FPC that its obligation to regulate in the public interest gave the FPC ample statutory authority to consider utilities' employment practices and to issue equal employment rules. Adopting something like the Civil Rights Commission's sufficiency-of-contacts rationale, Norman also advised that regulated utilities were constitutionally beholden state actors. "[I]n analogous situations," he reasoned, "courts have held private businesses subject to Fifth and Fourteenth Amendment obligations because of the extensive governmental regulation of their activities."²⁴⁵ In addition, he noted, "where the government is a joint participant in an activity with private persons, courts have held that there is an affirmative obligation on the part of the government to insure compliance with constitutional provisions."²⁴⁶ Here was another administrator generously interpreting court precedent to deem regulated firms state actors and endorse agencies' affirmative equal protection obligations.

²⁴³ Id. at 3961.

²⁴⁴ Id. at 3965.

²⁴⁵ Advisory Opinion from David L. Norman, AAG, CRD, Dept. of Justice, to Gordon Gooch, Gen. Counsel, Fed. Power Comm'n (Sept. 17, 1971), in *Responsibilities*, supra note 200, at 66 (citing *Pollak*).

²⁴⁶ Id. (citing *Burton*). Norman cautioned that this duty might not extend to electric companies that lacked a federal hydroelectric license since they were regulated primarily by state and local governments. According to Norman, they might well be state actors under the Fourteenth Amendment, which governed state, as opposed to federal, government actors, but "the existence of a duty on the part of the federal government to insure the companies' compliance with its constitutional obligations [was] unclear." Id.

To say that the FPC's General Counsel was uninterested in Norman's advice would be an understatement. In a prompt, icily cordial reply, Gordon Gooch reminded Norman of the time that had passed since Gooch made his request and informed him that the FPC had "made moot the need for such an informal opinion by its determination that such jurisdiction does not exist."²⁴⁷ Gooch set about preparing an internal memo that took apart Norman's reasoning from beginning to end.²⁴⁸ First, Gooch found no equal employment regulatory authority in the Agency's authorizing statutes, their legislative history, or the cases Norman cited. Like the FPC's order denying jurisdiction over the west coast utility's employment practices, Gooch argued that the FPC was required to consider utilities' compliance only with national policies that were sufficiently related to the FPC's regulatory purpose. These included economic policies but not social policies like that against discrimination in employment.²⁴⁹

Gooch also dismissed Norman's constitutional advice. Like other creative administrative constitutionalists, Gooch looked to case law for guidance. But where others *extended* these decisions, Gooch *narrowed* them aggressively. In order to distinguish the Supreme Court's state action decisions, Gooch read into them a nexus criterion similar to that used in his statutory argument: a nexus criterion that the Court had never recognized. Gooch dismissed as unhelpful the cases finding that regulated entities were themselves subject to the Fifth and Fourteenth Amendments. In cases such as *Pollak*, he noted, the regulatees' impermissible actions were found to be within the regulating agency's authority. Here, it was precisely this authority that was in question. If the FPC could not regulate employment practices, its regulatory relationship could not create constitutional duties for the utilities it oversaw.²⁵⁰ Creatively expansive interpreters had focused on the quantity of contacts. Gooch asserted it was *quality*, not *quantity*, that mattered. Without a nexus between an agency's regulation and its regulatee's discrimination,

²⁴⁷ Letter from Gordon Gooch, Gen. Counsel, Fed. Power Comm'n, to David L. Norman, AAG, CRD (Sept. 29, 1971), *in* Responsibilities, *supra* note 200, at 68.

²⁴⁸ Memorandum from Gordon Gooch, Gen. Counsel, to Fed. Power Comm'n (Feb. 17, 1972), *in* Responsibilities, *supra* note 200, at 61–65.

²⁴⁹ *Id.* at 62.

²⁵⁰ *Id.* at 64–65.

there was no state action. Ignoring Supreme Court decisions that drew a generalizable “significant involvement” state action standard from *Burton*,²⁵¹ Gooch also argued that the Constitution did not oblige the FPC to require equal employment from the utilities it regulated because *Burton* applied exclusively to leased public property.²⁵² As for Norman’s suggestion that the FCC’s rulemaking supported the FPC’s authority and obligation to act, the General Counsel found this simply ridiculous.²⁵³ Administrators might cite cases, but as they debated what, if any, equal employment policy-making was required of them, they extended and narrowed Supreme Court doctrine, engaging in creative constitutional interpretation.

Gooch’s creative constitutionalism emboldened the FPC’s resistance to congressional pressure. In 1970, the FPC’s Chairman, John Nassikas, had equivocated about his Agency’s equal employment duties when pressed by senators. When he returned to the House in 1972, his equivocating was over. In February, Congress passed Civil Rights Act amendments that would keep Title VII enforcement in the courts, rather than give the EEOC power to adjudicate and remedy violations itself, as civil rights supporters had urged. Agency rules remained the only administrative means of enforcing equal employment. Eager to expand this approach, the House Subcommittee for Civil Rights Enforcement called Nassikas to appear before it. The Subcommittee’s Chair, Representative Don Edwards, a Democrat from California who was known as a civil rights stalwart, called Nassikas to task for failing to exercise what Edwards described as the FPC’s statutory authority and affirmative constitutional duty to adopt equal employment rules.²⁵⁴ Other committee members, including a college classmate of Nassikas, used friendlier questions to draw out why the Chairman thought his Agency lacked any such authority.²⁵⁵ Nassikas emphasized that Congress had just amended the Civil Rights Act without saying

²⁵¹ See supra note 67 and accompanying text.

²⁵² Memorandum from Gordon Gooch, Gen. Counsel, to Fed. Power Comm’n, supra note 248, at 64.

²⁵³ Id. at 63.

²⁵⁴ Responsibilities, supra note 200, at 2, 12–33. On Edwards’s strong support of civil rights, see, for example, Letter from Joseph L. Rauh to James E. Stewart, NAACP (Apr. 24, 1974) (Joseph L. Rauh Papers, LCMD, Part I, Box 38, “NAACP” Folder).

²⁵⁵ Responsibilities, supra note 200, at 2, 12–33.

that it expected economic regulatory agencies to enforce the Act's equal employment policies.²⁵⁶ If he was aware of the Senate's rejection of the Exclusive Remedy Amendment, he was not saying so. Nassikas did not seem likely to bow to Representative Edwards's view of his Agency's constitutional duties.

By the early 1970s, both the general direction of Supreme Court precedent and a number of lower court cases supported administrators' broad and affirmative version of equal protection.²⁵⁷ As a result, administrators' creatively *expansive* state action theories now arguably comported well with court constitutionalism. After all, Justice Brennan had argued in 1966 that Congress could implement equal protection differently than the Court as long as it did so more expansively.²⁵⁸ Perhaps the Court authorized administrators to do the same. If so, this only makes the FPC's creatively *narrow* readings of the Court's equal protection decisions more remarkable.

In the absence of clear judicial rules, administrators practiced creative interpretation, extending and narrowing the Court's state action doctrine, relying on or rejecting other administrators' constitutional interpretations, and embracing or eschewing administrators' authority to directly interpret the Constitution. At the same time, Nassikas's contentious hearing before Representative Edwards's Subcommittee and the FCC's implementation of its rules despite Nixon's appointments suggest that administrative constitutionalists retained some latitude with respect to the legislative and executive branches.

III. SELECTIVE INTERPRETATION

Between 1972 and 1974 the Supreme Court significantly narrowed the scope of state action and specifically rejected the licensing, sanctioning, and sufficiency-of-contacts theories through which administrators had justified equal employment rules. Nonetheless, administrators preserved their constitutional arguments by selectively ignoring this unfavorable precedent.

²⁵⁶ Id. at 7–8.

²⁵⁷ See *supra* notes 40, 65–69, 159–62 and accompanying text.

²⁵⁸ *Katzenbach v. Morgan*, 384 U.S. 641, 648–51 (1966).

A. The Supreme Court Narrows State Action

In the early 1970s, the FPC had creatively narrowed Supreme Court doctrine, cutting against the gradually expansive trajectory of the Court's decisions and adopting a nexus theory of state action the Court had never endorsed. But the Court would soon catch up with the FPC. Flush with four new Nixon appointees, during the summer of 1972, the Court explicitly rejected the licensing theory of state action first promoted in the FCC attorneys' 1963 memo. *Moose Lodge v. Irvis* held that a liquor license was *not* sufficient to transform a private club into a state actor prohibited from excluding African-American guests.²⁵⁹ According to the Court, finding that all forms of state regulation converted regulated entities into state actors "would utterly emasculate the distinction between private as distinguished from state conduct."²⁶⁰ The Court reached back to its decision in *Burton v. Wilmington Parking Authority* but narrowed that decision's significant-involvement rationale. Like *Gooch*, the Court emphasized the quality, not the quantity, of involvement. Specifically, general involvement between the state and the private actor was no longer relevant; instead the state must "significantly involve[] itself with invidious discriminations" before it would be accountable for those acts.²⁶¹ Here, the state licensing agency regulated many aspects of the club but played "absolutely no part in establishing or enforcing the membership or guest policies."²⁶² As a result, the Court would not impute constitutional obligations to the club. The decision appeared to endorse *Gooch's* earlier nexus theory that neither the FPC nor the companies it regulated had constitutional equal employment duties because the FPC did not generally oversee companies' employment practices. The Court left some wiggle room for supporters of equal employment rulemaking, specifically noting that its holding turned on the fact that these licensees were not state-authorized monopolies.²⁶³ If

²⁵⁹ 407 U.S. 163, 177 (1972).

²⁶⁰ *Id.* at 173.

²⁶¹ *Id.* at 173–74 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967)).

²⁶² *Id.* at 175.

²⁶³ *Id.* at 177.

asked, the Court might view the FPC's regulated industries—many of which were licensed monopolies—quite differently.²⁶⁴

The next year, the Supreme Court demonstrated that it was deeply divided over the scope of state action, although this time the signs pointed more towards retraction than expansion of the doctrine's reach. The Court was reviewing a D.C. Circuit Court of Appeals decision that had found that broadcasters were state actors for First Amendment purposes and that the FCC had an affirmative duty to require that the broadcasters it regulated ensure free speech.²⁶⁵ The D.C. Circuit had rejected the licensing theory of state action,²⁶⁶ but it had found that the FCC's relationship with broadcasters was extraordinarily, almost uniquely, extensive.²⁶⁷ Applying a sufficiency-of-contacts state action theory derived from *Burton*, the D.C. Circuit found that licensed broadcasters were state actors. The D.C. Circuit also adopted something like a sanctioning theory of state action. According to the court, “[s]pecific governmental acquiescence, as well as specific approval,” could constitute state action.²⁶⁸ On this basis, the D.C. Circuit found that the FCC had violated the First Amendment by allowing broadcasters to adopt a ban on controversial political advertisements.

The Supreme Court disagreed. In *Columbia Broadcasting System v. Democratic National Committee*, the Court reversed the D.C. Circuit on statutory grounds, but four Justices wanted to reach and reverse the lower court's state action analysis, while only two defended it.²⁶⁹ Rejecting the sanctioning theory of state action, the plurality reasoned that, because the FCC did not foster, but merely declined to prohibit, the challenged action, “it cannot be said that the Government is a ‘partner’ to the action of the broadcast licensee complained of here, nor is it engaged in a ‘symbiotic

²⁶⁴ See Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 *Tex. L. Rev.* 1263, 1280 (1984) (describing electric utilities as regulated monopolies).

²⁶⁵ *Bus. Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 655 (D.C. Cir. 1971) (holding that the First Amendment prohibited regulated broadcasters from rejecting all controversial advertising).

²⁶⁶ *Id.* at 652 n.20 (“The mere existence of a licensing or delegation relationship is not, of course, enough by itself to establish state action . . .”).

²⁶⁷ *Id.* at 651–52.

²⁶⁸ *Id.* at 652 n.23.

²⁶⁹ 412 U.S. 94 (1973).

relationship' with the licensee."²⁷⁰ Encouragement, not mere permission or inaction, was necessary to bring the broadcasters' practices within the state action orbit. The plurality also reaffirmed *Moose Lodge's* nexus limit on state action.²⁷¹ Most tellingly, Justice Douglas, the only Justice to have vigorously defended the broad licensing theory of state action, conceded that his view had not been accepted by the Court and stated that he could find no other credible basis for ascribing the advertising ban to state action.²⁷²

Once again, the Court left a small loophole through which equal employment rulemakers might fit. In *Columbia Broadcasting*, the Court considered that the broadcasters had First Amendment rights of their own.²⁷³ The utilities, broadcasters, and common carriers targeted by equal employment rules had no equivalent constitutionally protected right to discriminate.

The next year, the Supreme Court closed the remaining loopholes, putting the rulemakers' constitutionalism at greater odds with Court doctrine. Again, the Court ruled that regulation alone did not convert regulated entities into state actors or make regulators constitutionally liable for their regulatees' actions; this time, however, the Court's decision seemed to unambiguously reject the licensing theory of state action on which equal employment rulemaking had relied. In *Jackson v. Metropolitan Edison Co.*, the Court ruled that the Constitution did not reach even state-licensed monopolies unless there was "a sufficiently close nexus between the State and the challenged action of the regulated entity."²⁷⁴ Only then could the challenged action "be fairly treated as that of the State itself."²⁷⁵ The Court's "close nexus" test elaborated the reasoning it had introduced in *Moose Lodge* and applied it to licensed monopolies like the broadcasters, utilities, and common carriers targeted by equal employment rules. The Supreme Court had endorsed the FPC's reasons why neither it nor the companies it regulated were constitutionally required to ensure equal employment.

²⁷⁰ Id. at 119.

²⁷¹ Id. at 119–20.

²⁷² Id. at 150.

²⁷³ Id. at 120–21.

²⁷⁴ 419 U.S. 345, 351 (1974).

²⁷⁵ Id.

2010]

Race, Sex, and Rulemaking

861

The FPC's constitutional theories were arguably no longer creative but conventional. The constitutional theories animating the FCC's rules, on the other hand, might no longer be defensible.

B. The Supreme Court Avoids Administrators' Creative Interpretations

Even as the Supreme Court retracted the state action doctrine in the ways presaged by the FPC's creatively narrow interpretations, the supporters of equal employment rules pressed ahead. In late June 1972, just weeks after the Supreme Court issued *Moose Lodge*, the Center for National Policy Review ("the Center"), a public interest law clinic housed at Catholic University, petitioned the FPC for an equal employment rule on behalf of an increasingly diverse coalition of civil rights groups.²⁷⁶ The Center had ties to the administrative constitutionalism of the rulemaking campaign. It was founded by William Taylor, who had spent the Kennedy and Johnson years working for, and eventually directing the staff of, the Civil Rights Commission. Howard Glickstein, who worked on *Hughes Tool* as a Justice Department attorney and headed the Civil Rights Commission's support for equal employment regulatory action, was now in private practice and was retained on the case. The FPC petition would be influenced by theories of administrators' role as interpreters and implementers of the Constitution that dated back to the early 1960s.

The Center's petition made the usual statutory, policy, and constitutional arguments. In fact, what is notable is just how familiar these arguments were. The Center made no effort to incorporate or distinguish the Court's recent *Moose Lodge* decision. Instead of acknowledging *Moose Lodge*'s requirement that the state significantly involve itself with the discriminatory conduct, the Center's

²⁷⁶ Memorandum and Petition from William L. Taylor & Raymond B. Marcin, Ctr. for Nat'l Policy Review ("CNPR"), Attorneys for NAACP, et al., to FPC (June 22, 1972) (Docket No. RM-447, FPC, Docket Files, RG 138, National Archives, FRC Box 55, Folder 1) [hereinafter CNPR Petition]. The Center's clients were the NAACP, the National Urban League, MALDEF, NOW, the Women's Equity Action League, the League of United Latin American Citizens in California, the Association for the Betterment of Black Edison Employees, United Church, the Center for Community Change, the American G.I. Forum, the Mexican American Political Association, and United Native Americans, Inc.

petition reasoned from Glickstein's familiar sufficiency-of-contacts rationale. *Moose Lodge* deemed a company a state actor only if the substantive areas regulated by the government included those in which the discrimination was said to have occurred. The petitioners, however, focused on quantity, not quality. Replicating the Civil Rights Commission's argument more or less verbatim, the petitioners reasoned that the "pervasive presence of the [FPC] in the most vital economic matters which an electric or gas utility company must face—rates, construction of facilities, interstate sales of electricity or gas, financial accounting systems, mergers, consolidations and foreign transactions—satisfies any test of government involvement based on sufficiency of contacts."²⁷⁷

The Center's petition also ignored the anti-affirmative action turn in presidential politics. During the summer of 1972, a number of the country's major Jewish organizations, including long-time supporters of workplace civil rights, came out against the kind of affirmative action programs in some proposed equal employment rules.²⁷⁸ Calling hiring quotas reverse discrimination (or "Crow Jimism," as one commentator put it), they pressed the presidential candidates to take a stand.²⁷⁹ Although Nixon and his Democratic challenger, George McGovern, like the groups pressuring them to action, voiced continued support for affirmative action and equal opportunity, they came out publicly against proportional or quota-based hiring.²⁸⁰ Within weeks, Nixon had even banned the federal government from using hiring quotas.²⁸¹ This turn against proportional hiring did not deter Glickstein and Taylor. As in the other rulemakings, the Center's proposed rule required the FPC to en-

²⁷⁷ Id. at 35. See quote in text accompanying supra note 225.

²⁷⁸ Irving Spiegel, Two Jewish Leaders Score Minority Job Quotas: H.E.W. Is Urged to Recast Its Guidelines and Repudiate "Preferential Treatment," N.Y. Times, June 30, 1972, at 11.

²⁷⁹ Glenn Fowler, Nixon and McGovern Oppose Quotas to End Racial Disparity, N.Y. Times, Aug. 19, 1972, at 12; Samuel Rabinove, Letter to the Editor, Crow Jimism, N.Y. Times, Mar. 27, 1972, at 34; Spiegel, supra note 278, at 11.

²⁸⁰ Fowler, supra note 279, at 12.

²⁸¹ Jon Katz, Nixon Bans Minorities' Job Quotas, Wash. Post, Aug. 25, 1972, at A1. Claims that affirmative action was reverse discrimination were not new, but the endorsement of these liberal groups gave the claims prominence and credibility. For more on the history of anti-affirmative action claims, see MacLean, supra note 180, at 185–224; Siegel, supra note 1, at 1473.

sure that regulated companies developed and implemented an affirmative action program.²⁸²

In less than three weeks, what the *New York Times* called “an eyeblink in regulatory time,” the FPC denied the Center’s petition.²⁸³ The FPC laid out the statutory and constitutional arguments General Counsel Gooch had made in his internal memo. Under its statutes and the Constitution, the FPC was only required to counter discrimination to the extent that it had a nexus with the Agency’s statutory charge. In addition, the order, thought to have been penned by Nassikas due to its combative tone, reaffirmed that the Commission’s Chair was no fan of extra-court constitutionalism.²⁸⁴ The FPC insisted that only Congress could empower the Agency to act, stating, “[e]xecutive authority and constitutional considerations do not provide the basis for Commission jurisdiction.”²⁸⁵ Furthermore, the FPC argued, the issues the petitioners raised “should be considered through *judicial* interpretation of regulatory statutes and laws and regulations governing employment practices.”²⁸⁶ If the petitioners did not like what the FPC had to say, the order suggested, they should ask a court to intervene.

The FPC’s quick action did not allow government officials to weigh in on the petition, but EEOC Chairman Brown wrote to Nassikas, as one administrator to another, asking the FPC to reconsider.²⁸⁷ Meanwhile, the petitioners filed for a rehearing.²⁸⁸ It was all to no avail. The FPC again acted in an “eyeblink,” denying the petitioners’ request.²⁸⁹ The FPC, it appeared, was challenging Glickstein and Taylor to take their theories to court.

The Center had to decide whether to find out what a court thought of their state action theories. An unfavorable ruling would be hard to ignore. Asking administrators to expansively read court

²⁸² CNPR Petition, *supra* note 276, at 40–47.

²⁸³ Edward Cowan, *A Fair-Jobs Role Barred by F.P.C.: Agency Says It Cannot Deal with Hiring by Utilities*, *N.Y. Times*, July 12, 1972, at 11.

²⁸⁴ *Id.*

²⁸⁵ *NAACP et al.*, 48 F.P.C. 40, 42 (1972).

²⁸⁶ *Id.* at 41 (emphasis added).

²⁸⁷ Letter from William H. Brown III, Chairman, EEOC, to John N. Nassikas, Chairman, FPC (July 13, 1972) (FPC Docket No. RM-447, FRC Box 55, Folder 1).

²⁸⁸ Petition from William L. Taylor & Robert B. Marcin to FPC (Aug. 8, 1972) (FPC Docket No. RM-447, FRC Box 55, Folder 1).

²⁸⁹ *NAACP et al.*, 48 F.P.C. 371 (1972).

doctrine was one thing; asking them to directly disobey a disfavorable court decision would be quite another.²⁹⁰ In the end, the Center took the FPC up on its challenge, petitioning the D.C. Circuit for review.²⁹¹ The EEOC filed an amicus brief in support. The Center's decision to take a recalcitrant FPC to court might force a confrontation between the constitutional theories underlying the FCC's rules and the Court's increasingly distinct view of the Constitution.²⁹²

During 1973, the Center's petition received further judicial and political blows. The Watergate scandal engulfed the White House and reached further into the President's cabinet, raising concerns about government secrecy and dysfunction to new levels. Consumer advocates like Ralph Nader added to administration's growing taint by issuing numerous reports charging agencies with capture by corporate interests.²⁹³ Opposition to affirmative action also gathered steam, as federal courts began to seriously consider reverse discrimination challenges to these policies. A prominent case charging that equal protection *limited* rather than *required* affirma-

²⁹⁰ Agency nonacquiescence to lower federal courts' decisions is hotly debated. Compare Samuel Eistreich & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679 (1989), Mashaw, *supra* note 14, at 513–15, and Joshua I. Schwartz, Nonacquiescence, *Crowell v. Benson*, and Administrative Adjudication, 77 Geo. L.J. 1815 (1989) (recognizing broad, moderate, and very limited instances, respectively, when agency nonacquiescence is justified), with Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 Minn. L. Rev. 1339 (1991), and Matthew Diller & Nancy Morawetz, Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Eistreich and Revesz, 99 Yale L.J. 801 (1990) (arguing against agency nonacquiescence).

²⁹¹ Petition for Review from Howard A. Glickstein & William L. Taylor, Attorneys, CNPR, and Robert Gnaizda & Albert Moreno, Pub. Advocates, Inc., MALDEF, to FPC (Oct. 12, 1972) (FPC Docket No. RM-447, FRC Box 55, Folder 1).

²⁹² Cf. Jerry L. Mashaw, Due Process in the Administrative State 35–36 (1985) (noting that welfare rights activists' turn to the courts may have been ill-advised since administrators were on the verge of creating far more robust procedural rights than those the Supreme Court ultimately ordered in *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

²⁹³ See, e.g., *Corporate Power in America* 133, 231 (Ralph Nader & Mark J. Green eds., 1973); *The Monopoly Makers: Ralph Nader's Study Group Report on Regulation and Competition* (Mark J. Green ed., 1973) (asserting that regulatory agencies exacerbated rather than ameliorated the ill effects of concentrated corporate power). Nader popularized, but did not invent, the New Left critique of regulation. For its academic counterpart, see Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (1969).

tive action made its way to the Supreme Court.²⁹⁴ Meanwhile the Court indicated that, at least in the courts, only discriminatory intent, not mere disparity, violated equal protection.²⁹⁵ The Court suggested that deference to states, legislatures, and administrators helped explain why it was taking this position.²⁹⁶ If so, supporters of equal employment rules could comfort themselves that agencies, which had neither the Court's federalism nor institutional capacity concerns, could define equal protection differently.²⁹⁷ But the more court constitutionalism diverged from their own, the riskier the Center's decision to take the FPC to court appeared. At the same time, Chairman Brown left the EEOC and seemed to take support for equal employment rules with him. His replacement had served as the Civil Rights Commission's General Counsel during the years it urged equal employment rules; one of the new chairman's first moves, however, was to express doubt about Brown's company-wide approach to battling employment discrimination.²⁹⁸

²⁹⁴ *DeFunis v. Odegaard*, 414 U.S. 1038 (1973) (agreeing to review a decision upholding a law school affirmative action admissions program). See Siegel, *supra* note 1, at 1526–27; see also Dennis Deslippe, *Protesting Affirmative Action: The Struggle Over Equality in Post-Civil Rights America*, ch. 4 (manuscript on file with the Virginia Law Review).

²⁹⁵ *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208, 211 (1973) (stating that intent distinguishes *de jure* segregation from *de facto* segregation and suggesting that only the former “warrant[s] judicial intervention”). Arguably, *Keyes* left open the possibility that intent might be rebuttably presumed based on disparity. See Note, *Reading the Mind of the School Board: Segregative Intent and the De Jure/De Facto Distinction*, 86 *Yale L.J.* 317, 332–36 (1976).

²⁹⁶ Siegel, *supra* note 1, at 1511–12, notes that federalism concerns explain why courts in this period limited equal protection remedies to intentional government acts of racial classification. Courts suggested that state legislatures could voluntarily adopt race-conscious desegregation policies, even if courts should not impose them absent a finding of intentional discrimination. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (noting that school officials have broad discretion to implement racial balancing policies, while courts cannot do so absent a finding of state-imposed segregation in violation of the Constitution); *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9, 17 (1st Cir. 1973) (stating that “the discretionary power of public authorities to remedy past discrimination is even broader than that of the judicial branch”); see also Siegel, *supra* note 1, at 1525 n.190.

²⁹⁷ But cf. Gillian Metzger, *Administrative Law as the New Federalism*, 57 *Duke L.J.* 2023, 2109 (2008) (encouraging present-day agencies to consider federalism principles when formulating policy).

²⁹⁸ Paul Delaney, *Action Reviewed on Bias Charges: New Rights Chief Doubts Use of Sweeping Actions*, *N.Y. Times*, Feb. 11, 1974, at 36.

In February 1975, the D.C. Circuit finally issued a decision in *NAACP v. Federal Power Commission*.²⁹⁹ According to the court, the FPC lacked the statutory authority to adopt the “affirmative” equal employment rules petitioners had proposed. The court side-stepped *Jackson* and the question of *whether* there was state action of the sort that would make equal protection reach regulated companies’ employment practices. Instead, it held that even if there were state action, it would not (though the court hedged on this, noting that some cases suggested the contrary) require an agency to affirmatively prevent constitutional violations. The court reasoned that a state action finding typically devolved constitutional obligations onto the “ostensibly private entity.”³⁰⁰ The opinion also acknowledged that state action might place an affirmative obligation on the government to terminate its relationship with the discriminating entity. But the court found little legal support for petitioners’ claim that “the government must affirmatively regulate its private partner to insure that the latter discharges the constitutional obligations devolving upon it because of” its relationship to the state.³⁰¹ Indeed, the court noted that the Supreme Court in *Columbia Broadcasting* had overturned the D.C. Circuit’s only precedent supporting such a proposition.³⁰² The D.C. Circuit did not say that *no* obligation inheres in the regulatory relationship. Nonetheless, it warned that the Center’s proffered requirement “would raise many problems.”³⁰³ “[H]owever we might resolve our difficulties with the proposition that the Commission is constitutionally required to adopt *some* anti-discrimination rule,” the court clarified, “we are very sure that it is not required to adopt *this* one.”³⁰⁴

The court nonetheless found that the FPC did have some statutory authority to take utilities’ discrimination into account in determining appropriate rate levels. Indeed, the court scolded, “[i]f the petitioners have been extravagant in their claims, . . . the Commission has been miserly in its response.”³⁰⁵ The court sug-

²⁹⁹ 520 F.2d 432 (D.C. Cir. 1975).

³⁰⁰ *Id.* at 445.

³⁰¹ *Id.* at 446.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 447.

³⁰⁵ *Id.*

gested a number of ways the FPC could weigh regulated companies' employment practices. Most enthusiastically, it proposed that the FPC, because it was statutorily required to charge "just and reasonable rates" to consumers, might discount the costs of discriminating from the rates it approved.³⁰⁶ Recognizing that it was within the FPC's discretion to take none of the proposed actions, the court vacated the FPC's order and remanded the matter for reconsideration.

The D.C. Circuit had firmly rebuked the petitioners' broad and affirmative equal protection theories, finding in their place a somewhat commodious statutory discretion to adopt more limited equal employment rules. At first glance, it might seem that the court had thereby rejected agencies' role as constitutional interpreters. But the court did not completely shut down administrative constitutionalism. It addressed *court* enforcement of the petitioners' claim. Saying that a court would not tell the FPC that it was constitutionally required to adopt the petitioners' rule was quite different from saying that the FPC could not choose to do so—or even find *itself* so compelled.

For the FPC, the court's opinion had left too much open. The Solicitor General, Robert Bork, declined to appeal the ruling but gave the FPC permission to do so on its own behalf. Once the FPC petitioned the Supreme Court for review, however, Bork undercut its efforts by filing an amicus memo for the EEOC that endorsed the D.C. Circuit's opinion.³⁰⁷ Over the summer, the Center cross-petitioned the Supreme Court for review.³⁰⁸ With the Court's doctrine moving in a different direction, however, it was unlikely to adopt the Center's broad state action theories and assertion of government's affirmative equal protection duties.

The Supreme Court granted certiorari in October 1975 and issued its decision the following May. By then, not only had Court doctrine turned against the rulemakers' constitutional theories, but both the left and the right, Democrats and Republicans, were vig-

³⁰⁶ Id. at 437, 443–44.

³⁰⁷ Memorandum for the United States and the EEOC as Amici Curiae, NAACP v. Fed. Power Comm'n, 425 U.S. 662 (1976) (No. 74-1608, 74-1619); Petition for a Writ of Certiorari, NAACP v. Fed. Power Comm'n, 425 U.S. 662 (1976) (No. 74-1619).

³⁰⁸ Cross-Petition for a Writ of Certiorari, NAACP v. Fed. Power Comm'n, 425 U.S. 662 (1976) (No. 74-1608).

orously attacking regulation itself. During 1975 and into 1976, Congress debated and eventually passed legislation that promised to shed disinfecting “sunshine” on distrusted agency activity.³⁰⁹ As the 1976 presidential campaign swung into gear, deregulation was both candidates’ buzzword.³¹⁰ The Supreme Court was not immune to these trends. Court watchers remarked on its pro-business and anti-regulation turn.³¹¹

Since the heyday of equal employment rulemaking, administrative agencies had gone from seemingly powerful levers for social change to beleaguered targets of political opprobrium—part of the problem, not of the solution. Deregulation could threaten the factual predicate of licensing, sanctioning, and sufficiency-of-contacts state action theories and lessen the reach of the government’s affirmative obligations. The political outcry might also sap agencies’ willingness to act.

The Supreme Court’s decision was hardly shocking. Just as Solicitor General Bork had advocated, the Court more or less adopted the lower court’s approach. The Court avoided the petitioners’ constitutional arguments, focusing on the FPC’s statutory duties instead.³¹² The Court also dismissed the claim that the FPC had expansive authority under its statute’s public interest provisions, cautioning that these provisions were not “a broad license to promote the general public welfare.”³¹³ Instead, as the FPC had contended, an agency was only authorized to regulate in the public interest insofar as those regulations were directly related to the agency’s statutory mandates. Under this standard, the Court approved the FCC’s rules because the FCC had a statutory duty to ensure that broadcasting “reflect[ed] the tastes and viewpoints of minority groups.”³¹⁴ The FPC’s public interest charges, however,

³⁰⁹ Government in the Sunshine Act, Pub. L. No. 94-409, § 3(a) (Sept. 13, 1976) (codified at 5 U.S.C. § 552b (2006)).

³¹⁰ See Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* 259 (1984); Washington & Business: Debate on Deregulation, *N.Y. Times*, Oct. 28, 1976, at 77.

³¹¹ Wayne E. Green, *Tipping the Scales: Supreme Court Shows a Pro-Business Tilt in Series of Rulings*, *Wall St. J.*, July 1, 1975, at 1.

³¹² *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 665 n.2 (1976).

³¹³ *Id.* at 669.

³¹⁴ *Id.* at 670 n.7. The Court did not address the fact that this rationale did not apply to the FCC’s common carrier rules.

did not sweep so far. Instead, the Court found that the FPC had only the modest “duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary labor costs.”³¹⁵ The FPC should therefore disallow any costs that were “demonstrably the product of a regulatee’s discriminatory employment practices.”³¹⁶

The news media seemed decidedly confused about the significance of the Court’s decision. While one headline read “Court Backs FPC Role on Job Bias,” another asserted “Agencies Needn’t Curb Industry Job Bias, Court Says.”³¹⁷ In truth, they were both right. The FPC issued an order in July of 1976 stating that it understood the Court to have upheld the FPC’s claim of limited authority. In future rate proceedings, the FPC would use its existing auditing procedures to disallow the costs a court or agency determined had been incurred due to a regulated utility’s discriminatory employment practices.³¹⁸ But the FPC did not take the D.C. Circuit up on its other modest proposals, let alone implement the broad, affirmative equal employment obligations envisioned by the civil rights petitioners.

Over the next several months, the Civil Aeronautics Board and the Interstate Commerce Commission (“ICC”), which had been sitting on petitions for equal employment rules since the early 1970s, issued notices more or less to the same effect.³¹⁹ The Court had decided in *NAACP v. Federal Power Commission* that agencies’ statutes required very little of them. If the Constitution required any more, neither the agencies nor the Court would impose it.

³¹⁵ *Id.* at 668.

³¹⁶ *Id.*

³¹⁷ John P. MacKenzie, *Court Backs FPC Role On Job Bias*, Wash. Post, May 20, 1976, at A1; Linda Mathews, *Agencies Needn’t Curb Industry Job Bias, Court Says*, L.A. Times, May 20, 1976, at 1. Compare *F.P.C. Rights Role is Found Limited: Supreme Court Says Agency Cannot Order Job Equality*, N.Y. Times, May 20, 1976, at 31, with *High Court Clears FPC to Consider Bias In Jobs in Passing on Utility Rate Boosts*, Wall St. J., May 20, 1976, at 4.

³¹⁸ *Accounting for Fed. Power Commission* (July 15, 1976) (Docket No. R-447, Order on Completion of Judicial Review of Commission Opinion No. 623, NAACP Papers, Part V, Box 353, Folder 6).

³¹⁹ *Discrimination of Airline Employment, Notice Terminating Proceeding*, Civil Aeronautics Board (Aug. 13, 1976) (Docket No. 24636, NAACP Papers, Part V, Box 353, Folder 6); *Equal Opportunity in Surface Transportation*, 353 I.C.C. 425 (1977).

Regardless of the decision's effect on equal employment rule-making, it would be wrong to depict *NAACP v. Federal Power Commission* as a loss for administrative constitutionalism. For over a decade, administrators had argued that agencies' public interest mandates authorized, and possibly required, them to ensure that the businesses they regulated did not violate the national policy against discrimination or the Fifth Amendment from which it arose. This was the primary basis for the FCC's broadcasting and common carrier rules, a basis the Court now rejected. At the same time, *NAACP v. Federal Power Commission* skirted the validity of administrative constitutionalism and of the constitutional theories animating this particular instance of it. By refusing to reach either the Center's or the FPC's arguments about agencies' and their regulatees' direct constitutional duties, the Court avoided challenging, or endorsing, those administrative constitutionalists' creative interpretations. The Court also had no occasion to dispute administrators' interpretive authority. In addition, the decision had nothing to say about whether and when the Constitution could turn an agency's statutory *can* do into a constitutional *will*—or *must*—do. Ultimately, the decision left ample room for administrators' constitutionalism to develop.

C. *The FCC Selectively Interprets State Action*

As it turned out, administrative constitutionalism persisted. In fact, in the years following *NAACP v. Federal Power Commission*, FCC attorneys moved beyond creatively interpreting Supreme Court precedent to selectively ignoring it. In June 1976, the Court appeared to deal the rulemakers yet another blow when it held, in *Washington v. Davis*, that racial disparities in hiring alone did not violate equal protection.³²⁰ Then again, the Court justified its rule in part on the deference courts owe administrative action.³²¹ If the FCC examined the case's impact on its equal employment rules, perhaps it reasoned that it could continue to use hiring disparities to prove discrimination, even if a court would not require it to do

³²⁰ 426 U.S. 229 (1976).

³²¹ *Id.* at 247–48 (explaining that examining disparate effects “involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution”).

so. Soon after *Davis*, the FCC clarified the affirmative action its equal employment rules required of broadcasters.³²² Although the FCC stated that it would not require statistical parity in hiring, the FCC would continue to look at statistics to determine whether licensees' minority and female hiring levels were within a "zone of reasonableness."³²³

The order gave no mention of the Constitution, but that did not mean that the FCC had rejected a constitutional basis for its rules. The next year, J. Clay Smith, Jr., the former Deputy Chief of the FCC's Cable Television Bureau and its current Associate General Counsel, gave a speech at the annual meeting of the National Citizens Committee for Broadcasting. Smith's speech demonstrated that neither court doctrine nor deregulatory fervor had interred equal employment rulemaking or the administrative constitutionalism that fed it.³²⁴

Smith vigorously defended the FCC's equal employment rules on statutory and constitutional grounds. In part, Smith relied on the statutory service-provision rationale the Supreme Court endorsed in *NAACP v. Federal Power Commission*.³²⁵ Yet Smith also justified the rules on grounds the Supreme Court had directly or indirectly rejected. Espousing arguments that dated back to the FCC attorneys' 1963 memo, Smith argued that the Communications Act's public interest provisions gave the FCC the "authority and duty . . . to consider the provisions of the United States Constitution and the public policies established thereunder," including the policy against racial discrimination.³²⁶ Smith also noted that there was a "strong argument" that the FCC was constitutionally "compelled to consider whether an applicant practices racial discrimination in the use of his authorization" and that its licensees must also be "measured by the standards of the Constitution."³²⁷ As support, Smith invoked the same licensing and sanctioning theories

³²² In the Matter of Nondiscrimination in the Employment Policies and Practices of Broad. Licensees, 60 F.C.C.2d 226 (1976). The order also gives a useful summary of the FCC's intervening amendments to its broadcast equal employment rules as well as its enforcement of them.

³²³ *Id.* ¶ 56.

³²⁴ Smith, *supra* note 1.

³²⁵ *Id.* at 6–11; see *supra* note 314 and accompanying text.

³²⁶ *Id.* at 14.

³²⁷ *Id.* at 14–15.

of state action that his office had formulated in the early 1960s, ignoring the Court's more recent *Moose Lodge*, *Columbia Broadcasting*, and *Jackson* decisions.³²⁸ In fact, the constitutional parts of Smith's speech appeared to be lifted almost directly from the 1963 memo.³²⁹ While some of Smith's citations had been updated since 1963, his constitutional arguments largely had not.³³⁰

Apparently administrators were still affirmatively interpreting the Constitution's equal protection guarantees and broadly defining state action.³³¹ Smith's speech indicates that administrators were willing to do more than creatively extend or narrow court doctrine; they were also willing to selectively ignore unfavorable precedent.³³²

IV. RESISTANT INTERPRETATION

The FCC's view that it could, should, and was implementing equal protection through its equal employment rules persisted into the twenty-first century, despite dramatic changes in the Supreme

³²⁸ Id. at 15 & n.5 (arguing that under *Pollak*, giving a license to a discriminator was "tantamount to the sanctioning of the discriminatory practices" and that a licensee was a "public trustee" and thus, like the lessee in *Burton*, was a state actor "held to the same standard as the Government, viz., compliance with the Fifth Amendment").

³²⁹ Compare language supra notes 324–28 and accompanying text with that supra notes 51–53 and accompanying text.

³³⁰ Smith, supra note 1, at 15 n.4 (citing Note, F.C.B.A. [B]riefing Conference on Equal Employment Guidelines, 24 FCBJ 3, 12 (1970)).

³³¹ Other government attorneys also found administrative action based on the Constitution little affected by recent Supreme Court decisions. Memorandum from Antonin Scalia, AAG, OLC, for the Solicitor Dep't of Labor: Dues-Paying Practices of Private Clubs, 1 Op. Off. Legal Counsel 220, 224 (1976) (advising that the federal government could enforce "equal protection standards" in its rules for government contractors and could continue to determine equal employment violations using effects-based standards because *Washington v. Davis* did not proscribe the government from doing so).

³³² In 1980, the FCC rejected a claim that its failure to add disability discrimination to its equal employment rules violated disabled persons' First and Fifth Amendment rights. In the Matter of Amendment of Broad. Equal Employment Opportunity Rules and FCC Form 395, 80 F.C.C.2d 299, ¶¶ 10–11 (1980). The FCC argued that it could constitutionally treat disabled people differently than the groups its equal employment rules covered. Id. The FCC also now relied on recent Supreme Court decisions declaring that licenses did not devolve constitutional responsibility on licensees and that government's failure to act did not make it responsible for private discrimination. Id. As the rest of Part IV demonstrates, however, this did not end the FCC's independent interpretation of equal protection.

Court's equal protection doctrine. The FCC's view even persisted after the D.C. Circuit struck down the FCC's equal employment rules in 1998 as a race-conscious *violation*, not a *vindication*, of equal protection.³³³ The FCC complied with the court's judgment, but it continued to insist that its equal employment rules implemented equal protection. The recent history of the FCC's rules suggests that the administrative constitutionalism that helped bring them into being persists in form, if not precisely in substance.

A. The Supreme Court Restricts Affirmative Action

During the 1960s, the Supreme Court's multi-factor state action tests rendered that doctrine quite malleable, while the Court's fact-specific analyses left many private-public relationships, including many regulatory relationships, unmapped. This created a fertile field for creative interpretations by administrators who were more willing than the Supreme Court, Congress, or the Attorney General to implement "the full limits of the constitutional power contained in the 14th amendment."³³⁴ During the 1970s, however, the Supreme Court began to place swaths of regulatory relationships outside the ambit of state action. In order to sustain their broad state action theories, administrators who defended equal employment rules moved from creatively to selectively interpreting Supreme Court doctrine.

By the late 1970s, a similar process was under way with respect to administrators' contention that the affirmative action programs called for by equal employment rules implemented equal protection. Opposition to affirmative action gathered over the decade, and, in the courts, plaintiffs were increasingly arguing that affirmative action programs *violated* rather than *vindicated* equal protection.³³⁵ In 1978, the Supreme Court weighed in on the issue in *Regents of the University of California v. Bakke*.³³⁶ For the Court, the question was not whether the University was *compelled* by equal protection to implement its affirmative action admissions program,

³³³ See *infra* notes 343–45 and accompanying text.

³³⁴ Kennedy House Statement, *supra* note 56, at 2656.

³³⁵ On the gathering opposition to affirmative action, see *supra* notes 278–81, 293 and accompanying text.

³³⁶ 438 U.S. 265 (1978).

or even whether the University was *allowed* to implement equal protection by adopting this program. Instead, the Court was asked to determine whether the University's affirmative action program, which set a minimum quota for minority admissions, *violated* equal protection. The Court struck down the University's program. Only Justice Powell reached this conclusion on equal protection grounds.³³⁷ His opinion, which applied strict scrutiny to the University's affirmative action program, nonetheless stopped short of deeming all such programs unconstitutional.³³⁸

Subsequently, the story of the Constitution and affirmative action in the courts was one of equal protection *limiting* state institutions' affirmative action plans.³³⁹ During the 1980s and early 1990s, the Court seemed to understand the Constitution to grant Congress more leeway to adopt, and federal agencies to require, affirmative action programs than it granted the states.³⁴⁰ Importantly, in *Metro Broadcasting v. FCC*, the Supreme Court upheld the FCC's minority ownership program on the grounds that it furthered the "the important governmental objective of broadcast diversity."³⁴¹ In 1995, however the Supreme Court, in *Adarand Constructors, Inc. v. Peña*, overruled *Metro Broadcasting* and determined that federal affirmative action policies, like state policies, violated equal protection if they could not pass strict scrutiny.³⁴² *Adarand* left open some possibility that congressionally enacted programs would be due greater deference than state

³³⁷ Id. at 319–20. Justice Powell commanded a majority only for the judgment he reached, not his opinion. The four other Justices in the majority struck the program down as a violation of Title VI of the Civil Rights Act of 1964.

³³⁸ Justice Powell's opinion left room for state actors to use race to promote diversity. Id. at 314–19.

³³⁹ See, e.g., *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 486 (1989) (holding that minority business set-asides violated the Fourteenth Amendment); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 272–73 (1986) (declaring a minority lay-off provision unconstitutional).

³⁴⁰ *Metro Broad. v. FCC*, 497 U.S. 547, 565–66 (1990) (upholding the FCC's minority ownership affirmative action policy after applying an intermediate level of scrutiny to determine whether it violated equal protection); *Croson*, 488 U.S. at 489–92 (distinguishing Congress, which had authority to remedy discrimination under § 5 of the Fourteenth Amendment, from states, whose minority set-aside programs must comply with § 1 of the Fourteenth Amendment); *Fullilove v. Klutznick*, 448 U.S. 448, 476–78 (1980) (upholding a minority set-aside program enacted by Congress).

³⁴¹ *Metro Broad.*, 497 U.S. at 600.

³⁴² 515 U.S. 200, 235 (1995).

2010]

Race, Sex, and Rulemaking

875

programs, even under the strict scrutiny standard. Nonetheless, the opinion's analysis focused on whether federal affirmative action programs *violated*, not *vindicated*, equal protection.

B. The FCC Resists a Reviewing Court's Constitutional Interpretation

In 1998, the D.C. Circuit, in *Lutheran Church v. Federal Communications Commission (Lutheran I)*, finally struck down part of the FCC's equal employment rules—not as an insufficient implementation of the Fifth Amendment's equal protection guarantees, but as a violation of them.³⁴³ The evolving court constitutionalism in which equal protection had come to constrain, rather than to require, equal employment rulemaking had finally caught up with the FCC. The Commission argued that its hiring rules should only be subjected to rational basis review because they did not mandate preferences, quotas, or set-asides.³⁴⁴ The FCC, however, had long used the statistical proportionality of broadcasters' hiring as a flag for detailed audits of broadcasters' compliance with the FCC's equal employment rules. According to the court, in practice this policy too strongly encouraged broadcasters to engage in preferential hiring.³⁴⁵

The FCC immediately petitioned for a rehearing and a rehearing *en banc*, continuing to implement its rules in the meantime. Later that year, a splintered court rejected both petitions, affirming, over several vigorous dissents, that the rules violated equal protection.³⁴⁶ In 1998 the FCC proposed, and in 2000 adopted, new rules that sought to avoid the court's rebuke by focusing on employer recruitment practices. The FCC deemed its new rules race- and gen-

³⁴³ 141 F.3d 344, 354–57 (D.C. Cir. 1998) (*Lutheran I*) (applying strict scrutiny to the FCC's equal employment rules because they require broadcasters to favor minorities for jobs, deeming the FCC's diversity-in-programming rationale not compelling, and its means of achieving diversity not sufficiently narrowly tailored).

³⁴⁴ *Id.* at 351.

³⁴⁵ *Id.* at 351–53.

³⁴⁶ *Lutheran Church v. FCC*, 154 F.3d 487, 492–94 (D.C. Cir. 1998) (*Lutheran II*) (denying rehearing and reaffirming that the FCC rules' encouragement of minority hiring was a racial classification, triggering strict scrutiny); *Lutheran Church v. FCC*, 154 F.3d 494, 495, 500 (D.C. Cir. 1998) (*Lutheran III*) (denying rehearing *en banc* over the dissents of Chief Judge Edwards and Judges Tatel and Wald).

der-neutral and thus not subject to strict scrutiny.³⁴⁷ Again, the court struck them down.³⁴⁸ Nonetheless, the FCC did not give up, issuing yet another equal employment rule. The FCC's third and final rule essentially retained those aspects of its recruitment-focused rule that had passed the D.C. Circuit's muster.³⁴⁹

This brief rendering implies that the FCC had foresworn the administrative constitutionalism of the 1960s and 1970s, but a closer examination of the record suggests that it may persist into the present day. The FCC, in its back and forth with the D.C. Circuit, resisted the court's constitutional interpretation. The FCC did not comply with the court's rulings without putting up a vigorous fight. The *Lutheran I* court noted the extreme lengths to which the FCC went to avoid judicial review of its policy.³⁵⁰ After the court's initial decision, the FCC petitioned for rehearings and, while those were pending, continued to partially implement its equal employment rules.³⁵¹ When the court denied the FCC's rehearing petitions, the FCC decided against asking the Supreme Court to review the D.C. Circuit's decision in order to avoid a more final and sweeping ruling.³⁵² In addition, when the FCC did comply with the *Lutheran* opinions, it revised the precise rules the court had struck down, but said it would continue to enforce similar rules regulating other

³⁴⁷ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, FCC Pub. 00-20, MM Docket Nos. 98-204 & 96-16 (Feb. 2, 2000), http://www.fcc.gov/Bureaus/Mass_Media/Orders/2000/fcc00020.pdf [hereinafter FCC EEO Rules 2000]; Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, FCC Pub. 98-305, MM Docket Nos. 98-204 & 96-16 (Nov. 20, 1998), http://www.fcc.gov/Bureaus/Mass_Media/Notices/1998/fcc98305.pdf [hereinafter FCC EEO Rules 1998].

³⁴⁸ MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 15-16 (D.C. Cir. 2001).

³⁴⁹ Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, FCC Pub. 02-303, MM Docket No. 98-204 (Nov. 20, 2002) [hereinafter FCC EEO Rules 2002].

³⁵⁰ *Lutheran I*, 141 F.3d at 349 ("[T]he Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but [its efforts to get this case remanded so it could tweak its rules] may well take the prize.").

³⁵¹ In re Applications of Radio SunGroup of Tex., Inc., File Nos. BRH-970407WB, BR-970317WB, BRH-970317WH (July 23, 1998), http://www.fcc.gov/Bureaus/Mass_Media/Orders/1998/fcc98171.txt [hereinafter Radio SunGroup] (issuing a notice of apparent liability for violation of the FCC's equal employment rules but staying imposition of the sanctions pending court's final order on the rules).

³⁵² Neil A. Lewis, F.C.C. Revises Rule on Hiring of Women and Minorities, N.Y. Times, Jan. 21, 2000, at A16.

types of licensees.³⁵³ Apparently, the FCC accepted the rule of the case, but not necessarily the constitutional theories underlying it.

In fact, the FCC walked a fine line between complying with court constitutionalism and continuing to express its own understanding of the Constitution. Both times the FCC proposed and then adopted new rules, it explained why the rules would comport with the *Lutheran* opinions and the constitutional concerns voiced in the public's comments.³⁵⁴ The FCC and its Commissioners, however, also asserted opposing constitutional views. They did not have court cases to creatively extend, and they did not attempt to creatively narrow *Adarand*. Instead, they offered their views in less legalistic terms. For instance, Democratic Commissioner Susan Ness forthrightly stated, “[w]hile I disagree with the Court’s assessment in *Lutheran Church* that our previous rules violated Constitutional standards, I accept its ruling.”³⁵⁵ Strikingly, the FCC continued to suggest that its equal employment rules not only *complied* with equal protection but that they also *implemented* it. “Indeed,” the FCC reasoned, “nondiscrimination and inclusive outreach requirements like those [in its 2000 rules] advance the principle that is at the heart of the Equal Protection Clause: equal protection of the laws and equal opportunity for all citizens, regardless of race or gender.”³⁵⁶ In response to the 2001 proposed rules, Democratic Commissioner Michael J. Copps distinguished what the Constitution required of the FCC from the courts’ constraining “legal and judicial boundaries.”³⁵⁷ He reminded that “[t]he Constitution has brought us a long ways in civil rights and equal

³⁵³ 1998 Fed. Commc’ns Comm’n Ann. Rep. 15–16. Note that the ultimate rule did affect these other regulatees. FCC EEO Rules 2000, *supra* note 347, ¶ 1; FCC EEO Rules 1998, *supra* note 347, ¶ 46.

³⁵⁴ FCC EEO Rules 2000, *supra* note 347, ¶¶ 210–29; FCC EEO Rules 1998, *supra* note 347, ¶¶ 18–23.

³⁵⁵ FCC EEO Rules 2000, *supra* note 347, at Separate Statement of Commissioner Susan Ness.

³⁵⁶ *Id.* ¶ 228 (arguing that it “turns equal protection analysis on its head to suggest that” the FCC’s rules that implement equal protection, and which it claimed were race- and gender-neutral, would be “suspect under it”).

³⁵⁷ Separate Statement of Commissioner Michael J. Copps, In the Matter of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (Dec. 13, 2001), <http://www.fcc.gov/Speeches/Copps/Statements/2001/stmj129.html> [hereinafter Copps 2001].

opportunity in the past half century.”³⁵⁸ Urging the Commission to adopt bolder equal employment rules, he charged, “I just don’t believe it’s out of gas yet.”³⁵⁹

The statements of other commissioners suggested more indirectly that the FCC’s equal employment rules implemented constitutional values. Michael Powell, a Republican commissioner, and by 2001 the FCC’s Chairman, recognized that the Constitution constrained equal employment rules and that the FCC had to comply with the D.C. Circuit’s opinions.³⁶⁰ But he also suggested that the rules implemented constitutional values, stating that he “affirmatively believe[s] that the courts and the Constitution they interpret continue to abhor discrimination and sanction minimally intrusive programs designed to vigilantly guard against it.”³⁶¹ This constitutional abhorrence, he continued, “explains the programs we suggest today.”³⁶²

³⁵⁸ *Id.*

³⁵⁹ *Id.* In 1992 the D.C. Circuit struck down the FCC’s grant of a minority set-aside to a woman under *Metro Broadcasting*’s intermediate scrutiny on the grounds that there was not empirical evidence linking women’s ownership to programming diversity. *Lamprecht v. FCC*, 958 F.2d 382, 393–96 (D.C. Cir. 1992). Soon thereafter, Congress amended the Communications Act to bar the FCC from changing its broadcasting equal employment rules, among other of its affirmative action policies. Communications Act of 1934, 47 U.S.C. § 334 (2006). Accordingly, it is notable that, in defending those rules after *Lutheran I*, the Commissioners relied on the Constitution, not only on Congress, for authority.

³⁶⁰ See, e.g., Separate Statement of Chairman Michael K. Powell, Re: Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (Dec. 13, 2001), <http://www.fcc.gov/Speeches/Powell/Statements/2001/stmcp145.pdf> [hereinafter Powell 2001]; FCC EEO Rules 2000, *supra* note 347, at Statement of Commissioner Michael K. Powell.

³⁶¹ FCC EEO Rules 1998, *supra* note 347, at Separate Statement of Commissioner Michael K. Powell.

³⁶² *Id.*; see also *id.* at Joint Statement of FCC Chairman William Kennard & Commissioner Gloria Tristani (asserting that the rules the FCC proposed after *Lutheran* were part of the nation’s long struggle to “reconcile” its “principles of liberty, justice and equality” with “ugly political realities”). The Constitution also informed the FCC’s final 2002 rules in ways unacknowledged, and possibly unknown, to the FCC. In adopting its 2002 rules, the FCC declined to rely on the service-provision rationale the Supreme Court endorsed in *NAACP v. FPC*. FCC EEO Rules 2002, *supra* note 349, at 18. Instead, the FCC returned to the public interest and national antidiscrimination justifications it had advanced in the late 1960s. *Id.* at 11. As described above, these justifications incorporated constitutional considerations. See *supra* notes 100–08, 136–42 and accompanying text.

Not all commissioners agreed that the FCC could interpret the Constitution independent of the court. When the FCC continued to enforce its rules while its rehearing petitions were pending, Commissioner Harold W. Furchtgott-Roth, a Republican known for his libertarian views, issued a strong and unusually legalistic dissent. Quoting *Marbury v. Madison*, he accused his fellow commissioners of failing to demonstrate the respect due democratically appointed “Article III judges, whose constitutional duty it is ‘to say what the law is.’”³⁶³ Furchtgott-Roth’s view, however, was a minority viewpoint. Into the twenty-first century, administrators continued to interpret and implement the Constitution in ways that diverged from court doctrine.

The commissioners also differed as to how conservatively they should proceed in light of the D.C. Circuit’s decisions. In 2000, when the FCC issued its new rules, Furchtgott-Roth elaborated on his theory of the relationship between court and administrative constitutionalism. In addition to observing strict judicial supremacy, he thought the Commission should refuse to act in the face of *inconclusive* court doctrine, lest its policies fall under a “cloud of constitutional doubt.”³⁶⁴ That he felt the need to comment suggests that, in his view, his fellow commissioners were willing to venture close to the outer limits of court doctrine. This, however, was not far enough for every member: Commissioner Copps thought the Agency’s 2001 proposed rules were overly conservative.³⁶⁵ In metaphor-laden words, he expressed concern that “the reversals by the D.C. Circuit have imparted too much caution about even approaching the borders of circumscription established by the Court.”³⁶⁶ Instead, he pressed his colleagues to action, urging that “when civil rights are at stake, . . . [o]ur responsibility is . . . to push

³⁶³ Radio SunGroup, supra note 351, at 15276–78 (Furchtgott-Roth, Comm’r, concurring in part, and dissenting in part) (arguing that the nonacquiescence doctrine might apply to agencies’ *statutory* interpretations, “but the justification for such conduct dissipates when the case at issue presents a *constitutional* question”) (emphasis added).

³⁶⁴ FCC EEO Rules 2000, supra note 347, at 17 (Furchtgott-Roth, Comm’r, dissenting). See also Press Release, Commissioner Harold W. Furchtgott-Roth, In the Matter of Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding (Jan. 20, 2000), http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr006.html.

³⁶⁵ Copps 2001, supra note 357.

³⁶⁶ *Id.*

the edge of the envelope.”³⁶⁷ The Commission, he charged, could still “push the envelope farther.”³⁶⁸

Despite Supreme Court decisions that arguably rendered equal employment rules unconstitutional, and even appellate court decisions directly striking the rules down, some resistant administrative constitutionalists have continued to adhere to a divergent, even conflicting, understanding of equal protection.

CONCLUSION

Thus far, agencies’ interpretation and implementation of the Constitution has largely escaped empirical study. Examining the history of equal employment rules at the FCC and the FPC alters our understanding of constitutional history and of administrative agencies’ role in constitutional governance. Throughout the rule-making campaign, administrators implemented constitutional commands the scope and content of which were different from those described in court-based legal histories. In particular, they embraced a distinct administrative form of affirmative equal protection duties, broadened the state action doctrine to reach the traditionally private workplace, and viewed affirmative action policies as implementing, rather than violating, equal protection.

This history demonstrates that the state action doctrine remained a central element of the civil rights Constitution much longer than legal historians have recognized. Equal protection histories generally describe sustained challenges to the state action doctrine as arising in the 1940s and again, briefly, during the sit-ins of the early 1960s.³⁶⁹ During these episodes, courts are depicted as using fact-specific doctrines to reach the right result in tough cases, without seriously altering the doctrinal division between private

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ See, e.g., Risa L. Goluboff, *The Lost Promise of Civil Rights* 227–28, 245–47 (2007) (describing civil rights challenges to the state action doctrine as ending in the early 1950s); Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961*, at 233–34, 308–13 (1994) (demonstrating that state action challenges re-emerged in the early 1960s in response to the sit-ins); cf. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *Yale L.J.* 441, 497–501 (2000) (noting that the state action doctrine’s limits on Sections 1 and 5 of the Fourteenth Amendment were hotly contested in the early 1960s).

and public.³⁷⁰ Including administrative constitutionalism in this history shows that the state action doctrine remained under pressure into the 1970s and that government officials were some of its most expansive interpreters.

Equal employment rulemaking also relied on a distinctly affirmative understanding of equal protection. The kinds of affirmative equal protection claims lawyers and scholars are most familiar with are those pressed in the courts, either by welfare-rights advocates in the late 1960s and 1970s or, more recently, in efforts to win state constitutional claims to an adequate education.³⁷¹ Legal theorists have also argued that the Constitution imposes affirmative equal protection duties on the legislative branch. They look to Congress to vindicate these exhortatory, rather than justiciable, affirmative rights.³⁷²

Equal employment rules relied on a different kind of affirmative equal protection than either the judicial or legislative models. Agencies' affirmative equal protection duties might not have been enforceable in a court, but neither were they mere textual exhortations. Although administrators retained leeway in deciding their constitutional obligations, the public had formal mechanisms for asserting them. These obligations may not have been justiciable, but they were administrable.

Lastly, this history of equal employment rulemaking examines a time when equal protection was thought to require, rather than constrain, affirmative action. Legal histories of equal protection in this period recognize that whether equal protection required race-conscious remedies was an open question.³⁷³ Historians have yet to

³⁷⁰ Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *Mich. L. Rev.* 213, 270–79 (1991).

³⁷¹ For histories of the welfare rights movement, see Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (1995); Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (2007). New York courts recently ruled that the state constitution guarantees “a sound basic education” and ordered the state to allocate sufficient funds to provide one. *Campaign for Fiscal Equity, Inc. v. New York*, 100 N.Y.2d 893, 930 (2003).

³⁷² See, e.g., Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 7–9, 93–94 (2004); Robin West, *Progressive Constitutionalism: Reconstructing the Fourteenth Amendment* 1–4 (1994).

³⁷³ Siegel, *supra* note 1, at 1500; see, e.g., Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 *Harv. L. Rev.* 564, 583–617 (1965)

recover, however, the extent to which equal protection was used to justify affirmative action. Instead, scholars focus on whether affirmative action was understood to violate equal protection.³⁷⁴ As this history demonstrates, administrators supported, adopted, and enforced affirmative action policies in order to implement their understanding of equal protection.

The history of equal employment rulemaking also has implications beyond the particulars of the legal interpretations it recovers. Extra-court constitutionalists are interested in questions of democratic responsiveness and constitutional legitimacy that are deeply implicated by administrative constitutionalism, but the existing literature generally reaches only as far into the executive branch as the President's closest legal advisors.³⁷⁵ Administrative law scholars engage in theoretical and normative debates about how much administrators should defer to court constitutionalism, but there is limited understanding of how agencies approach their core task of statutory interpretation, let alone how they practice constitutional interpretation.³⁷⁶ Nevertheless, as the FCC's recent equal employment rulemaking process suggests, administrative constitutionalism persists into the present day. Often it is and will be administrators who give the Constitution meaning in the first instance.³⁷⁷

How should these agencies imagine their task? Are they implementers of congressional, presidential, and judicial interpretations, or are they constitutional interpreters in their own right? Even if administrators accept the more modest task of applying court, executive, or legislative interpretations, how should they bridge the inevitable gap that law's indeterminacy will leave between these interpretations and the concrete circumstances administrators confront? Today's lawyers, activists, administrators, judges, and scholars have to resolve these questions, debating what comprises, in the ambiguous words of President Kennedy, a "sound public constitutional policy."³⁷⁸

(establishing the basis for an equal protection obligation to ensure equal educational opportunity).

³⁷⁴ Siegel, *supra* note 1, at 1518–20.

³⁷⁵ See *supra* notes 17–21 and accompanying text.

³⁷⁶ Mashaw, *supra* note 14, at 501–02.

³⁷⁷ See, e.g., Paulsen, *supra* note 20, at 223 (noting that the executive branch is often the first branch to apply the Constitution to a novel legal problem).

³⁷⁸ Kennedy Press Conference, *supra* note 28.

The history of equal employment rulemaking offers a novel empirical guide to the practice of administrative constitutionalism. First, the Constitution's influence on administration is not necessarily divulged in public texts such as opinions, orders, and rules. Instead, at the FCC and the FPC, the Constitution's influence often occurred behind the scenes in inter-agency comments and intra-agency memoranda. Thus, administrators' understanding of whether the Constitution authorizes or compels certain policies may never make its way into the Federal Register or agency-specific reporting services. Nonetheless, many of these views are accessible to the public thanks to the National Archives, the Freedom of Information Act,³⁷⁹ and, increasingly, the Internet.

Second, this history suggests that administrators, when considering the Constitution, may be guided, but are not necessarily bound, by court doctrine. In the early days of equal employment rulemaking, administrators' comments and memos drew on Supreme Court doctrine for authority, but also showed a willingness to extend these principles in ways the Court had not. Practicing creative interpretation, attorneys and officials drew on cases such as *Burton* that addressed leasing to imagine the constitutional implications of quite distinct regulatory relationships. Some also looked to the constitutional opinions of other agencies, such as those expressed by the NLRB in *Hughes Tool*.³⁸⁰ Even after the Supreme Court issued decisions that suggested it would not uphold these administrators' state action theories if it were asked to do so, selective interpreters at the FCC continued to endorse an affirmative and broad understanding of regulators' and regulatees' equal protection obligations. Finally, when the D.C. Circuit struck down the FCC's rules as a violation, rather than a vindication, of equal protection, the FCC complied with the court's judgment, but continued to express a resistant interpretation of its rules as implementing equal protection.

Third, while constitutional advocacy in regulatory agencies involved many standard lawyering tools, from brief writing to battles over the scope of discovery, it was also shaped by forces alien to court adjudication: popular letter-writing campaigns, congressional

³⁷⁹ 5 U.S.C. § 552 (2006).

³⁸⁰ 147 N.L.R.B. 1573 (1964).

hearings, legislative threats, presidential nudging, public hearings, and the constitutional interpretations of other administrators. At the same time, the partisan balance of the independent agencies and the frequent appointments process sometimes altered its course. Nixon's appointment of John Nassikas to lead the FPC took administrative constitutionalism in a different direction than it was headed when Lee White was the Agency's chair. Likewise, the FCC's recent approach to equal employment rulemaking had to be forged from quite divergent legal and political perspectives. In this sense, it would be wrong to judge administrative constitutionalism as entirely unaccountable; instead, it was fed, shaped, and constrained by popular and democratic pressures.

At the same time, administrative constitutionalism cannot be reduced to an instance of legislative or executive constitutionalism. If President Kennedy inspired attorneys at the FCC and PCEEEO to action, these administrators interpreted state action more broadly than Kennedy's legal advisors would. The FCC's broad interpretation of state action persisted long past Kennedy's death and Johnson's trouncing at the polls, and despite Nixon's appointment of an anti-regulation, anti-civil rights chairman.³⁸¹ The FCC's view that its rules implemented equal protection survived through the Reagan-era 1980s and on into the second Bush presidency. If the FCC demonstrates that administrative constitutionalism had a degree of independence from the Executive, the FPC's history emphasizes the same vis-à-vis Congress. Notably, to the extent that Congress addressed the FPC's equal employment responsibilities, it was to encourage them in committee hearings or to refuse to repudiate them in the Senate's Exclusive Remedy vote.

Fourth, administrative constitutionalism should be taken seriously, even when an agency publicly rests its actions as much—or even exclusively—on its statutory authority. If an agency invokes statutory authority to justify its action, as the FCC did in issuing its equal employment rules, the background constitutional support for the action is still relevant. Statutory discretion, especially post-

³⁸¹ For most of the period this history covers, Congress did not exert much influence on appointments. Erwin G. Krasnow & Lawrence D. Longley, *The Politics of Broadcast Regulation* 84 (1978) (observing that until 1973, the Senate “usually contented itself with a passive ‘rubber stamp’ role” in the confirmation process).

Chevron, is the essence of administration.³⁸² There will always be myriad policies an agency can adopt under its statutes, but does not. When the sphere of policymaking discretion is broad, a sense that the Constitution compels, or even merely supports, a certain action may help turn a statutory *can-do* into a policy *will-do*. For instance, the FCC and early FPC interpreted the “public interest” language in their statutes quite differently than did the FPC under Nassikas because they differed as to whether the Constitution authorized, perhaps even required, agencies to regulate workplace discrimination. Such underlying constitutional interpretations do reside in the eventual policies, even if their presence is not explicit.³⁸³

Finally, this history has focused on administrators who creatively extended, selectively relied on, or actively resisted court doctrine. Even an administrator who wishes to cleave cautiously to court doctrine, however, will often find gaping interpretive spaces between the decisions on the books and their practical application. For instance, agencies that contemplate equal employment rules in the wake of the D.C. Circuit’s decisions will hardly find a clear map of the permissible. The court stated, on the one hand, that not “all race conscious measures adopted by the government must be subjected to strict scrutiny” but, on the other hand, that the FCC’s “regulations . . . must be subjected to strict scrutiny because they encourage racial preferences in hiring.”³⁸⁴ In such instances, it is important to uncover, analyze, and debate administrators’ practice of constitutional meaning making. Whether creative, selective, re-

³⁸² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (giving varying degrees of deference to agencies’ statutory determinations); cf. Eskridge & Baer, *supra* note 15, at 1091, 1179 (demonstrating that the Supreme Court applies varying degrees of deference to agency action and that *Chevron* governs few of the Court’s decisions).

³⁸³ Similarly, those who debate courts’ use of the avoidance canon agree that doing so involves implementing the Constitution. Compare Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 816 (1983) (arguing that courts’ use of the avoidance canon creates an undesirable “judge-made constitutional ‘penumbra’”), with Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1585 (2000) (defending the avoidance canon and recognizing that when a court applies it, “the court has made a constitutional decision”).

³⁸⁴ *Lutheran Church v. FCC (Lutheran II)*, 154 F.3d 487, 492 (D.C. Cir. 1998).

sistant, or cleaving, administrators' interpretations help determine what it means, in practice, to be governed by the Constitution.

This history of administrative constitutionalism raises difficult normative, theoretical, and empirical questions. How representative is this history?³⁸⁵ Are there legal and theoretical justifications for administrators' divergent constitutional interpretations?³⁸⁶ Even if justifiable, are such interpretations desirable? This last question may be the most vexing.³⁸⁷ Regardless of the pros and cons of administrative constitutionalism, it is probably ineluctable. Our current circumstances—a Court soon to be flush with new appointments, a Congress passing novel and ambitious laws, and a President who has charged regulators with a mandate for change—will likely feed, not dampen, its development.

This account of equal employment rulemaking notwithstanding, we still know little about the full scope and range of administrative constitutionalism and about the principles and forces that guide administrators in their interpretations. Studying these subjects further will advance our understanding of constitutional law and administrative practice. It will also provide crucial guidance to those who are called upon to implement or evaluate future instances of administrative constitutionalism.

³⁸⁵ There are indications that this history is not anomalous. See *supra* note 12.

³⁸⁶ There are separation of powers and institutional competency reasons for the Constitution to look different from an agency perspective. For instance, scholars argue that agencies, when interpreting their statutes, may not need to avoid constitutional questions in the same way that courts do since they do not share courts' reasons for treading lightly on the legislative branch. Mashaw, *supra* note 14, at 507–09; Strauss, *supra* note 14, at 114. Affirmative rights may be another area where administrative and court constitutionalism should differ. Courts have abjured affirmative rights claims for separation of powers and institutional competency reasons that do not apply to administrative agencies. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (“[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.”); see also *supra* notes 371–73 and accompanying text; cf. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 311–14 (2002) (arguing that the Supreme Court increasingly assumes policymaking responsibilities properly left to Congress).

³⁸⁷ Metzger, *supra* note 5, at 521–24, 527–30, does not address how administrators should consider the Constitution when designing and implementing policy; she makes a strong normative argument, however, that they should be encouraged to do so.