Regulating Constitutional Law

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Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, **96 Va. L. Rev. 799** (2010).

There is considerable overlap between administrative law and constitutional law. The appointment of particular agency leaders without Senate confirmation, ex parte communication between an agency and interested persons in a rulemaking process, and the type and timing of a hearing used in terminating a government benefit, for example, can raise constitutional issues. These topics generally receive some attention, at least in the academic literature and at times in the courts.

Sophia Lee's exceptional article, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, turns our attention from these more conventional explorations of the overlap to "regulatory agencies' interpretation and implementation of constitutional law," what Lee terms "administrative constitutionalism." The article compares the contrasting responses of the Federal Communications Commission and the Federal Power Commission to pressure to use the state action doctrine to enact and enforce employment policies aimed at furthering equal employment by race, sex, and ethnicity, mainly in the 1960s and 1970s. The FCC did implement equal employment rules, largely independent of direct presidential or congressional influence, while the FPC did not.

The article describes how, as Office of Legal Counsel lawyers pushed back against President Kennedy's executive order barring employment discrimination by federal contractors being grounded in any constitutional obligation, FCC attorneys argued that the agency "'ha[d] the authority and *duty*' to consider whether an applicant had violated the Fifth Amendment" and thus "should refuse to license broadcasters who practiced racial discrimination because licensing such broadcasters 'would not be in the public interest.'" This "public interest" argument—though constitutional in part—was grounded in FCC statutes. FCC attorneys also made a non-statutory argument, that "the Constitution directly compelled the FCC to deny licenses to racially discriminatory broadcasters" and "that broadcasters were also state actors constitutionally barred from discriminating."

The story of how these arguments were made when Attorney General Robert F. Kennedy, among others, was warning Congress that they raised "very far-reaching and grave issues" is a fascinating one. Through impressive archival work, Lee concludes that FCC leaders mostly "creatively extended or narrowed court doctrine in the absence of clear, judicially defined rules" but sometimes "in the presence of directly relevant, but unfavorable, Supreme Court precedent, they ignored the unfavorable decisions" or "acquiesced in a[n] [appellate] court's judgment, but did not embrace the constitutional principle underlying that judgment."

To be certain, the article will be of interest to legal historians and to scholars interested in the history of the administrative state. Its detailing of the enactment and enforcement of equal employment rules by the FCC from the 1960s to today is remarkable. The article, however, should have broader appeal.

The article suggests some thoughtful takes on broader issues in administrative and constitutional law. Starting on the smaller side of these broader issues, the FCC's equal employment rulemaking sits in the wider context of agency choices between rulemaking and adjudication in making policy decisions. The

article provides an illuminating case study for Elizabeth Magill's and follow-on work (by Matthew Stephenson and others) on agency choice of form.

In addition, the article displays a range of conflicting agency views about the state action doctrine – from the Department of Justice and General Services Administration (on the executive agency side) to the FCC, National Labor Relations Board, and Equal Employment Opportunity Commission (on the independent agency side), and among a range of independent regulatory commissioners (most notably, between the FCC and FPC). These disparate views raise questions about the role of agency structure, the civil service, and political appointments in administrative constitutionalism. This piece wonderfully demonstrates that an agency is a "they" not an "it" (with apologies to Kenneth Shepsle). There are no simple left-right explanations. Some of the strongest proponents for agency rulemaking on equal employment are Republicans.

Most important, the piece focuses on agency "interpretation and implementation of the Constitution." We take for granted the role of the courts and even Congress in that task. It is good to think more deeply about how agencies engage in such work and whether agencies should be doing so. As Lee concludes:

> This history of administrative constitutionalism raises difficult normative, theoretical, and empirical questions. How representative is this history? Are there legal and theoretical justifications for administrators' divergent constitutional interpretations? Even if justifiable, are such interpretations desirable? This last question may be the most vexing. 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.

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