Critical Bureaucracy:

The Communicative Power of the

Equal Employment Opportunity Commission

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I. Introduction

Jürgen Habermas concludes his landmark work, *A Theory of Communicative Action*, by reflecting on the world-historical moment in which it was written. In 1970s, Habermas saw pervasive administrative intervention into society in the developed, Western world. This intervention, in his view, threatened the integrity of the "lifeworld." The lifeworld generates social stability and political legitimacy from a rich fabric of communication and shared understandings. The daily lives of private citizens, as they speak with friends and family, learn from teachers and peers, engage in common projects, and discuss politics, create a fund of meaning that gives purpose and resilience to society. Administrative power and economic rationality, by contrast, generate stability and legitimacy through the antiseptic media of coercion, incentives, cost benefit analyses, and the efficient allocation of risk and capital. Forced to mitigate and prevent the destabilizing effects of economic crises, the administrative state compensates victims of the market with spending on social welfare, education, and childcare. Habermas was concerned that this technocratic salve for the ills of society crowded out the communicative capacities of the lifeworld. Western polities were faced with the prospect

that individuals would become merely the passive objects of bureaucratic management, rather than the authors of the laws that governed them. [1]

Habermas' critique of the administrative state resonates deeply with certain strands of American political culture and institutions. Unlike European social democracies, the American state did not inherit a bureaucratic infrastructure from an *ancien régime*. Administrative agencies rest uneasily in the constitutional architecture, which refers to unspecified "executive Departments," and specifically authorizes only such bureaucracies as the military and the postal service. Traditions of local and limited government, federalism, and economic liberty militate against robust state machinery. Thus, the expansion of the administrative state, during Reconstruction, the Progressive Era, the New Deal, and the Civil Rights Era has often roused hostility. In 1934, as the New Deal bureaucratic state was taking shape, the chairman of the American Bar Association described administrative agencies as "that hybrid thing beloved by tyrants and abhorred by free men."[2] Habermas shares a related concern, articulating the dangers posed by administrative governance in terms of communicative impoverishment.[3] In Habermas' deliberative view of democracy, the people can only be sovereign when citizen engage in rational discourse that informs legislative behavior, and where the state

[1] Max Horkheimer and Theodore Adorno, *Dialectic of Enlightenment*, 20

[2] "American Bar Association Special Committee on Administrative Law," 58 *American Bar Association Reports* 204 (1933).

[3] Classical liberal concerns about the growth of the administrative state focuses on its incursions into individual rights and the rule of law. See, e.g. Frank J. Goodnow, "Private Rights and Administrative Discretion," 39 *Annual Reports of the American Bar Association*, 408 (1916); Richard Epstein, "Why the Modern Administrative State is Inconsistent With the Rule of Law," *NYU Journal of Law and Liberty* no. 3, 491 (2008). Habermas, too, is concerned with private rights, insofar as private rights form the basis for "public autonomy," meaning the capacity for deliberative self-government. To the extent the administrative state impinges unduly on private rights, it undermines citizens' capacity to reach rationally motivated agreement. Habermas adds to this the additional concern that administrative governance stifles a vibrant public sphere, as citizens acquiesce to management by experts.

guarantees the rights requisite for such engagement. The growth of Administrative power threatens the communicative core of democratic life, as it displaces rational argumentation and public will formation with technocratic forms of social management. Because "there is no administrative production of meaning," the public sphere withers under the pervasive control of bureaucratic social engineering, raising the specter of totalitarian governance and profound crises of political legitimacy.[4]

I argue that the history of civil rights administration complicates Habermas' account of administrative power, and offers trenchant responses to the democratic critique of bureaucracy. Those agencies that implemented national civil rights policy, such as the Justice Department, the Office of Federal Contract Compliance in the Labor Department, and the Equal Employment Opportunity Commission are atypical of bureaucracies because of the sharply *ethical* character of their activities. These agencies had an ethical mandate in the sense that they were engaged in transforming the structural context within which personalities form, symbolic meaning arises, moral and political discourses transpire, and society reproduces itself. From school, to public accommodations, to employment, these agencies attacked the pathologies of racial prejudice that injured individuals physically and psychically, undermined democratic institutions, and gave the lie to the nation's claims to liberty and equality. It is implausible, on the surface, to think of such agencies as mere technocratic social managers, mechanically implementing statutes that advanced the cause of powerful interest groups. They did, as we shall see, partake in more typical administrative "steering" functions. But they were also preeminently democratic institutions, at least in

[4] Juergen Habermas, *Legitimation Crisis*, trans. Thomas McCarthy (Boston: Beacon Press, 1975), 70.

the sense that they sought to advance the basic rights and social conditions that might replace racial despotism with republican self-government.

Certain parts of the civil rights administration not only sought to further deliberative democracy instrumentally, but also enacted deliberative democracy through their bureaucratic practices. Here, I focus on the Equal Employment Opportunity Commission (EEOC). Created by the Title VII of the Civil Rights Act of 1964 to enforce the employment discrimination provisions of the Act, the EEOC had little formal power. It could not promulgate binding rules regulating employment practices, could not order employers to cease and desist discriminatory conduct, and could not bring suits against discriminatory persons or organizations. The powers it did have were largely *deliberative* in character. The EEOC conducted conciliation efforts between employers and employees who alleged discrimination. It consulted with labor, business, and the civil rights lobby in developing a promulgating employment seniority and testing guidelines. It held public and private hearings with different industrial sectors to shed light on unfair practices and encourage increased minority hiring. It lent to more powerful agencies its unique competencies in settling employment claims to implement large-scale changes in corporate practices. Most significantly, it interpreted the ambiguous terms of the Civil Rights Act in an expansive way, which shaped the Federal courts' interpretation of Act.

These non-coercive, discursive, hermeneutic practices exemplify a form of bureaucratic activity that inspires rather than stifles the communicative capacities of civil society. It mediates between the generality of legislative enactments and majoritarian politics, on the one hand, and the particular individuals and groups most affected by

statutes, on the other. With so little formal administrative power, the EEOC exercised principally what Habermas would call "communicative power." In this way, the EEOC gives us a picture of a deliberative and democratic form of administrative governance. It enables us to rethink the potentialities of the modern state as it confronts a growing array of challenges that require public action.

This paper thus aims to reconstruct norms of discursive administration by interpreting the activity of the EEOC through the lens of critical social theory. Rethinking the civil rights administration from this perspective at once clarifies the normative significance of this episode in social administration, while at the same time offering an important supplement to Habermas' political theory. Section II first lays out Habermas' account of modern society as bifurcated between "system and lifeworld," and his attendant critique of administrative power. Section III goes on to fill this conceptual space with the concrete historical practice of the EEOC in its early years, between 1965 and 1972. I argue that Habermas' concept of "communicative power" provides an essential characterization for the mode of bureaucratic practice that the EEOC embodied. Section IV then develops the norm of discursive administration in relation to Max Horkheimer's distinction between "traditional" and "critical" theory. I argue that the EEOC deployed its communicative power as a "critical bureaucracy." When they use their authority to articulate the meaning of institutionalized freedom, administrators take on a critical capacity. They analyze social tensions, embodied within empirical facts, with an eye towards their progressive transformation, in the interests of dominated classes. My goal in this reconstruction is to discover a form of administrative praxis within the history of the civil rights era that has lasting normative significance for our

understanding of the relationship between deliberative democracy and bureaucratic governance.

II. Discovering A Place for Deliberative Bureaucracy in Habermas' Social Theory

Over the course of three of his major works—*Legitimation Crisis*, *A Theory of Communicative Action*, and *Between Facts and Norms*—Habermas articulates a trenchant critique of the bureaucratic state. He argues that bureaucracy stifles the deliberative capacities of the public sphere and thereby undermines democratic legitimacy. However, in the last chapter of *Between Facts and Norms*, Habermas qualifies his critique, suggesting that administrative agencies might themselves be democratized. But he does not flesh out this possibility in much detail. Here, I reconstruct Habermas' account of the pathologies of administration, and the key concepts of communicative rationality that underly it. I suggest that Habermas' late qualifications to his otherwise sharp distinction between administrative and communicative power open an important avenue of inquiry into the structure of the modern state. In the next section, I use the EEOC as an example of a discursive form of administrative.

A. *Legitimation Crisis*: The Need for (and Threat of) Bureaucratic Management

Habermas' concern over the pathological consequences of the expansion of administrative power has been a consistent theme in his social theory since *Legitimation Crisis* (1973). In that work, Habermas described how the crisis tendencies of capitalism required expansions of state capacity to mitigate losses, compensate victims, and prevent citizens from losing confidence in the social and political order. Confronting an

internally fragmented social structure, with deep class inequalities, the administrative state negotiates settlements between labor and capital, and engages in ever more expansive social planning, in order to prevent conflict and the breakdown of law and order. For the administrative state, "*crisis avoidance is thematized* as the goal of action."[5] As the government takes on these various social steering functions, it faces increasing demands that it justify to its citizens the goals and consequences of its social planning, as well as the underlying inequitable economic system that such planning protects from self-destruction. For Habermas, however, the administrative state is ill equipped to provide such justification. In his famous formulation, "*there can be no administrative production of meaning*."[6] The bureaucracy, on his account, merely calculates interest group pressures as inputs, and generates outputs that ameliorate the conflicting social imperatives to which it is sensitive.

The administrative state is unable, however, to trade effectively in more robust forms of communication and argumentation—the processes of opinion and will-formation that Habermas first identified in *Structural Transformation of the Public Sphere.* Deliberative actors in the public sphere require more than incentives and coercive pressures to consider their social order to be legitimate. More than tis, they demand that "consensus on a recommended norm be brought about *with reasons*," through "rationally motivated agreement."[7] Citizens must "test the validity claims of norms, and, to the extent that they accept them with reasons, arrive at the conviction that in the given circumstances the proposed norms are 'right.'"[8] If bureaucracies only have

[5] Habermas 1975, 64.
[6] Ibid., 70.
[7] Ibid., 105.
[8] Ibid., 105.

at their disposal monetary incentives and coercive disincentives, then they can never satisfy such demands for discursive legitimation. Administrative power nonetheless attempts to fill this gap with increased rewards for disadvantaged groups and the victims of economic crises, reaching into spheres previously beyond the bounds of state power, such as schooling and child rearing. Whether such efforts to replace communicatively generated legitimacy with administrative competencies can succeed in mitigating social conflict is an empirical question. But to the extent they do succeed, they progressively undermine the capacity of citizens to reason, deliberate, and participate in public affairs. The people are managed; they no longer govern.

B. *A Theory of Communicative Action*: Administrative System and Communicative Lifeworld

Habermas again confronts the specter of the totally administered society in *A Theory of Communicative Action.* Here, the underlying contrast between the formal power of the administrative state, on the one hand, and the use of public reason, on the other, is made explicit in the distinction between "system" and "lifeworld." "System" refers to spheres of action governed by the economy and the administrative state. The system trades in the "media of money and power," in order to coordinate action amidst the complexity of modern society, using the formal principles of positive law to structure interaction. By contrast, the lifeworld generates and enacts different forms of communicative rationality. Whereas the "traditional" lifeworld drew social meanings out of stable social hierarchies, unreflectively endorsed by their participants, the enlightenment brought with it the "rationalization" of the lifeworld, such that actors could become self-conscious of their social arrangements, and exercise their reason to evaluate

such arrangements. Citizens in the public sphere subject political and social structures to criticism, reach mutual understandings as to normative commitments, crystallize disagreements, and collectively press economic and political powers to justify themselves in rational terms, and heed rationally motivated demands. Such discursive practices rely upon a rich social fabric, sustained by public discourse, which is threatened by the increasing exercise of administrative power: "In the communicative practice of everyday life, cognitive interpretations, moral expectations, expressions, and valuations have to interpenetrate and form a rational connectedness via the transfer of validity that is possible in the performative attitude. This communicative infrastructure is threatened by two interlocking, mutually reinforcing tendencies: *systemically induced reification* and *cultural impoverishment*."[9] Systemically induced reification refers to the ways in which the communicative bedrock the lifeworld ossifies under the strain of legal formalism and bureaucratic management. The legitimacy that could once be won only through public reflection on the content of a parliamentary debate is now bought with a block grant. The idea becomes a thing; agreement becomes co-option. Cultural impoverishment refers to the diminution of capacities for communication in the lifeworld that this systemic reification brings about.

A Theory of Communicative Action also begins to situate the critical social theory Habermas presented in *Legitimation Crisis* in relation to law. Law does not stand neatly on either side of the system/lifeworld divide. Rather, corresponding to system and lifeworld are two different dimensions of law: law as medium and law as institution. As a medium, law serves as a conduit for economic and administrative power. Habermas

[9] Juergen Habermas, *A Theory of Communicative Action: Volume 2, A Critique of Functionalist Reason*, trans. Thomas McCarthy (Boston: Beacon Press, 1982), 327.

places economic, commercial, business, and administrative law squarely in this steering category. But this purely instrumental side of law, which renders formal procedures to accomplish social steering functions, is complemented by a communicative dimension. "Law as a medium remains bound up with law as an institution. By legal institutions I mean legal norms that cannot be sufficiently legitimized through a positivistic reference to procedure."[10] Such legal institutions include constitutional law and criminal law, which are distinguished by their intrinsic connection to questions of morality and justice, and not merely to the logical consistency and empirical regularity of a juridical procedure. Such branches of law "need substantive justification, because they belong to the legitimate orders of the lifeworld itself and, together with informal norms of conduct, form the background of communicative action."[11] Law thus includes elements of system and lifeworld within it. It is internally differentiated between those species of law grounded in communication, and those that are uncoupled from it, deriving their impetus from the functional imperatives of social steering. Administrative law, for Habermas, stands definitively on the "steering" side of law, and is bereft of communicative power and discursive legitimation.

C. *Between Facts and Norms*: The Facticity of Administration and the Validity of Democracy

This bifurcation of law into "medium" and "institution" plays a central role in Habermas' normative political theory as developed in *Between Facts and Norms*. There, he reformulates the distinction between law as medium and law as institution in terms of a tension between "facticity" and "validity." "Facticity" refers to law's status as a given

[10] Ibid, 365.
[11] Ibid.

set of rules and procedures that stabilizes social structures and expectations in a way that makes complex collective action possible. "Validity" refers to the law's necessary appeal to certain conditions of justification and legitimation amongst those who are subject to it. These two aspects of law are interdependent. In modern states, where political power cannot rest exclusively on tradition, kinship, or charisma, the factual power of law must be undergirded by normative, justificatory discourses that give some account of why the exercise of power is reasonable, necessary, and fair. Likewise the communicative rationality of the lifeworld requires the stability of an affectively administered positive law to preserve spaces in which un-coerced communication is possible.

The relationship between facticity and validity takes concrete form in social and political structures that implement public opinions developed through rational discourse. Evaluation, criticism, and advocacy on behalf the use of political power wells up from the public dimension of the lifeworld, or "civil society." Civil society includes social and political clubs, religious institutions, schools and universities, news media, non-profit organizations, and other forms of association that link the private life of individuals with the public life of a political community. Civil society provides the social infrastructure for the public sphere. "The public sphere can best be described as a network for communicating information and points of view."[12] The organs of civil society coalesce to produce public conversation and opinion over questions of shared social political concern. The public communicates these opinions through the legislative process, which makes their claims to validity "factual" when it passes particular statutes, which are

[12] Juergen Habermas, *Between Facts and Norms,* trans. Williams Rehg (Cambridge, MA: The MIT Press, 1998), 360.

enforced by the judiciary. In this way, the factual, coercive aspect of law is informed by and subject to public norms produced through democratic procedures.

Habermas describes such political capacities of civil society as "communicative power." He takes his cue from Arendt's claims that "power springs up between men when they act together, and vanishes the moment they disperse."[13] In the public sphere, as people organize and differentiate themselves amongst the institutions of civil society, opinions and arguments circulate and accrue motivating force. Rational deliberation amongst individuals and groups becomes can become a form of power because "the shared belief that is produced…between speaker and hearer by the intersubjective recognition of a validity claim…implies a tacit acceptance of obligations relevant for action."[14] However, communicative *action* only becomes communicative *power* when it "passes through the filters of the institutionalized *procedures* of democratic opinion- and will-formation," and influences the legislative debates.[15] Such communicative power is the fount of legitimacy for Habermas, because it is founded not on violence, or coercion, but upon "*the unforced force of the better argument*."[16]

The deliberative practices of argument between individuals take institutional shape in the "circulation of reasonably structured deliberations and decisions" from the public, to the legislature, and into the laws of the state.[17] Popular sovereignty thus asserts itself "through the communicative presuppositions and procedures of an institutionally

[13] Hannah Arendt, *The Human Condition* (Chicago: London: The University of Chicago Press, 1958), 200.
[14] Habermas 1998, 147.
[15] Ibid., 371.
[16] Ibid., 306, emphasis added.
[17] Ibid., 136.

differentiated opinion and will-formation."[18] This constitution of political power divides sharply, for Habermas, between administrative and communicative power. The administrative power of the state, Habermas insists repeatedly, must always refer back to the communicative power emanating from the public sphere in order to be legitimate: "If the sources of justice from which the law itself draws its legitimacy are not to run dry, then a jurisgenerative communicative power must underlie the administrative power of the government."[19] Legitimate power must be transmitted from the informed opinions of the people, through the legislature, and into the duly constituted agencies that implement statutes. Whereas communicative power is justified by reference to its acceptance in the minds of participants in rational discourse, administrative power is justifiable only to the extent that it seamlessly implements the opinions that result from such deliberative processes. In this sense, "legitimate law is generated from communicative power and the latter in turn is converted into administrative power via legitimately enacted law."[20] Thus, the basic divide in Habermas social theory between system and lifeworld, medium and institution, fact and norm, unfolds again in a categorical distinction between communicative and administrative power. Whereas communicative power relies on the unforced force of the better argument, administrative power relies on various forms of coercion.

As a consequence of this conceptualization of political power, the administrative state has a purely instrumental role to play in the exercise of public autonomy. It must faithfully implement the legislative statutes that are backed by the opinions developed through rational communication in the public sphere. Drawing on Jerry Mashaw's

[18] Ibid., 135.
[19] Ibid., 147.
[20] Ibid., 168.

account of administrative ideals in *Due Process in the Administrative State*, Habermas emphasizes the "pragmatic" nature of administrative discourse, which is "tailored to the choice of technologies and strategies that, under the given circumstances…are suitable for realizing the values and goals previously set up by the legislature."[21] Such administrative pragmatism is guided by principles of "accuracy," "efficiency," and "competence." In an ideal-typical account of the function of bureaucracy, "the administration is not permitted to deal with normative reasons in either a constructive or reconstructive manner. The norms fed into the administration bind the pursuit of collective goals to pregiven premises and keep administrative activity within the horizon of purposive rationality."[22] Habermas acknowledges Mashaw's insight that administrators often must weigh political values in the exercise of their discretion, and that bureaucratic structures often include procedures for individuals affected by administrative power to voice their opinions directly to the agency. But his normative reconstruction of the place of administration in the separation of powers explicitly relegates it to the "facticity" and "steering" dimension of law. Within the given normative commitments implicated in the statute, it is the purpose of the agency only to select the most efficient technologies and strategies for concretizing the abstract commands of the legislature, such that they become material constraints on social activity.

D. Habermas' Qualification of His Conception of Administrative Rationality

[21] Ibid., 186.
[22] Ibid., 192.

Though Habermas describes administration in this idealized, purposive-rational model, he goes on to articulate a vision of administrative governance that gives normative legitimacy to the participatory reforms in administration that Mashaw outlines. Habermas is concerned to avoid cases in which the administration "self-programs" or "assumes unauthorized delegations of power," which deprives citizens of their public autonomy as lawmakers, and their individual autonomy as legal subjects. This leads him to suggest that administrative agencies absorb within themselves the "functional separation of powers…through new elements of participation and control, including domain-specific public spheres."[23]

Habermas understands the welfare state to have answered a serious problem with the classical bourgeois legal order, namely, its inattention to the material preconditions for the exercise of those liberties protected in the higher law of liberal-democratic states. The administrative state therefore expanded its reach in order to provide what Rawls calls "the social bases of self-respect"—those basic goods, such as food, shelter, and healthcare that make the possibility of freedom realizable. Here Habermas has recast the growth of administrative power, which he described in *Legitimation Crisis* as a way mitigating social conflict, as an essential requisite for liberal rights and democratic governance. Nonetheless, he retains from his earlier critique a concern over "welfare-state paternalism": "with such overwhelming provisions, the welfare state obviously runs the risk of impairing individual autonomy, precisely the autonomy it is supposed to promote by providing the factual preconditions for the equality of opportunity."[24] Habermas in this way reformulates his previous claim that administrative management

[23] Ibid., 391.
[24] Ibid., 407.

undermines the communicative capacities of the lifeworld as a concern that administrative management will undermine individual and collective autonomy. He wants to ensure that the "factual," steering activity of administration does not overcome the capacities for individual and collective autonomy that it is meant to preserve. This risk is at its height where agencies become "self-programing" as they interpret broad statutory mandates, often becoming captured by powerful interests in the process. Here, the threat that citizens become passive clients of the agency combines with the threat that the agency is no longer acting for public purposes in the first place.

Given that agencies must have recourse to normative reasons and argumentation as they interpret open-textured statutes, and given that such norms must ultimately arise from the communicative processes of the public sphere, Habermas suggests a "'democratization' of the administration that, going beyond special obligations to provide information, would supplement parliamentary and judicial controls on administration from within."[25] He thus endorses experimenting with different forms of "participatory administrative practices," going beyond existing procedures such as hearings, quasi-judicial adjudications, and public comment on regulation, which, in the U.S. at least, have been part and parcel of administrative law since the passage of the Administrative Procedure Act in 1945.[26] Here, at the end of the final chapter of *Between Facts and Norms*, Habermas has added an important addendum to the critique of administrative power he had developed over a quarter of a century. Because administrative power is necessary to provide factual preconditions for the formulation and realization of validity claims; and because administrative power will crowd out the communicative capacity of

[25] Ibid., 440.
[26] Ibid., 440.

the lifeworld if it provides such factual preconditions in its usual pragmatic, strategic, and technocratic mode of activity; administrative power must be restructured so as to incorporate the communicative capacities that it otherwise would snuff out.

This addendum is striking in that it deeply complicates the neat divide between administrative and communicative power, which Habermas had elucidated over the course of his critical and political theory. Already, after the publication of *A Theory of Communicative*, sympathetic critics had begun to press on Habermas' dichotomy. Thomas McCarthy, for example, questioned Habermas' insistence that bureaucratic action is organized only by functional, systemic imperatives, channeled through the formal media of legal procedures. Surely bureaucracies do not always, and need not always, function via the "non-normative steering of subjectively uncoordinated individual decisions rather than via normative consensus."[27] Nancy Fraser questioned Habermas' division between lifeworld contexts where communicative freedom ought to reign, such as the family and the school, and the system context of the market, where steering functions are more or less appropriate. She describes Habermas' effort to cordon off the family from administrative intervention as a "potentially ideological" maneuver, insensitive to problems of gender domination and the status of unpaid household work.[28] Whereas McCarthy questions whether bureaucratic action is always engaged in purely functional, steering functions, Fraser questions whether the problems of reification and cultural impoverishment that result from bureaucratic action are not offset by the need to address forms of social domination that exist in lifeworld and system contexts alike.

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[27] Thomas McCarthy, "Systems Theory: Complexity and Democracy," in *Communicative Action*, eds. Axel Honneht and Hans Joas, trans. Jeremy Gaines and Doris L. Jones. (Cambridge UK, Polity, 1991),

[28] Nancy Fraser, 35 "What's Critical About Critical Theory: The Case of Habermas and Gender," *New German Critique* (1985), 105.

Habermas obliquely addresses both concerns in the concluding chapter of *Between Facts and Norms,* acknowledging both the need for welfare interventions across the spectrum of society to secure the material basis for the exercise of rights, and the possibility of administrative procedures that could incorporate discursive rationality. Together, these revisions enable bureaucratic power to expand to address social domination without acting beyond the authorization of discursive legitimacy. However, this refiguring of the administration loosens the ties between Habermas' normative theory, in which administrative power is clearly disaggregated and is subservient to communicative power, and his institutional account, in which administrative power and communicative power now might act in tandem, outside of the usual stream of the official circulation of power. To be sure, Habermas can still maintain a "functional" distinction between administrative and communicative power, even if these two forms of power coexist within the administrative apparatus. But this imbrication of administrative and communicative power within the bureaucracy raises a host of questions: How do the imperatives of administrative and communicative power interact, and how ought they interact? Who should be included in participatory procedures for bureaucratic decisionmaking? What is the proper relationship between the opinions expressed in legislative acts and those given voice in administrative regulation? If bureaucrats are now participants in a process of deliberation, how ought we to characterize their role in this process? What is the relationship between crisis management and communicative power in bureaucratic contexts, and how does it defer from crisis management through traditional steering functions?

Such questions are difficult to answer in the abstract. To better frame and answer them, we need to turn to the history of bureaucratic practice, in hopes of identifying and reconstructing practices of communicative power that exist or did exist, rather than manufacturing them from whole cloth. But we are less likely to find such practices in those bureaucracies that informed Habermas' conception of administrative power as the absolute other of communicative power. Habermas focused his attention on those organizations concerned with different forms of welfare provision and economic management. Without excluding the possibility that agencies such as the Social Security Administration, the Federal Housing Authority, or the Security Exchange Commission, partook in communicative power, I redirect the inquiry to another field of bureaucratic activity that is less clearly in focus in Habermas' theorization. During the Civil Rights Era in the United States, the administrative state was directed, through legislative acts and executive orders, to implement significant social change in the area of racial equality. In this effort, they used many of the traditional bureaucratic steering techniques and formal procedures that Habermas has identified in order to advance both the various social and political preconditions for the exercise of rights. In Particular, The Equal Employment Opportunity Commission, because of its unusual institutional history, gives us an example of what communicative power looks like within the administrative state. Because the Commission mostly lacked formal power, its history allows us to see a fairly pure form of communicative power in operation alongside and in interaction with more traditional forms of administrative power. My goal here is not merely to supply Habermas' theory with an example of communicative power within the bureaucracy. More importantly, Habermas' concept of "communicative power" grasps the singular

importance of the early history of the EEOC. Namely, the Commission became an institutionalized form of civil rights discourse, which could only exercise its power through various forms of interpretation and communication. Thus in the EEOC we see a proceduralized form of discursive argumentation that helps to advance the interests of a dominated class by expanding the state's capacity to exercise its formal power. We also see an element of bureaucratic leadership and creativity that Habermas' theoretical scheme does not fully capture. Characterizing this practice of "critical bureaucracy" requires us to delve deeper in into the intellectual resources of the Frankfurt School. First, however, we need to offer a more detailed account of communicative power at work in the civil rights administration.

III. Communicative Power in the EEOC

A. Title VII of the Civil Rights Act

Congress created the Equal Employment Opportunity Commission in Title VII of the Civil Rights Act of 1964. It was to be led by five commissioners, appointed by the President with the advice and consent of the Senate, not more than three of whom could be members of the same political party (§705(a)). The Commission was given power to broker voluntary conciliations between employers and unions, on the one hand, and individuals who claimed to have been the victims of discrimination, on the other (§705(g)(4)). Individuals claiming discrimination were required to file a complaint with the EEOC prior to filing a lawsuit.[29] The EEOC then investigated the complaint and, upon a finding that there was "reasonable cause" to believe the charge, the commission

[29] § 706 (a) also gave Commissioners authority to issue complaints if they have reasonable cause to believe a violation of Title VII had occurred.

was empowered to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" (§705(a). In this investigation, the commission had a right, subject to judicial review (§706(c), to demand evidence from respondents related to alleged unlawful employment practices (§709 (a)), and to examine witnesses under oath, and apply to the federal district courts to enforce its demands upon respondents (§706(b)). If a settlement could not be reached within 30 days of the submission of the complaint, then the EEOC would certify the case for adjudication by a federal district court (§706(f)).[30] It could also refer the case to the Attorney General to recommend his intervention in civil actions on behalf of the United States in cases where a "pattern or practice" of discrimination had been alleged (§705(g)(6); § 707(a)). It was also empowered to issue interpretations of the Civil Rights Act, compliance with which could shield employers and labor organizations from liability from discrimination (§713(b)). The Commission was also given the power to issue regulations, after a hearing, requiring employers, employment agencies, and labor organizations to make and keep records "relevant to the determinations of whether unlawful employment practices have been or are being committed" (§706(c)). Finally, the Commission had various "educational and promotional" powers (§706(i)), and could make "technical studies," (§705(g)(4)), and provide technical assistance to individuals who were subject to conciliation agreements (§705(g)(3)).

With such limited authority, it is no surprise that the early EEOC was widely viewed at the time as an ineffectual body. Its own commissioners and staff largely

[30] § 706 (c) required the Commission to first give State Fair Employment Practice Commissions an opportunity to settle the case if such a commission existed in the state where discrimination was alleged. The EEOC was required to give such state commissions 60 days to reach conciliation. If conciliation failed, EEOC had an additional 30 days to attempt to reach conciliation.

viewed it as a "toothless tiger."[31] Studies of the commissions emphasized that it did not have sufficient power to implement the Civil Rights Act, describing it as a "poor, enfeebled thing."[32] The Legal Defense Fund described the EEOC as "woefully lacking in power, funds, and staff, as illustrated by its performance."[33] Richard Berg, who had worked at the Justice Department and as an advisor to Senator Humphrey, believed that "the enforcement procedures of the title…bear only too visibly the marks of compromise, and seem to me to contain serious deficiencies. It seems questionable that much can be accomplished through suits in federal court by persons aggrieved by acts of discrimination."[34] From its debut, the EEOC faced a chronic backlog of complaints, caused in part by the NAACP conscious effort to demonstrate that the agency's existing authority was insufficient.

The EEOC's lack of formal administrative power was a result of a political compromise with economically conservative supporter of civil rights litigation, such as Everett Dirksen.[35] Northern Republicans who were otherwise aghast at the indignities of Jim Crow were nonetheless unwilling to grant an administrative agency any power to enforce equal employment against private employers. The specter haunting negotiations had been the National Labor Relations Board, first established in 1933, which had the power to investigate allegations unfair labor practices and issue legally binding orders for

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[31] Alfred W. Blumrosen, *Black Employment and the Law* (New Brunswick, NJ: Rutgers University Press, 1971), 59.

[32] Michael Sovern, *Legal Restraints on Racial Discrimination in Employment* (The Twentieth Century Fund, 1966), 205.

[33] Richard P. Nathan, *Jobs & Civil Rights: The Role of the Federal Government in Promoting Equal Employment Opportunity and Training* (Washington, D.C.: The Brookings Institution, 1969), 31.

[34] Richard K. Berg, "Equal Opportunity Under the Civil Rights Act of 1965," 31 *Brooklyn Law Review* (1965), 96.

[35] Hugh Davis Graham, *The Civil Rights Era* (New York: Oxford: Oxford University Press, 1990), 146.

respondents to cease-and-desist such practices. During the 40s and 50s, liberal minority groups and labor organizations had pushed to expand this model at the state level to cases of discrimination on the basis of race and national origin, successfully establishing a crop of state Fair Employment Practices Commissions, with similar cease-and-desist powers.[36] The hope was that such state level Commissions would provide a model for a federal commission. However, in the face of Republican opposition, this proposal was not incorporated into the final bill. The push for cease-and-desist powers for the EEOC would continue in Congress through 1972, when the EEOC's was given the power to sue respondents itself, rather than merely permit complainants to file suit. But cease-and-desists powers were never granted.

Despite its lack of formal power, the EEOC was influential in several ways (1) it broadly interpreted the Civil Rights Act in ways that were influential in the federal courts[37]; (2) it coordinated with other Federal agencies with greater power in order to achieve significant settlements with large employers; (3) it deployed what regulatory power it had to develop data about the scope of black exclusion from employment; (4) it held public meetings with employers in different sectors and in different regions to shine light on discrimination in employment and advance its interpretation of the meaning of

[36] Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States*, 1941-1972 (Princeton, NJ: Oxford: Princeton University Press, 2009). Chen argues that the political dynamics of the Fair Employment Practice movement broke down along traditional ideological lines.

[37] As Nicholas Pedriana and Robin Striker argue, the EEOC, despite its lack of formal power, was able to expand state capacity to address racial discrimination in employment, through broad statutory construction: "Because liberal interpretation emphasizes achieving policy goals, liberally interpreting legislation may generally expand state capacity." Nicolas Pedriana and Robin Stryker, "The Strength of a Weak Agency: Enforcement of Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965-1971," 110 American Journal of Sociology no. 3 (2004), 717. I address Pedriana's argument about why the EEOC expanded state capacity in this way in section III (E).

such discrimination. Throughout all of these activities, the EEOC acted in consultation with the civil rights, labor, and business lobbies. It was generally most interested in expanding its capacity to prevent racial discrimination, and was to this extent most sensitive to the interest of the minority beneficiaries of the Act. However, it was not a passive participant in this process. Rather, the EEOC helped to frame the effort to redress racial inequality in a way that melded traditional bureaucratic competencies with forms of communicative power. It exercised communicative power in the sense that it reached rationally motivated understandings with the courts, which were informed by legitimation pressures from the public sphere. Its communicative power stemmed from in its interpretations of the Act, which were informed by the views of civil rights advocates and its own concept of administrative efficacy. This power then circulated throughout the government as the EEOC interacted with the courts and other agencies to make its interpretations binding and effectual.

B. Legislative Interpretation as a Form of Communicative Power

The EEOC's interpretations of its enabling statute were communicative in the sense that they were founded upon rational arguments, which were then considered and accepted by courts. These interpretations were communicative insofar as they were tethered to opinion-and will-formation in the civil rights domain of the public sphere. This is because legitimation concerns drove the EEOC to adopt broad statutory constructions (see section III (E)). Because the EEOC's interpretations were not legally binding, they could only be efficacious to the extent that they deployed what Habermas calls "the unforced force of the better argument."

In its first years, the EEOC issued hundreds of legal opinions concerning Title VII, and filed numerous amicus curiae briefs in discrimination cases, outlining the Commission interpretation of the statute and its application to the facts of particular cases.[38] Alfred Blumrosen, a law Professor who joined the EEOC after the passage of the Act, describes a process of "administrative creativity," in which the agency sought to interpret the statute in such a way as to have maximum impact on the problem of black exclusion from the labor market.[39] This included the following procedural interpretations: that only a minimum amount of information would be sufficient to warrant an investigation; that the statutory requirement that complaints be "under oath" could be satisfied subsequent to the filing of the initial complaint; that the filing of a complaint could serve as an occasion for a more far reaching investigation of practices at respondent institutions, in order to detect wider patterns or practices of discrimination; that a complaint submitted to the EEOC which had not been submitted to a State Commission, as required by statute, would be forwarded to the State directly by the

[38] *EEOC Administrative History*, Reel 1. Equal Employment Opportunity Commission: Administrative History (1968) is part 2 of a larger collection, Civil Rights During the Johnson Administration, 1963-1969 assembled from the holdings of The Lyndon Baines Johnson Library (Frederick MD: University Publications of America, Inc., 1984). It was commissioned by the EEOC's Departmental Histories Project, and was researched and written by Ruby Y. Weinbrecht, with the assistance of Linda F. Blumenfeld, Lafayette Grisby, and Martha Peters under the direction of then Vice-Chairman Luther Holcomb).

[39] Blumrosen 1971, 52. For Blumrosen, the EEOC's lack of formal power was in fact a source of strength. It meant that the EEOC could broadly interpret the statute while sailing under the radar of powerful business and labor interests who were more focused on agencies with greater administrative power, such as the Office of Federal Contract Compliance, which could cancel government contracts if it found that contractors were discriminatory. This agency rarely exercised its power because it was subject to such fierce political pressures (Blumrosen 1971, 42). Blumrosen therefore brushed aside Berg's pessimism about the limits of the EEOC's power, and instead saw it as an opportunity for the agency to have lasting impact upon the meaning of the Civil Rights Act: "The legislative history sets limits beyond which administrators could not go in carrying out the statutory mandate, but it did not dictate the course of administration… This view of legislative history requires the administrator to develop ideas, policies, and procedures which derive from an informed understanding of the dynamics of the social problem and the role of government in its resolution" (Ibid., 52).

Commission, rather than rejected.[40] It also included a substantive interpretation: that the Commissions' determination that it had "reasonable cause" to investigate a complaint could be founded upon "any evidence" that discrimination had occurred.[41] All of these initial, marginal interpretations were intended to make it easier to file discrimination complaints, and to advance cases as quickly as possible within statutory limits.

In some cases, the courts explicitly confirmed these interpretations, thus incorporating non-binding agency interpretations into binding federal law. For example, in *King v. Georgia Power*, a U.S. District Court adopted the EEOC's view that charges filed with the Commission did not preclude complainants alleging "like or related to charges contained in the charge and growing out of such allegation during the pendency of the case before the Commission."[42] Quoting directly from the EEOC amicus brief, the court held that "To compel the charging party to specifically articulate in a charge filed with the Commission the full panoply of discrimination which he may have suffered may cause the very persons Title VII was designed to protect to lose that protection because they are ignorant of or unable to thoroughly describe the discriminatory practices to which they are subjected."[43]

Likewise, in *International Chemical Workers v. Planters Manufacturing Co.*, a U.S. district court adopted the EEOC's broad construction of "aggrieved parties" to enable labor unions representing alleged victims of discrimination to sue on their behalf. The EEOC had argued that Congress did not intend to limit standing to those only

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[40] Alfred Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Madison: The University of Wisconsin Press, 1993)61-2; Blumrosen 1971, 64.

[41] Blumrosen 1993, 62.

[42] 295 F. Supp. 943, 947 (N.D. Ga. 1968).

[43] Ibid.

directly affected by discrimination, but rather intended to give those with a "measurable interest in terms and conditions of employment prevailing at the facility in question."[44] The court reasoned that the agency's interpretation of "aggrieved" was entitled to discretion, and was a reasonable interpretation on the merits.[45] The court cited a principle of administrative law that administrative interpretations of their enabling statutes were entitled to "great weight," especially where the agency was offering a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."[46] This principle, applied to the EEOC, recognized that the administrators who were interpreting the Civil Rights Act shortly after its passage into law were in a privileged position to determine how best to implement its broad commands. The vindication of the EEOC's interpretation in this case is particularly significant, given that the legislative history shows that an earlier draft of the bill had contained a provision allowing charges to be brought "on behalf" of a person alleging discrimination.[47] This provision was deleted from the final bill. Nonetheless, the EEOC was able to reintroduce standing for labor organizations, given its unique capacity as an implementing agency to determine the most effective way to enact the underlying purposes of the statute.

The EEOC's most important statutory interpretation concerned the meaning of "discrimination," as first expressed in the EEOC's "reasonable cause" determinations. These determination collectively represented an effort to find "constructive proof of

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[44] *EEOC Administrative History*, reel 1, p. 254.
[45] 259 F. Supp. 365, 367 (N.D. Miss. 1966).
[46] *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).
[47] *Legislative History of Titles VII and XI* (EEOC: 1968), 3017.

discrimination" rather than evidence of an "intent" to discriminate in its application of Title VII. Thus, the Commission "reasoned that it is an unlawful practice to fail to refuse to hire, to discharge, or to compensate unevenly, or to limit, segregate and classify employees on *criteria which prove to have a demonstrable racial effect without clear and convincing business motive*."[48] The Commission's evolving administrative common law thus articulated the general principle that racially disparate impact constituted "constructive discrimination" if there was no reasonable business motive for the disparity. The EEOC applies this effect-based, rather than motivational approach to discrimination, in two areas: (1) seniority systems and (2) employment testing.

(1)-Seniority: § 703(h) reads of the Civil Rights Act reads, in relevant part: "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system…." The act thus protected "bona fide" seniority systems from liability. The EEOC had to reconcile this language with its efforts to address the racially discriminatory consequences of union seniority systems that did not explicitly segregate black and white workers. In *Whitfield v. United Steelworkers of American*, the Fifth Circuit Court of Appeals had held that in integrating separate black and white seniority lines, it was permissible to tack the black workers to the end of the white list.[49] The EEOC sought indirectly to challenge this interpretation—issued before the passage of the Civil Rights Act—and argue that a seniority system was, by definition, not "bona fide" if it had a discriminatory effect on black employees.[50] Thus, certain

[48] *EEOC Administrative History*, Reel 1, p. 249, emphasis added.
[49] 263 F.2d 546 (5th Cir. 1959).
[50] Graham, 253.

broad criteria for evaluating seniority systems emerged from the EEOC's administrative case law:

> (1) A seniority system which has the intent or effect of perpetuating past discrimination is not a bona fide seniority system within the meaning of section 703(h) of Title VII. (2) The fact that a seniority system is the product of collective bargaining does not compel the conclusion that it is a bona fide system. (3) Seniority systems adopted prior to July 2, 1965 (the effective date of the Act) may be found to be discriminatory where the evidence shows that such systems *are rooted in practices of discrimination that have the present effect of denying classes of persons protected by the statute equal employment opportunities*.[51]

The EEOC also issued seniority guidelines, providing that "Seniority systems…may be found to be discriminatory where the evidence shows that such systems…have the present effect of denying classes of persons…equal employment opportunities."[52]

In *Quarles v. Phillip Morris*, Inc. the EEOC advanced this "present effects" position in its amicus brief, arguing that a seniority system was not bona fide if it in fact prolonged discriminatory practices that had existed before the act.[53] The court agreed with this interpretation, finding that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system."[54] It reasoned that "nothing in § 703(h), or in its legislative history, suggests that a racially discriminatory seniority system established before the act is a bona fide seniority system under the act. *Congress did not intent to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act*."[55] It is not clear from the opinion to what extent the EEOC amicus brief was persuasive to the court, though the court referenced its reasonable cause finding, thus showing how the EEOC's decision to make official rather than informal reasonable cause determinations could help frame litigation. The ruling in

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[51] *EEOC Administrative History*, Reel 1, p. 249-50.
[52] Pedriana and Striker, 731.
[53] Blumrosen 1993, 94.
[54] 279 F. Supp. 505, 517 (E.D. Va. 1968).
[55] Id at 516, emphasis added.

Quarles was not appealed, and the court's holding and language proved very influential over the next decade.

(2)-Testing: In *Griggs v. Duke Power*, the Supreme Court went a step further than Quarles and *explicitly* endorsed the EEOC's effects-based position.[56] *Griggs* addressed another key question of statutory interpretation with which the EEOC had wrestled, namely, the meaning of Title VII's exemptions for "professionally developed ability tests." §706(h) states, in relevant part, that it shall not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin." This subsection, known as the Tower Amendment, was introduced to foreclose the possibility that employers might be found guilty of discrimination merely for using an employment qualification test that disproportionately disqualified blacks. Senator Tower entered into the Congressional record an Illinois Federal Employment Practice Commission's hearing examiner's recommendation to issue a cease-and-desist order against the Motorola Corporation for denying employment to a black man on the basis of an aptitude test. The examiner found that the test did not take into account "inequalities and differences in environment."[57] Senator Tower used this anecdote to justify his proposed amendment to Title VII. His expressed concern was that "the Equal

[56] 401 U.S. 424 (1971).

[57] Graham, 149. Interestingly, the EEOC would go on to achieve a significant settlement with Motorola in 1979, requiring awards of back pay and affirmative action measures. See Mays v. Motorola 22 Fair Empl. Prac. Cas. (BNA) 803 (N.D. Ill. 1979), M.V. Lee Badgett, "Affirmative Action in a Changing Economic and Legal Environment," 34 *Industrial Relations* no. 4, (1995), 489.

Opportunity Commission…might attempt to regulate the use of tests by employers."[58] The intent behind the Amendment therefore seems clear.

Nothing in the Act, however, prevented the EEOC from issuing testing guidelines that simply interpreted the meaning of "professionally developed ability test." EEOC research determined early on that employment tests had proven a serious barrier to minority employment.[59] But they found they had insufficient bases to build changes in testing into conciliation agreements without a "clear official statement of what the law required."[60] The EEOC therefore consulted with testing specialists to recommend testing best practices. The specialists' key recommendation was that "Job descriptions should be examined and their *critical* requirements established before tests are selected for screening applicants."[61] These recommendations served as the basis for employment guidelines, which the EEOC officially adopted in 1966. The guidelines stated that the Commission "interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII."[62] The Guidelines state: "If the facts indicate that an employer has discriminated in the past on the basis of race . . .the use of

[58] *Legislative History, 3138.*
[59] *EEOC Administrative History*, Reel 1, p. 233.
[60] Blumrosen 1972: 60.
[61] *EEOC Administrative History*, reel 2, "Testing of Minority Group Applicants for Employment," Phyllis Wallace et al. (1966), p. 27.
[62] *Griggs v. Duke Power 401 U.S. 431*, 433 ff. 9.

tests in such circumstances will be scrutinized carefully by the Commission."[63] The EEOC applied these Guidelines to "reasonable cause" findings, holding that where an employer had a history of racial discrimination, it bore the burden "to show affirmatively that the tests themselves and the method of their application are non-discriminatory within the meaning of Title VII."[64] The EEOC thus sought to open up testing to review by focusing on the meaning of "ability" in § 703(h). If the test did not actually measure job-related abilities, it was not a professionally developed ability test.

In *Griggs*, the Supreme Court adopted the EEOC's interpretation of § 703(h), as expressed in its testing guidelines. *Griggs* was a lawsuit against a power company which had "openly discriminated on the basis of race" prior to the passage of the Civil Rights Act, and had subsequently introduced high school education and testing requirements for many of its departments.[65] The tests the company used were professionally prepared. The Court reversed the Court of Appeals' determination that the tests were permitted under the act because there was no "showing of a racial purpose of discriminatory intent."[66] On the contrary, the Court found that "the Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes can not be show to be related to job performance, the practice is prohibited."[67] It held in this particular case that the company's high school completion requirement and general intelligence test did not "bear a demonstrable relationship to

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[63] Quoted from CCH EMPL. PRAC. GUIDE, ¶ 17,304.53 (EEOC Dec. 2, 1966), appendix A in Alfred Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination," 71 *Michigan Law Review* no. 1 (1972), 108-9.

[64] Ibid.

[65] 401 U.S. 424, 427.

[66] Id at 429.

[67] Id at 431.

successful performance of the jobs for which it was used."[68] The Court read the Civil Right Act expansively to reach this conclusion, maintaining that "Congress directed the act towards the *consequences* of employment practices, not simply motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment question."[69] This interpretation of the Act faced several headwinds: § 706 (g) explicitly required a finding "that the respondent has intentionally engaged in or is intentionally engaging in an unlawful practice charged in the complaint." And § 703(h), which explicitly provided an exception for professionally developed ability tests, mentioned only discriminatory intent as a basis for withholding this exemption.

To advance its effects-based interpretation of the Act, the Court turned to the EEOC for support: "The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference... Since the Act and its legislative history support the Commissions construction, this affords good reason to treat the guidelines as expressing the will of congress." The Court interpreted the legislative history as indicating that the Tower Amendment was concerned solely to insure that *job-related* tests with disparate racial impact could still be used. This interpretation finds support in Senator Humphrey's statement that the act was intended to insure that "employers shall seek and recruit employees on the basis of their talents, their merit, and their qualifications for the job."[70] If an employer with a history of discrimination uses a test, which does not select

[68] Id.
[69] Id at 432.
[70] *Legislative History of Titles VII and IX*, 3107.

applicants on the basis of their merit, and has the effect of disproportionately disqualifying black workers, then such a test would seem to work against the spirit of Title VII. On the other hand, Senator Tower, the author of § 703(h), thought the whole Title to be unconstitutional, felt that the "pressures placed upon private business by this title are utterly unacceptable in a free economy," and understood the amendment to prevent the EEOC from regulating the use of tests (LC 3133, 3136).[71] His amendment therefore evinces intent to preclude any liability for professional developed ability tests absent a finding that they are intentionally discriminatory. But as the Court stresses, Senator Humphrey sought to blunt the impact of the amendment by stating that it was "in accord with the intent and purpose of the title," thus indicating that it should be read in light of the Act's overarching goal to ensure qualification-based employment.[72]

Given this uncertain legislative history, the EEOC's interpretation of the amendment, which aligned it with the general purposes of Act, rather than Senator Tower's ambitions to gut Title VII's efficacy, serves as the lynchpin of the Court's opinion in *Griggs*. The EEOC's interpretation, entitled to deference under principles of administrative law, enabled the Court to confirm its reading of the statute with the considered, expert opinion of the agency. Despite the deference accorded to the agency, the Court's opinion shows that its agreement with the EEOC's interpretation was rationally motivated. The Court was convinced, like the EEOC, that Congress did not intend to bar effects-based reasoning; that it did not intend to freeze blacks in their pre-Act place. Because the EEOC and the Court were of substantially the same opinion, but the EEOC's interpretation carried some weight under principles of judicial deference, the

[71] Ibid., 3133, 3136.
[72] 401 U.S. 435, 436.

Court could deploy the EEOC's standards into its own statutory argument. In this way, the EEOC's innovative decision to issue testing guidelines led to a broad construction of the statute. In adopting the EEOC's interpretation, as expressed in the employment Guidelines, the EEOC exercised communicative power in its interpretive dialogue with the Court. The Court thus applied the "unforced force" of a heretofore non-binding advisory opinion. In this way, communicative power circulated from the legislative debates, through the EEOC's interpretations and its interactions with civil rights publics, and finally issued into the deliberations of the Supreme Court. The "toothless tiger" deployed its powers of rational argumentation and interpretation to expand the power of the Courts to redress discrimination in the absence of a showing of discriminatory intent. If the Commission could not bite, at least it could speak.

C. Communicative Power Meets Administrative Power: The EEOC's Collaboration With Other Agencies

While the EEOC worked to advance broad constructions of the Civil Rights Act in the federal courts, it also, on two particularly significant occasions, worked in tandem with other administrative agencies to achieve large settlements against employers the agencies believed were in violation of Title VII. In the first case, the Newport News Shipyard Agreement, the EEOC played the role of bargain broker. In the second, the A T & T agreement, the EEOC went beyond this in explicitly advancing constitutional and statutory arguments in order to justify its intervention another agency's licensing decisions. These cases serve to contrast administrative with communicative power. The Newport News agreement was more clearly a case of simple bargaining, operating under the shadow of the Civil Rights Act's democratically affirmed mandates. The A T&T

case, in comparison, shows how constitutional creativity, combined with bureaucratic entrepreneurship, can influence hard bargaining despite having no coercive force of its own. In both instances, the EEOC aligned its communicative competencies with more traditional forms of administrative power in order to achieve concrete results for the victims of discrimination.

In 1965, 40 black employees of the Newport News Shipping and Dry Dock Company filed discrimination charges with the EEOC under Title VII, on the grounds that they had been passed over for promotion while their white peers advanced. The EEOC investigated the complaint, and found reasonable cause to support their charges.[73] The EEOC attempted to conciliate, but was rebuffed by the company. It then sent notice letters to the complainants indicating that conciliation had failed and they could go file suit in federal court. The complainants then filed a class action suit, and were represented by the Legal Defense Fund. The EEOC also sent the Newport News case to the Department of Justice, which prepared to file suit against the Shipyard. Meanwhile, the Defense Department's Equal Opportunity Office had determined the Shipyard was not in compliance with Executive Order 10925, which required government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Also interested in the case was the recently constituted Office of Federal Contract Compliance in the Department of Labor, established by Executive Order 11246, which had the power to suspend government contractors with discriminatory practices.

[73] Blumrosen 1971, 336. The following description of the Newport News Agreement is based upon Blumrosen's account.

Subsequently, representatives EEOC, Justice Department, Defense Department, and OFCC met to discuss the case and decide upon a course of action. The Justice Department elected to hold off on filing suit, to see if a settlement could be negotiated. The EEOC volunteered and was appointed to conduct the negotiations. It drafted a proposed settlement, including remedies for past discrimination as well as structural changes the employment at the shipyard going forward. These initial proposals met with the approval of all involved government agencies and aggrieved parties. The EEOC then opened negotiations, while the OFCC suspended the Shipyard's federal contracts. Thus, the negotiations occurred under the shadow of the contract suspension, as well as the pending private lawsuit and the possibility of a Justice Department suit. The result was a negotiated settlement, in which the EEOC and an appointed expert would work with the company to improve employment, pay, and apprenticeship practices, and desegregate locker facilities, and implement agreements to promote and improve pay for the original charging parties. The government, the charging parties, and the Shipyard all agreed to its terms. The result was the promotion of 3,000 of 5,000 black employees at the yard, of which 100 were designated to become supervisors. The EEOC estimated that this agreement was worth roughly one million dollars per year in income to the local black community.

In reaching this impressive result, the EEOC exercised its core competency—negotiating settlement agreements—at the helm of a federal bureaucracy with much stronger enforcement powers. However, this bargaining process cannot qualify as full-throated "communicative action" in Habermas' sense. Communicative action requires that individuals "adopt positions toward criticizable validity claims in order to mutually

convince one another of their argument."[74] Habermas explicitly distinguishes bargaining from this form discursive rationality: "bargaining processes are tailored for situations in which social power relations cannot be neutralized in the way rational discourses presuppose. The compromises achieved by such bargaining contain a negotiated agreement that balances conflicting interests," rather than a "rationally motivated consensus."[75] However, Habermas grants that bargaining operates under discursive norms indirectly, through "procedures that *regulate* bargaining from the standpoint of fairness" and provide interested parties with "an equal opportunity to influence one another during the actual bargaining, so that all the affected interest can come into play and have equal chances of prevailing."[76] The Newport News Agreement can be understood as a case in which the federal government threw its weight behind otherwise fairly powerless black employees, in order to enhance their bargaining position against the Shipyard. But Habermas' standard of procedural fairness does not tell us enough about the dynamics of this process. One could argue, after all, that the complainants were made more powerful than their employer because of the government's coercive pressures. Does this render the agreement unfair? No. The agreement occurred not only under the shadow of contract suspensions and looming federal lawsuits, but also under the shadow of the recently enacted Civil Rights Act. Because the Act rendered discrimination illegal, the agreement cannot be seen as the product of an unequal compromise between people who have a taste for discrimination and those who don't. Rather, the settlement represented an articulation of an employer's obligations under Title VII, applied to the particular case at hand. As the EEOC developed remedies, won the agreement of

[74] Habermas 1998, 167.
[75] Ibid., 166.
[76] Ibid., 167-7.

aggrieved parties and respondents, it gave concrete form to broad statutory injunctions against discrimination. In this process, there was less of the rationally motivated argumentation that we see in the EEOC's role in statutory interpretation. And there was a good deal more of the traditional, coercive use of administrative power to mitigate crisis potentials with redistributive bargains. Here, the EEOC played the more traditional, instrumental, bureaucratic role that Habermas envisions.

This contrasts to the EEOC's role in a path breaking settlement between the federal government and A T&T to address its discriminatory practices against minorities and women.[77] The FCC had promulgated a rule that interpreted its authority as encompassing "an independent responsibility to effectuate the strong national policy against discrimination in employment" grounded in the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and its statutory obligation to consider the "public interest" in granting licenses. In justifying this authority, the FCC had relied upon the "state action" doctrine, under which Fourteenth Amendments regulated even private activity where there was sufficient public involvement.[78] Unlike the EEOC, the FCC had coercive authority based on its power to grant or withhold assent for licenses and rate increases for utilities. Sophia Lee has dubbed this novel interpretation of constitutional and statutory authority "administrative constitutionalism."[79]

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[77] The following account of the EEOC settlement is based upon Sophia Z. Lee's history in "Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present," 96 *Virginia Law Review* (2010), 837-43.

[78] See e.g. *Shelly v. Kraemer* 334 U.S. 1 (1948).

[79] "Administrative constitutionalism involves what I term *creative interpretative*. 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." Lee, 801.

In 1970, AT&T requested a rate increase from the FCC (Lee 2010, 837). The EEOC then sent the FCC a petition to intervene in this request, using statistical evidence to argue that AT&T's operating companies had "historically excluded and segregated and continue to exclude and segregate women, blacks and Spanish-surnamed Americans." The EEOC thus advanced the statutory interpretation it had developed in the rulings and guidelines that would eventually lead to *Griggs*—that disparate treatment, even the absence of evidence discriminatory intent, could constitute a violation of Title VII. Like the FCC, it also advanced constitutional arguments, arguing that the FCC's grant of a monopoly to AT&T made it subject to constitutional restraints against government discrimination. After being deluged with civil rights groups' petition supporting EEOC intervention, the FCC agreed to consider the EEOC petition under its anti-employment-discrimination rules. The EEOC thus pushed the FCC to implement and apply rules it had previous developed. It built upon the FCC's constitutional arguments, and combined them with its interpretations of Title VII, and its statistical knowledge of AT&T's employment practices, generated from its reporting regulations, to push for broad reforms in one of the nation's largest employers. The EEOC's petition was accompanied by a 20,000-page report documenting its discrimination claims. The EEOC also convinced the OFCC to prevent a lesser settlement, which General Service Agreement had reached with AT&T. This led to a universal government settlement, which set hiring goals and timetables, opened up jobs to women from which they had previously been excluded, and awarded 35 million-dollars in back pay for employees who had been victims of AT&T's discriminatory practices.

In contrast to the Newport News case, the EEOC's intervention in the AT&T rate increase proceeding was laden with legal and constitutional argumentation. The EEOC leveraged the FCC's previous commitment to enforce employment opportunity, and contributed its own expertise in data collection and statutory interpretation to develop a compelling argument against AT&T. The settlement that was reached was not a "rationally-motivated agreement" in the sense that AT&T was not convinced by AT&T's "better argument" that its discriminatory practices were removed. It was convinced by the threat of FCC enforcement of EEOC's interpretation. Here, the "facticity" and "validity" dimension of law interact. The EEOC and FCC were engaged, between them, in a process of constitutional and statutory elaboration that partook in many of the features of communicative power. These agencies were in dialogue, founded in legal reasoning, over the content of the nation's commitment to eliminate discrimination in employment.

The EEOC's intervention served to catalyze the intervention of civil rights groups in the public sphere, who submitted petitions supporting the EEO request. This process resembles Habermas' description of communicative power as a "siege" by the public against the state. Communicative power "influences the premises of judgment and decision making in the political system without intending to conquer the system itself."[80] In this case, however, the siege from the public sphere was aided by a Trojan horse, as the EEOC operated from within side the government to spearhead interventions from civil society. EEOC's non-coercive appeal to the FCC, based upon its interpretative and informational competencies, served as a fulcrum on which to leverage public pressure upon the formal power of the FCC. This legal and political discourse then provided the

[80] Habermas 1993, 486.

basis for applying the coercive pressure of the FCC to achieve AT&T's compliance with the EEOC and FCC's considered judgment of its legal obligations. Here, we see the EEOC's communicative power—shared and generated with civil rights publics—circulating throughout the Federal Government, in its interactions with the FCC, the OFCC, and the GSA. Though it possessed no coercive power of its own, it helped to achieve a landmark settlement with the country's largest corporation. Here, we see communicative power in operation, not merely in the creation of the Civil Rights Act, but within the bureaucratic activity of the agency charged with its administration.

D. Information Gathering and Dissemination

Title VII gave the EEOC authority to require employers to keep and report employment records (§709(c)) and to engage in "educational and promotional activities" (705(i)). The EEOC undertook the former by requiring employers to submit records of their employees by minority status. It undertook the latter with a series of convenings covering different sorts of industries and different regions. These two practices were alike in their effort to understand, publicize, and gain support for efforts to redress the problem of discriminatory employment. They thus show how the EEOC sought to interact with civil society in such a way as to raise the public's consciousness of the ongoing barriers to employment faced by minorities. While the tangible benefits of the EEOC's convening efforts are difficult to assess, its reporting requirements were essential for expanding government capacity to deal with employment discrimination. Importantly, both efforts attempt to make the "private" world of business employment into a public matter, by creating public records of employment statistics, and holding

public hearings on employment practices. In this way, they sought to push the boundaries of the public sphere beyond its current confines, in a way that might alter public perceptions and practices. Since these efforts were explicitly condoned by the Civil Rights Act, they embody the self-reflective and self-critical practices of a democratic society.

In November 1965, the EEOC announced that it would require all employers with over 100 employees—118,000 in all—to submit "EEO-1" reports on their minority hiring practices.[81] EEO-1 collected and computerized data on minority and female employment participation. The rules were adopted after the public hearing required by statute, over the objections of businesses, who found the requirement intrusive, and some civil rights advocates, who worried that it might actually enable further discrimination.[82] As John David Skrentny argues, the EEOC decision to require minority reporting from large business was driven by the "logic of administrative pragmatism."[83] Whereas the complaint-based conciliation process forced the commission to rely on individuals coming forward to allege discriminatory conduct, the reporting forms would provide the EEOC with a "sociological radar" to identify and challenge discrimination in the workforce.[84] As Chairman Franklin Roosevelt, Jr. put it in his announcement of the proposed rule, "we have conscientiously sought to develop a report form which will provide a factual basis for attacking discrimination where it appears to exist—without

[81] *EEOC Administrative History* Reel 2, "The Role of the EEO-1 Reporting System in Commission Operations" (1967).

[82] John David Skrenty, The Ironies of Affirmative Action: Politics, Culture, and Justice in American (Chicago: London: The University of Chicago Press, 1996), 128.

[83] *Ibid, 127.*

[84] Blumrosen 1971, 68.

imposing new, difficult and unusual burdens on employers."[85] The EEO-1 reports were intended to serve as the basis of the public hearings discussed below and to serve as the basis for commissioner initiated charges. It was also the purpose of the EEO-1 reports to serve as an "annual EEOC 'calling card,'" which would serve "an auxiliary capacity to give credibility to a weak statute."[86] The EEOC published its reports, revealing highly unequal patterns of employment, particularly when it came to white-collar jobs. The EEOC's reporting requirements provided it with a supply of data to support its investigation of individual complaints, and to initiative actions such as the AT&T case discussed above. The reporting requirements were traditional bureaucratic, technical response to the problem of racial discrimination. And yet, they had a communicative side: the production of reliable information about the scope of a problem is a condition of the possibility of rational discussion and rational adjudication about the way to solve that problem. To the extent the EEOC provided this data, it therefore laid the groundwork for its own, the courts', and society's effort to redress racial discrimination.

The EEOC employment reports also served as the catalyst for holding a series of hearings with employers in different industries and different regions to shed light on unfair employment practices and encourage voluntary compliance.[87] The EEOC held hearings in North Carolina with the textile industry (January 1967), in New York City to shine light on the problems in white-collar employment (January 1968), and with the National Association of Manufacturers (May 1968). The EEOC also worked conjunction with other Federal Agencies interested in further employment opportunity. At the

[85] New York Times, "Survey on Job Discrimination Sought by Employment Panel," November 26, 1965.

[86] *EEOC Administrative History*, Reel 2, "The Role of EEO Reporting."

[87] *EEOC Administrative History* reel 1, p. 129-172.

initiative of the FDA, it led a closed-door meeting with the pharmaceutical industry (October 1967). And, given EEOC data that showed that the utility industry had the lowest minority employment rate of any major industry at 3.7 percent, the EEOC co-sponsored a utility industry hearing with the Federal Power Commission (June 1968). The EEOC also held hearings in Los Angeles (1969) and Houston (1970).

The New York City hearing on white-collar employment was perhaps the most successful of these meetings because of its high profile. A front page New York Times article declared: "Business Job Bias in City is Charged," and went on to cite the commissions finding that "56 of 100 major corporations in New York City 'had not a single Negro serving as official or manager."[88] Similar statistics were cited for Puerto Ricans. The Commission deployed its reporting requirements here to publicize the serious nature of minority exclusion from white-collar jobs. Of all 4,249 employment units reporting, 27 percent had not a single black person in any position, and 48 percent had none at the white collar level. Chairman Clifford Alexander, Jr. also observed, however, that some firms had managed to hire blacks and Puerto Ricans for white-collar jobs. He argued, persuasively, that this undermined the claim that there were no viable minority candidates for such work.

The goals of the Commission in holding this hearing were: "(1) to focus public attention on the problem of discrimination in employment, in this case, the white collar field; (2) to serve notice on all concerned of EEOC's determination to exercise its legal authority imaginatively and aggressively; (3) to discover, and lay a basis for, Commission action to remedy entrenched discrimination practices in white collar hiring and

[88] New York Times, Jan 16, 1968.

upgrading; (4) to stimulate by all means available greater affirmative action efforts by major private employers to open white collar jobs to members of minority groups."[89]

The EEOC's effort to first collect data on minority employment, and then to hold hearings on specific industries using such data, and finally to use the data to offer arguments for why "minority utilization" could be higher, represented a true form of rational argumentation. While EEOC could do little to threaten industries directly, it could publicize information and arguments that would give the public a sense of the scope of the problem, and encourage further public and private action address it. In this way, the EEOC fostered the public's reflection upon itself through its information gatherings and dissemination programs. It used its statutory authorization to increase the public's ability to understand and to criticize itself. Though it is difficult to say to what extent these informative and persuasive activities were efficacious, they nonetheless represent an effort of the EEOC to bring the substantive commitments of the Civil Rights Act to bear on public discourse.

D. The Public Generation of Communicative Power: EEOC and the Civil Rights Movement

The EEOC's efforts at statutory interpretation, landmark settlements, and information gathering and dissemination all partake in different forms of communicative action. They represent different efforts to deploy the non-coercive authority of knowledge and argumentation in order to transform society in accordance with the public interests expressed in the Civil Rights Act. However, for these administrative actions to take on the mantel of "communicative power," something more must be shown.

[89] *EEOC Administrative History*, Reel 1, 150-1.

Bureaucratic communicative power must remain tied to the public sphere, lest the state constitute its own public, unmoored from the opinion- and will-formation of the citizenry. Thus, we must see how the EEOC's communicative activity was influenced by legitimation pressures emanating from civil rights groups in the public sphere.

Nicholas Pedriana and Robyn Stryker argue that the EEOC chose its "effects based" interpretation of discrimination on questions of seniority and testing because of "aggressive action by civil rights plaintiffs… Because Title VII denied the EEOC prosecutorial power, the agency was ware that civil rights groups, including the NAACP and the LDF, had direct access to the federal courts… For the EEOC itself to play an important role, it was in the agency's interest to work closely and cooperate with civil rights advocates to get cases to court and interpret the law in a consistent fashion."[90] They cite also the deluge of complaints that the NAACP filed with the EEOC to demonstrate the inadequacy of its powers.[91] But this concept of institutional "interest" cannot do all the work on its own. Pedriana and Stryker recognize that the EEOC was chronically understaffed and underfunded from day one. They also recognize that the broad, effects-based constructions the EEOC adopted "faced greater obstacles and required more administrative creativity than did a narrow, color-blind construction of Title VII."[92] Thus, it might equally have been in the EEOC's institutional interest to acquiesce in the narrower construction until rulings issuing from civil rights litigation indicated otherwise.

A further reason Pedriana and Stryker offer for why the EEOC chose the more difficult path was a desire for *legitimation*: "persistent civil rights group pressure for

[90] Pedriana and Stryker, 331.
[91] Ibid at 725,
[92] Ibid at 734.

broad construction increase the likelihood that the infant EEOC, anxious to *legitimate* its existence, would view broad construction as in the agency's interest. The volume of civil rights group complaints highlighted agency weakness, focusing the EEOC on *legitimacy* concerns with respect to its civil rights *constituency.*"[93] The use of "legitimacy" is instructive here because the term, in the classical Weberian sense, refers to the "rightful" or "valid" exercise of power, secured in the modern state through "rationally enacted" formal legal rules, implemented by the bureaucracy.[94] Under this definition, the EEOC's legitimacy would stem directly from the Civil Rights Act, enacted through all the formally correct procedures. The EEOC, however, had little power it needed to legitimate. It was only "illegitimate" to the extent that the promise of its title—"Equal Opportunity"—was not born out by its powers, and therefore it had no "right" to such a title. Thus, the EEOC could only show it was legitimate by, first, (1) exercising power in some way and (2) showing that that exercise of power was valid. In other words, it needed to show the minority beneficiaries of civil rights and society at large that it could accomplish an underlying purposes of Title VII—to guarantee, in President Johnson's words "not just equality as a right and as a theory, but equality as a fact and equality as a result."[95] Because that the EEOC had no enforcement power, it could only achieve such legitimacy through the exercise of what Habermas calls communicative power, that is, power generated from rationally motivated agreement. Thus, it interpreted the Civil Rights Act in a way that in a way that might win the rationally motivated agreement of the courts, the civil rights movement, and society at large. The EEOC developed one

[93] Ibid. at 748, emphasis added.

[94] H.H. Gerth and C. Wright Mills, trans., eds. *From Max Weber: Essays in Sociology* (New York, Oxford University Press, 1946), 294, 271, 78.

[95] Lyndon B. Johnson, Commencement Address, Howard University, June 4, 1964.

plausible, but contestable, interpretation of the statute in its various activities, which focused upon the Congress' expressed desire to address the empirical racial inequalities in the labor market, rather than to simply identify pernicious racial motives.[96] In adopting this perspective, it was oriented towards expanding the capacity of the government to improve the condition of minorities. In this sense, as we shall see, the EEOC practiced a form of "critical bureaucracy."

IV. Critical Bureaucracy at the EEOC

The EEOC's activity was *critical* in the sense that it analyzed its statutory mandate, and the crisis tendencies of the present, with an eye towards the emancipation of a dominated class. I draw this concept of critical bureaucracy from Max Horkheimer's distinction between "traditional" and "critical theory." I argue that the EEOC broad constructions of the Civil Rights Act, and its other bureaucratic interventions, were a form of critical practice which took on communicative power when these constructions were taken up by other agencies, courts, and civil rights publics.

A. "Traditional and Critical Theory"

Traditional theory, for Horkheimer, refers to "positivist" social science, which aims to subsume empirical facts under general categories in order to understand the world as it is. The traditional social scientist mimics natural science, reassembling causal connections between data. "Critical" theory, by contrast, begins by stepping back to recognize that the categories social science deploys, such as "interest-groups," "voter preferences," and "utility," are themselves the product of the socially produced facts it

[96] Blumrosen 1993, 100-114.

seeks to analyze. Contemporary social processes prearrange fact and category to fit together. As a consequence, the use of such concepts in traditional theory often confirms the rationality of the status quo. "To the extent then that the facts which the individual and his theory encounter are socially produced…[t]he perceived fact is…co-determined by human ideas and concepts, even before its conscious theoretical elaboration by the knowing individual."[97]

Whereas traditional theory describes the coherence of existence facts, critical theory addresses itself to current tensions and contradictions within social structure that threaten its coherence, and point towards the need for social transformation. It is *critical* because it deals with the *crisis* potentials within the current social order. This effort requires a normative, and not merely descriptive orientation. The normative principle "derives from historical analysis of…the goals of human activity, especially the idea of a *reasonable organization of society that will meet the needs of the whole community….*"[98] This historically derived principle—that society should be organized to meet the needs of all—gives Horkheimer a prospective from which to view the tensions of his time. For him, the dominant tension was between capital and wage labor. The effort to articulate the "needs of the whole community," in a context where part of the community is dominated, must put the self-understanding of subordinated groups in a privileged position: "Because of its situation in modern society the proletariat experiences the connection between work which puts ever more powerful instruments into the men's hand in their struggle with nature, and the continuous renewal of an outmoded social

[97] Max Horkheimer, "Traditional and Critical Theory," trans. Matthew J. O'Connell, in *Critical Theory: Selected Essays* (New York: Herder and Herder, 1968), 200.

[98] Ibid., 213, emphasis added.

organization."[99] While the critical theorist must privilege the perspective of subordinated groups because of their unique insights into the inadequacy of the existing society, giving voice to this perspective does not exhaust the task of critical theory: "even the situation of the proletariat is, in this society, no guarantee of correct knowledge… Even to the proletariat the world superficially seems quite different than it really is."[100] Rather, critical theory must combine the perspective of subordinated groups with a more distanced appraisal of the overall social dynamics and universal normative principles, drawn from expert analysis and practical reason. In this way, he forms a "dynamic unity with the oppressed class, so that his presentation of social contradictions is not merely an expression of the concrete historical situation but also a force within it to stimulate change" (215).[101] Horkheimer therefore identifies critical theory with the effort to analyze the crisis tendencies of society with an eye towards their resolution in favor of the interests of the dominated classes, which itself advances the universal interest in achieving "a community of free men" (217).

B. From Critical Theory to Critical Bureaucracy

I argue that Horkheimer's distinction between traditional and critical theory can foreground a distinction between traditional and critical bureaucracy. Traditional bureaucracy takes its enabling statute as a given, fixed, conceptual tool, much as the positive social scientist treats his categories. Whereas the traditional theorist attempts to subsume facts under his categories, the traditional bureaucrat subsumes social facts under his agency's statutory mandate. If a statute commands that "cancer-causing substances

[99] Ibid., 213.
[100] Ibid., 213-4.
[101] Ibid., 215.

may not be used in commercial products" the traditional bureaucrat aims to determine what substances cause cancer, what commercial products contain those substances, and then enjoins their use. There is nothing wrong with this traditional form of bureaucracy. This is what Habermas has in mind when he talks about administrative power being properly "programmed" by the legislature and public sphere. Indeed, modern societies require such bureaucracies to implement their collective interests, as expressed by the legislature. Likewise, while Horkheimer seems to condemn traditional social theory as an enterprise, I admit the need for a division of labor between those who gather facts under existing categories, and those who build on that work to criticize the categories and introduce normative considerations.

But there are certain cases in which a critical form of bureaucracy is permissible, and warranted. When the legislature ambitiously proposes to address social subordination, and does not fully articulate how to address such subordination, the bureaucracy should take on a critical task. That is, it should evaluate the concepts of the statute itself with an eye towards their most emancipatory possible construction. In this effort, it should privilege the opinions those subordinated groups whom the legislation was supposed to help, and should work with them in "dynamic unity" to progressively transform society. This does not mean it should always act on the views of these groups. But it should always be oriented towards their emancipation. Such critical bureaucracy is particularly necessary where social crisis is not merely potential but actual, and the state, in order to retain true legitimacy, must redress the injustices of oppressed groups.

C. The EEOC as Critical Bureaucracy

I argue that the EEOC's interpretations of the meaning of racial discrimination were a form of such critical bureaucratic practice. Faced with an ambiguous statue, with evidence from the legislative history supporting both a narrow, intentional conception of discrimination, and a broad interest in increasing black employment opportunities, the EEOC consistently chose to use its non-coercive power to endorse the latter. As Pedriana and Stryker have shown, this was in part due to the EEOC's sensitivity to pressure from the civil rights social movement. But it was also based in part upon the bureaucrats' conception of their proper role. As Alfred Blumrosen put it, reflecting on his time as Chief of Conciliation at the EEOC between 1965-67, administrators should "focus sharply on the question of how we can best fulfill the purposes which brought our agency into being, rather than on the question whether the courts will sustain this course of action."[102] This interest in the underlying purposes behind the EEOC's enabling statute led the EEOC to choose the more "liberal" construction of the statute. As Blumrosen wrote elsewhere,

> The use of the "effect test," was not required by statute or by the legislative history. The agencies had a choice… The effect test was aimed at changing industrial relations systems with a minimum governmental effort and at maximizing the influence of law on industrial relations practices… The criticisms which came in later years…disregarded the existence of this choice and also disregarded the consequences of the choice which was made—vastly expanded opportunities for minorities and women which were far greater than those which the intent test would have provided.[103]

Underlying this key choice was the recognition of broad the historical principles that were inscribed in the Civil Rights Act. Chairman Clifford Alexander, Jr., in his forward to the *EEOC Administrative History*, described the act as a "very important chapter in the history of the realization of human rights in the United States." The relationship between

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[102] Alfred Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 George Washington Law Review, 65 (1970), 698.

[103] Blumrosen 1993, 75.

the EEOC and its minority beneficiaries was also put succinctly in the title of the report it published on a hearing it held in Houston, Texas: *They Have the Power, We Have the People*.[104] In the Introduction to this report, then Chairman William Brown, III, explained the EEOC's understanding of discrimination: "discrimination is a condition of pervasive exclusion. It does not matter whether exclusion is the result of a deliberate act of discrimination or the maintenance of a traditional community pattern of employment or the perpetuation of past discrimination."[105] Between this title and this policy, we see the "dynamic unity" between the minority beneficiaries of the act, and the EEOC, which led to its broad construction of Title VII's terms. However, the EEOC was never subject to "regulatory capture," in the sense that the EEOC's activities were simply dictated by civil rights groups. The EEOC, for example, sided against the NAACP in its crucial decisions to require employers to submit EEO-1 reports from employers enumerating their minority and female employment.[106] That the EEOC's effects-based statistical approach would soon become a mainstay of civil rights advocacy among such organizations shows that the interaction between the EEOC and the movement was dynamic and bi-directional. Still, it is difficult to deny that the EEOC's policies were most often substantively line with those of black civil rights advocates, as expressed in its amicus briefs to their litigation. To call this "capture," however, is to shortchange the unique role of an agency charged with remedying social domination. In that case, the agency should pay close

[104] Equal Employment Opportunity Commission et al. *"They Have the Power – We Have The People": The Status of Equal Employment Opportunity in Houston, Texas, 1970.* (EEOC, 1970).

[105] Ibid., i.

[106] Skrentny, 128.

attention to the views of those who the act is intended to benefit. Otherwise, the emancipatory potential of the legislation will go unrealized.[107]

D. The Relationship Between Critical Bureaucracy and Social Crisis

The EEOC did not explicitly frame its activity in terms of crisis potentials within society. However, it did understand its work to involve the identification of social pathologies. The EEOC's effort to collect information about the scope of employment exclusion in its EEO-1 forms represented its effort to grasp the underlying social antagonisms that the Civil Rights Act sought to address. It thus married techniques of traditional social science with a critical effort to further emancipation. At times, the EEOC also understood its mission in terms similar to that of crisis diagnosis. At his conclusion to the EEOC hearings, Chairman Brown spoke in the language of social pathology: "as we evaluate this patient that we call Houston, and the economic situation and employment situation that exist here, our diagnosis would certainly be that Houston as a patient is a very sick one."[108] The use of this medical language to describe social problems bears close kinship to the concept crisis. As Habermas wrote in *Legitimation Crisis*, "prior to its employment as a social-scientific term, the concept of crisis was familiar to us from its medical usage. In that context it refers to the phase of an illness in

[107] The EEOC's lack of effort on behalf of women is illustrative in this regard. Here, the EEOC was extremely slow to implement the statutory language preventing discrimination against women. The EEOC's unwillingness to pursue female emancipation, and its positive contempt at times for women's rights, was a significant contributing factor in the rise of the women's movement, as the indignity of governmental inaction urged them to protest (Graham 205-232). Floating along with the gender norms of the time, the EEOC failed to exercise the critical capacity on behalf of women that it had for blacks, and, to a lesser extent, for Latinos.

[108] EEOC 1970, 1. Chairman Brown would act on his crisis diagnoses, as the EEOC pressed the pathbreaking AT&T settlement under his leadership (Lee 839-42).

which it is decided whether or not an organism's self healing powers are sufficient for recovery."[109]

Already in 1965, it might have seemed that the United States had reached this critical phase. John David Skrentny describes how a climate of racial crisis pervaded the mid-to-late sixties, beginning with the Watts Riots in 1965. This crisis, Skrentny argues, formed the context for the federal bureaucracy's various efforts to address black unemployment. He argues that "a racial crisis, the severe race rioting of the 1960s, made available a discourse of crisis management with which affirmative action or other normally risky, race-targeted measured could be advocated by political and business elites."[110] Skrentny shows how the need to restore social stability shifted the public debate towards affirmative remedies to address black unemployment. The EEOC did not explicitly make use of a discourse of crisis management, though its report on New York City white-collar labor was deployed in that discourse.[111] However, it operated under the shadow of the urban unrest almost from its birth.

The clouds had already gathered by the time the EEOC had its first major meeting in 1965. § 716 of Title VII required the President to "convene one or more conferences for the purpose of enabling the groups whose members will be affected by this title to become familiar with the rights afforded and obligations conferred by this title, and for the purpose of making plans which will result in the fair and effective administration of this title…" Accordingly, President Johnson convened a meeting of 600 persons representing business and civil rights organizations on August 19 and 20th, 1965. The Watts Riots in South Los Angeles had begun on August 11th and lasted through the 15th.

[109] Habermas 1975, 1.
[110] Skrentny 1996, 67.
[111] Ibid., 93.

Thus, the EEOC's inaugural event, two months after it had gone into operation, occurred against the background of large-scale urban unrest. President Johnson's address to the meeting, in this context, takes on sharp significance. He called Title VII the "key to hope for millions of Americans. With that key, we can now begin to open the gates that now enclose the ghettos of despair."[112] The phrase "ghettos of despair" might have seemed to sound a surprisingly dim note, in the wake of the passage of the most significant federal anti-discrimination legislation in history, were it not for the immediate context of social crisis. The President's implication, perhaps, was that the EEOC should consider Title VII as one tool to ease the urban unrest. In 1967, he would again speak of "despair" in a speech in the wake of the Detroit riots: "The only genuine, long-range solution for what has happened lies in an attack mounted at every level upon the conditions that breed despair and violence. All of us know what these conditions are: ignorance, discrimination, slums, poverty, disease, joblessness."[113] Thus, the EEOC's early period was contemporaneous with searing racial crisis and the federal government's effort to maintain order. This might help to explain why the EEOC was particularly zealous in its effort to read Title VII broadly. It also gives added plausibility to an understanding of the EEOC as a critical bureaucracy. The EEOC was "critical" not only because it interpreted the statute with an eye towards social emancipation, but also because its actions were informed by a broader social context of social crisis.

E. The Relationship Between Critical Bureaucracy and Communicative Power

[112] *EEOC Administrative History,* Reel 1, p. 56.
[113] Ibid., 187.

Part III explained the ways in which the EEOC exercised forms of communicative power. In this section, I have argued that the EEOC also exercised a form of critical bureaucratic practice. These claims are related but distinct. Both "critical theory" and "communicative power" describe forms of reason that further social freedom rather than social domination. Communicative power furthers freedom because it is a form of institutionalized collective action based not on coercion but on rationally motivated agreement. Critical theory furthers freedom in the sense that it aims to understand social tensions and helps to articulate the struggles of dominated classes in the interest of their emancipation. Communicative power need not always be directed towards the interests of dominated classes, though it can never undermine their rights. One can also be a critical theorist without ever achieving communicative power. But to the extent one is efficacious as a critical theorist, it is because of that achievement. A critical theorist exercises communicative power when his articulation of social struggles and principle of emancipation wins the rationally motivated agreement of others, and this common understanding becomes efficacious in the political process.

Just as critical theory uses reason to further social emancipation, critical bureaucracy describes an administrative activity that primarily uses reason, rather than coercive force, to further social emancipation. In order for reason to have any force at all, it must take on communicative power. This is the kind of communicative power we see at work in the EEOC. The only instances in which it exercised coercive power were in its issuance of subpoenas as part of its investigations into discrimination charges, and in its EEO-1 reporting requirements. The former was a straightforward implementation of statutorily authorized administrative power. The latter reporting requirements were

issued after the usual notice and comment procedures, requiring a public hearing in advance of a binding rule, which the EEOC was obliged to provide by statute. While there was a coercive element to reporting requirements, it was minimal, requiring not any kind of structural organizational change, but only data collection. But the EEOC's most significant activity was not in these forms of administrative power, but rather in its statutory interpretations. These had no actual or implied coercive power of its own, except for the unforced force of the better argument. In the exercise of this communicative power, the EEOC could have acted as a traditional bureaucracy. Namely, it could have adopted the more straightforward and then officially recognized understanding of discrimination as a matter of intentional malice. Instead, the EEOC exercised communicative power, in conjunction with the courts, other agencies, and civil rights publics, to articulate an expansive understanding of discrimination that advanced the interests of minority plaintiffs excluded or oppressed in the workplace. In this sense, the EEOC exercised its communicative power toward critical ends. It therefore did not stifle the communicative power of the lifeworld, but rather inaugurated an essential and ongoing debate about the content of our nation's commitment to fairness and equality.

This concept of critical bureaucracy overlaps with recent legal scholarship on bureaucratic constitutionalism and deliberation. William N. Eskridge, jr and John Ferejohn describe the EEOC's later efforts in the 1970s to issue pregnancy discrimination guidelines as a case of "administrative constitutionalism": "As a general matter, administrative constitutionalism is both the primary means by which social movements interact with the state and the primary means by which governmental actors deliberate about how to respond to social movement demands and needs… An important feature of

administrative constitutionalism is that it is not the final word; the trial balloons hoisted by agencies are subject to public critique as well as veto by courts, legislatures, and other executive branch officials."[114]

The account of the EEOC I have offered adds to theirs by pointing to an earlier instance of what they call "administrative constitutionalism" and what I call "critical bureaucracy." The EEOC was a critical bureaucracy almost from day one, as it sought to read the Civil Rights Act in the broadest possible terms in order to further black emancipation. The EEOC should thus be understood as an agency with an institutional culture of critical praxis, at least in its first decade of operation. The pregnancy guidelines were not an isolated burst of administrative creativity, but rather should be understood alongside the AT&T settlement, the testing and seniority guidelines, and the EEO-1 reports. In this context, we see critical bureaucracy not merely as a practice but as an institutional commitment. The EEOC developed a tradition of interpretation and action that expanded its influence, and furthered black and women's rights, far beyond what anyone might have expected from such a "poor, enfeebled thing." In the early years of the EEOC, communicative power circulated amongst its staff and its programs, and its beneficiaries, thus nurturing a growing federal commitment to civil rights.

My account in this way relates the deliberative activity Eskridge and Ferejon have identified back to the thought of Habermas, the deliberative thinker *par excellence*, and the critical theory tradition in which he is grounded. The study of administrative constitutionalism contributes to Habermas' thought by demonstrating how bureaucracies can deploy communicative, rather than coercive forms of power. In addition, the relationship between Habermas' account of deliberation and his understanding of social crisis adds an important dimension to the study of administrative constitutionalism. Habermas saw administrative power expand to deal with the crisis tendencies of capitalism. However, he focused on the ways in which bureaucracy deployed formal power to deal with such crises. The early history of the EEOC demonstrates how bureaucracies may also respond to social crisis through the use of communicative power. The EEOC, like the rest of the federal bureaucracy, used its available resources to mitigate social crisis by removing systemic barriers to black employment. This paper suggest that the need to address looming social crisis during the EEOC's early years seems to have expanded its communicative capacity and conceptual horizons in a way that made its later innovative efforts to expand women's rights more likely.

[114] William N. Eskridge, Jr. and John Ferejohn (New Haven: London: Yale University Press, 2010), 31.

The study of popular constitutionalism, from work the work of Bruce Ackerman, to the more recent efforts of Eskridge and Ferejon, should focus on the ways in which social crisis often forms the background for crucial transformations in our constitutional understandings. When the validity of constitutional norms collides with the reality of bursting social antagonisms, political actors must deploy deliberative efforts to adjudicate the tension between facticity and validity. The insight of critical theory is that this interpretive effort should be oriented towards the emancipation of dominated groups, and it should help to articulate normative principles that justify such emancipation. These principles can then be universalized, as was the case as race equality informed the struggle for gender equality.[115] The commitment to social emancipation gains traction in times of actual crisis where the accommodation of oppressed groups is necessary to sustain political legitimacy. But this commitment to social emancipation can maintain its normative traction long after its necessity for social stability is evident. To the extent principles of social justice prevail, or at least gain a place in the background of competing ideals in the public sphere, it is often in part because of the communicative power of the critical bureaucracy.

IV. Conclusion

Habermas' dire concerns about the administrative impoverishment of the lifeworld gave him a crucial theoretical insight: "it may be that this provocative threat, this challenge that places the symbolic structures of the lifeworld as a whole into question, can account for why they have become available to us" (TCA 403). Precisely because the discursive fiber of society was under deep strain, the threads of communicative rationality became visible to the critical eye. They could then form the

[115] Serena Mayeri, "Reconstructing the Race-Sex Analogy," 49 *William and Mary Law Review*, 1789 (2008). While Mayeri confirms that racial civil rights in the 1960's informed women's civil rights discourse in the 1970s, she also suggests that feminist legal activists, such as Ruth Bader Ginsberg, then reintroduced innovations from sex discrimination law to advance racial affirmative action. Thus, the extension of critical principles from race to sex is not uni-directional, but rather dialectical, constructing a universal through perpetual tension between identity and difference.

basis for Habermas' normative commitments: that coercive power must be justified through rational public discourse.

We face another kind of "provocative threat" in our historical moment. The administrative provision of social welfare in the United States has been progressively eroded over the last several decades. Political ideology, the influence of the interests of capital on politics, and the fiscal constraints caused by economic crises conspire against those government programs that protect the poor and the unemployed. At the same time, we are at risk of defaulting on our nation's commitment to equality, which runs from the Declaration of Independence, through the Reconstruction Amendments, and onto the Civil Rights Act of 1964 and Voting Rights Act of 1965. The African American community faces extremely high rates of unemployment, poverty, foreclosure, and incarceration, along with low and falling wealth levels and pervasive social exclusion. As Habermas drew ethical principles from the crises of his day, so might we. In the same way that the threats to communicative rationality exposed to Habermas its normative significance, the threats to social welfare and racial justice invite us to explore the normative significance of the administrative implementation of civil rights. We can find in such administrative practice a form of political activity that sought to meet demands for social justice without necessarily supplanting communicative rationality with technocratic calculus. Such a reconstruction of administrative ethics must take Habermas' concerns about the "colonization of the lifeworld" seriously, and search for a mode of bureaucratic behavior that achieves social management without abandoning practical judgment. In this progressive dialectic, we learn the lessons from Habermas'

critique of administrative power, while refiguring the administrative state in such a way that we can tap its emancipatory potential in future moments of political possibility.