Constitutionalizing a dispute is a matter of constitutional interpretation. More specifically, constitutionalizing often times signals a shift: What was previously considered a matter of common law or ordinary legislative process is moved into constitutional terrain because the Supreme Court decides that the issue implicates rights guaranteed by the constitution.\(^1\) To constitutionalize a legal issue or dispute does not determine whether equality is ultimately enhanced or diminished as such determinations are inherently contested, political and retrospective. But when the Court constitutionalizes an issue, it is open to critique both on what might be called procedural and substantive grounds: As to the former, the concern is that constitutionalizing a issue trumps ordinary politics and undermines democratic governance, while substantively the concern relates to how the decision affects prevailing inequalities.\(^2\) On one hand, constitutionalizing an

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\(^1\) Rosalinde and Arthur Gilbert Foundation Chair in Civil Rights and Civil Liberties
\(^1\) This involves reading constitutional text in ways that depart from precedent and often and more specifically suggests that such readings are less tightly tethered to the text.
\(^2\) The classic examples here would be *Dred Scott v Sanford*, 60 U.S. 393 (1857) and *Lochner v. New York*, 198 U.S. 45 (1905). In *Dred Scott* the Court ruled that Scott could not sue in federal court for his freedom based on temporary residence in territory designated as free under the Missouri Compromise because as an African descendant he had no rights of citizenship and that moreover, the Missouri Compromise was invalid because it imposed an unconstitutional deprivation of slaveholders’ property rights guaranteed by the due process clause. *Lochner* struck
issue can arguably advance equality; on the other hand constitutionalizing an issue may undermine equality by insulating an unequal status quo from intervention. At the same time, when the Court declines to recognize certain rights as constitutionally grounded, this too can negatively the impact the salience or legibility of equality claims. The point is that there is no a priori alignment between constitutionalizing an issue and equality enhancement.

However, in the context of anti discrimination law, I argue that the Court’s decisions about how to treat disparate impact theory under equal protection — whether or not to constitutionalize it-- has had a troubled and troubling trajectory that reveals little about constitutional principles and more about racial projects. The journey from Washington v Davis\textsuperscript{4} where disparate impact theory was rejected as a constitutional standard to Ricci v DeStefano\textsuperscript{5} where the constitutionality of disparate impact doctrine is called into question (at least implicitly) is complex and non linear, but one can discern a fundamental dis-ease with disrupting racial baselines. To

\begin{itemize}
\item down a state labor law regulating working hours for bakers on the grounds that it interfered with the right to freedom of contract protected by the due process clause of the Fourteenth Amendment.
\item See e.g. Roe v. Wade, 410 U.S. 113(1973)(holding that state law abortion restriction infringed right to choose an abortion privacy protected by the due process clause of the 14\textsuperscript{th} Amendment.) This is not to say that there will be consensus about the characterization of what decision does or does not advance equality. Obviously, there is ongoing controversy about the legitimacy of the opinion. My point is rather that Roe is commonly justified on the grounds that it promotes women’s autonomy and equality.
\item Washington v. Davis, 426 U.S. 229 (1976)
\item Ricci v. DeStefano, 127 U.S. 2658 (2009)
\end{itemize}
return to the critical principle that race and law are mutually constitutive,\(^6\) the current Court’s revisionist depiction of disparate impact theory as inherently in tension with the core meaning of Title VII anti-discrimination law\(^7\) and potentially constitutionally infirm both reflects and constitutes a particular understanding of racial neutrality.

In *Davis* the Court’s refusal to constitutionalize disparate impact theory reflected a commitment to system stability grounded in an asymmetric and inherently unequal status quo. In *Ricci* the Court’s deployment of the discourse of strict scrutiny to modify and constrict disparate impact theory and the threat to subject the theory itself to strict scrutiny review similarly reflects an investment in consolidating existing racial distributions. This does not mean that there were no plausible concerns that the *Davis* Court might have had about embracing disparate impact theory as an equal protection standard nor is it to say that the *Ricci* Court had no reason to consider how disparate treatment and disparate impact theories might be doctrinally complex and at times be in tension. Rather, my contention is that a significant factor contributing both to the Court’s prior decision declining to constitutionalize disparate impact theory and its more recent drift towards constitutionalizing the question of whether disparate impact theory is permissible is

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\(^6\) To explain, “[T]he law does not merely reflect race as an external phenomenon; law and legal doctrine constitute an ideological narrative about what race and racism are. From this vantage point, the issue is not simply how societal bias is reflected in the legal system or how the law manages disputes that implicate race: The objective is to map the mutually constitutive relationship between race and the law.” Cheryl I. Harris, Critical Race Studies: An Introduction, 49 UCLA L. Rev. 1215, 1216-17 (2002)

\(^7\) See *Ricci v DeStefano*, 127 U.S. 2658, 2676 (2009)(arguing that there was a ‘statutory conflict’ between Title VII’s disparate impact and disparate treatment provisions)
a view of the existing state of racial inequality as racial neutrality. Paradoxically, a majority of the Court has steadfastly adhered to this view at a period of actual and increasing racial inequality (as between whites and Blacks and Latinos). Precisely because of this contradiction, anti-discrimination law is highly unstable and what is adjudicated inside and outside Equal Protection parameters less predictable. *Ricci* is symptomatic of this problem as it represents the expansion of strict scrutiny beyond the issue of remedies and into the corpus of anti-discrimination law.