# Many Laws of Discrimination: The Multiple Sources of Constitutional-Statutory Convergence

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## I. INTRODUCTION

What do the statutory prohibitions on racial discrimination in employment, voting, and education mean? Does a prohibition on discrimination in employment apply to those actions that have a disparate impact on racial minorities, only those that are motivated by a discriminatory purpose, or something in between? If the statute explicitly prohibits actions that have a disparate impact, as a provision of the federal Voting Rights Act ("VRA") does, what is the baseline for measuring when an action has such an impact? Is it equal outcomes, some other proxy for equality, or the status quo such that retrogression is impermissible? Does the prohibition on discrimination in education include affirmative action programs that harm whites and benefit racial minorities? Or are such programs permissible as a means to redress the ongoing effects of historical discrimination?

Stephen Rich's Article *One Law of Race* seems to assume that Congress answered these questions when it adopted the major antidiscrimination statutes in the 1960s or when it amended and re-authorized some of these statutes in later decades.[1] Congress presumably had a specific intent about the

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1. *See* Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 203 (2014) (suggesting that a source of divergence can be found in the differences between the texts and purposes of

meaning of discrimination in these statutes premised on empirical judgments about the requirements for racial equality. These empirical judgments led Congress to adopt disparate impact standards in employment and voting as well as a permissive affirmative action policy for higher education.

These standards differ from that which the Supreme Court has adopted for adjudicating claims under the Fourteenth Amendment Equal Protection Clause. In a series of cases in the late 1970s, the Court made clear that evidence of disparate impact alone would not be sufficient to invalidate a state action under the Equal Protection Clause.[2] Instead, challengers would have to prove that a discriminatory purpose motivated the state action.[3] That same decade, the Court also limited the scope of permissible affirmative action programs so that race could only be considered as one of many plus factors in admissions;[4] and currently, even these types of programs are under constitutional threat.[5]

What has happened since, as Rich explains, is that with one notable exception, there has been a convergence between the constitutional and statutory standards.[6] When the Supreme Court interprets anti-discrimination statutes, it has narrowed or repudiated statutory standards, sometimes citing equal protection case law as support.[7] As a result, antidiscrimination statutory law has come to resemble constitutional equal protection law in the domains of employment, voting, and affirmative action in higher education.[8]

What is the source of this convergence? Rich departs from other scholars, such as William Eskridge and myself, in arguing that this convergence is not principally the product of the migration of constitutional principles or values into the statutory domain. Eskridge has noted with favor the "gravitational pull" of constitutional values in statutory interpretation.[9] I have argued in a

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constitutional and statutory provisions).

2. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

3. *See id.*; *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (subjecting challenges to a state action to a requirement that they prove the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group").

4. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–18 (1978) (finding constitutionally appropriate the Harvard admissions plan in which it considered race as one of many plus factors in its individualized review of each applicant).

5. *See* Fisher v. Univ. of Tex., 133 S. Ct. 2411, 2422 (2013) (remanding a challenge to the University of Texas affirmative action admissions program after finding that the district court had not applied a sufficiently rigorous strict scrutiny standard).

6. *See* Rich, *supra* note 1, at 234–54.

7. *See infra* Part III.

8. *See infra* Part III.

9. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1013 (1989).

more critical vein that the Supreme Court has shifted the meaning of statutes to the mainstream of its constitutional value orientation.[10] In the race discrimination context, this has meant that the values and principles that the Supreme Court articulates in its constitutional jurisprudence usually inform its interpretation of statutes. When there are two potential interpretations of an ambiguous statute, the Court will choose the one that is most consistent with its constitutional value orientation. The Court does so even if the alternative interpretation better accords with the current values of Congress as expressed in statutory enactments or those of agencies as expressed in regulations or interpretive guidelines.[11]

Rich suggests that there is a source other than judicial constitutional values for this constitutional-statutory convergence. He argues that the convergence is driven less by the Supreme Court's imposition of values and principles and more by its imposition of empirical judgments about racial equality that inform both its constitutional jurisprudence and statutory interpretation.[12] For example, Rich contends that the Court's decision to narrow and repudiate disparate impact and affirmative action standards should be understood as a rejection of congressional empirical determinations that racial inequality has structural sources.[13] In its place, the Court has adopted an empirical assessment that the law is responsible for rooting out an identified source of inequality, the motivational bias of individual state actors against racial minorities.[14]

Rich then addresses the normative desirability of the Court's establishment of this "one law of race" from the convergence of constitutional and statutory standards. He describes some of the intuitive attractions of convergence, but ultimately concludes that the Court should not impose one law of race for two reasons. First, Rich argues that by interpreting statutes contrary to congressional judgments and will, convergence undermines the rule of law and exacerbates the countermajoritarian difficulty.[15] Second, according to Rich, judicial convergence limits opportunities for the political branches to adopt alternative approaches to redress racial discrimination.[16]

Rather than convergence, Rich highlights two virtues of divergence between constitutional and statutory standards. First, he argues, divergence "observes legislative supremacy, respects the authority of political institutions to exceed constitutional equality guarantees, and preserves possibilities for

10. *See* Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1206 (2011)

11. *See id.*

12. Rich, *supra* note 1, at 226–30 (providing examples of convergence driven by the Supreme Court's empirical-based judgments).

13. *Id.* at 230.

14. *Id.*

15. *Id.* at 256.

16. *Id.* at 258.

experimentation and adaptation to evolving social problems."[17] Second, Rich contends, "[d]ivergence enhances democratic responsiveness, permitting political institutions to tailor laws to meet the challenges of particular eras and to pursue the objectives of an ever-changing electorate."[18]

In several respects, Rich's account is quite compelling. It certainly seems to be true that the Court's empirical judgments about race and race discrimination animate constitutional-statutory convergence. Many of the empirical judgments that the Court makes in its interpretation of the Equal Protection Clause seem to find their way into opinions about the meaning of statutes and the extent of congressional authority under Section 5 of the Fourteenth Amendment.[19] This is an important, descriptive point that has been overlooked in accounts of constitutional-statutory convergence thus far. In addition, Rich recognizes an important cost to convergence in that it limits the flexibility of non-court institutional actors to pursue alternative approaches to redressing problems of racial inequality. Although Rich could go even further in exploring these issues, his intuition seems right insofar as judicial adoption of one standard for all statutory and constitutional claims limits opportunities for lawmakers to assess the effectiveness of alternative approaches to eliminating racial discrimination and to tailor such claims to changing societal contexts.

Rich's analysis, however, suffers from three flaws that render it incomplete. First, Rich's idea of convergence assumes a clear congressional will that has not existed with respect to civil rights statutes. This assumption leads to a second problem with Rich's analysis: he omits important institutional actors involved in the process of convergence. Rich fails to account for administrative agencies' role in articulating civil rights regulatory standards from ambiguous statutes, and misses the fact that constitutional-statutory convergence arises in part from the judicial denial of deference to agency interpretations. Finally, since Rich does not consider the role of agencies in developing regulatory standards, he does not address whether, when, and why agencies should be given leeway to adopt such standards that deviate from judicially constructed constitutional standards. In the following, I elaborate on these three points.

## II. AMBIGUOUS STATUTE, UNFORESEEN CONTEXTS

Congress has rarely articulated clear standards in the text of civil rights statutes or in the legislative histories that accompany them. Title VI of the

17. *Id.* at 262.

18. *Id.*

19. The primary example that Rich cites is the Title VII case of *Ricci v. DeStefano* in which the Court brought into the opinion empirical judgments and doctrinal standards familiar to its constitutional jurisprudence. *Id.* at 232–38; *see also* Ricci v. Stefano, 557 U.S. 557, 582 (2009). For further discussin of *Ricci*, see Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837 (2011).

Civil Rights Act states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[20] It says nothing about whether it is permissible for institutions of higher education to favor racial minorities in admissions to overcome the ongoing effects of historical discrimination.

Title VII of the Civil Rights Act declared two forms of employment practices to be unlawful for employers. First, an employer cannot "fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[21] Second, it is unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[22]

The statute says nothing specific about whether the prohibitions narrowly apply to employment actions motivated by a discriminatory purpose or more broadly apply to those employment actions that have a disparate racial, gender, or religious impact. And there is language in the text supporting either standard. For those inclined to read the statute as only prohibiting actions motivated by a discriminatory purpose, they can point to language requiring proof that the employer pursued the employment action "because of" race, gender, or religion. This language of causation can be linked to a required showing that the employer intended to harm members of a particular group. But for those inclined to read the statutes as containing a disparate impact standard, support can be found in the text about adverse employment effects. This language suggests that evidence proving an employment action harms one group more than another is sufficient to support a cause of action under the statute.

Even statutes like Section 5 of the Voting Rights Act, which clearly establishes a prohibition on any change to voting qualifications, procedures, standards, or practices that have the purpose or will have the effect of denying or abridging the right to vote on account of race or color," contains an important ambiguity.[23] The statute never establishes the baseline for measuring whether a voting change has a discriminatory purpose or disparate impact. Questions later arose regarding whether the statute prohibits only those voting changes that have a retrogressive purpose or impact in that those

20. 42 U.S.C. § 2000d (2010).

21. *Id.* § 2000e-2(a)(1).

22. *Id.* § 2000e-2(a)(2).

23. *Id.* § 1973b(a)(1)(A); *see also id.* § 1973c(a).

changes made racial minorities worse off than they were before or whether it prohibits changes depriving racial minorities of equality in voting and electoral influence over the selection of candidates.

For each of these civil rights statutes, legislative history does not provide any further clarity about congressional will. Many statements of intent from the congressional debate are conflicting or do not directly address the issue about the proper standard to be used to address discrimination.[24] To the extent legislators' statements of intent are congruent, the problem remains that individual expressions about statutory meaning say nothing about what the silent members of the coalition supporting passage thought.[25]

This ambiguity in the text and legislative history of civil rights statutes has two primary sources. First, many of the civil rights statutes arose in the context of extremely divided Congresses.[26] To manage this division and to construct coalitions necessary to secure the passage of the civil rights statutes, proponents had to compromise in ways that introduced ambiguity into the statutes. Second, the forms and operation of racial discrimination were in flux at the time of passage.[27] The enacting Congress, therefore, could not foresee all the future contexts in which the civil rights statutes would need to be applied. This inability to foresee all future issues arising under the civil rights statutes also rendered the statutes ambiguous.

What about congressional empirical judgments about race and racial discrimination? Do these suggest a congressional will about a particular standard? To the extent that Rich suggests that Congress's empirical judgments indicate its will, it is important to note that such judgments do not lead ineluctably toward any particular standards. Congress, in justifying the civil rights statutes, provided evidence of discrimination by employers, schools, and voter registrars that demonstrated both individual bias and the structural dimensions of racial inequality. But this evidence did not provide any clear indication about the anti-discrimination standard that Congress wanted enforcers to employ to root out racial inequality. It could have been the case that Congress intended to eliminate structural inequality by subjecting state and private actors to a disparate impact standard. It could have also been the case that Congress recognized structural inequality but

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24. *See, e.g.*, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 433 (1989) (describing legislative intent as "a fiction in hard cases—a problem aggravated by the extraordinary difficulties of aggregating the 'intentions' of a multimember body").

25. *Id.* at 431 ("Congress enacts statutes rather than its own view about what those statutes mean; those views, while relevant, are not controlling unless they are in the statute.").

26. *See e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretations*, 151 U. PA. L. REV. 1417, 1452–74 (2003) (discussing the legislative debates surrounding the passage of the Civil Rights Act of 1964).

27. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–28 (1987) (discussing the different forms of conscious and unconscious discrimination).

determined that a disparate impact standard would be too disruptive of institutional authority and decided to only address insidious, purposeful discrimination. These empirical judgments might point to an affirmative action program that permits quotas or other weighty forms of racial consideration in higher education admissions to redress structural inequality. Alternatively, they might suggest a narrow scope for affirmative action programs in order to avoid stereotypes and stigmatization that might exacerbate individual bias. Congress's empirical judgments alone simply do not provide answers to these questions.

What we are left with, then, are civil rights statutes that arguably support either discriminatory purpose or disparate impact standards, broadly drawn or narrowly constrain affirmative action programs, and underlying baselines that are anchored to the past or tethered to future goals of equality. Whatever the reasons, the enacting Congresses did not provide definitive answers to these questions. Rich's analysis overlooks that the enacting Congresses did, however, appear to anticipate ambiguities arising in the statutes and dealt with them by delegating enforcement of the civil rights statutes to administrative agencies. And it was these agencies—using a variety of enforcement tools—that played an important role in the development of the regulatory standards that gave meaning to the civil rights statutes.[28]

In employment, where the congressional choice between disparate impact and discriminatory purpose remained ambiguous or unresolved, the responsible agencies adopted a disparate impact standard for Title VII of the Civil Rights Act, and the statutes modeled after Title VII—the Age Discrimination and Employment Act and the Americans with Disabilities Act.[29] In education, it was an agency that issued a guideline broadly permitting affirmative action in higher education under Title VI of the Civil Rights Act.[30] In voting, where Congress explicitly adopted a disparate impact standard, an

28. *See* 42 U.S.C. § 2000d-1 (granting agencies responsible for providing federal financial assistance to government programs or activities the authority to enforce Title VI through the issuance of presidentially-approved "rules, regulations, or orders of general applicability"); *id.* § 2000e-5(b) (granting the EEOC the authority to enforce Title VII through reasonable cause determinations and informal methods of "conference, conciliation, and persuasion").

29. *See* EQUAL EMP'T OPPORTUNITY COMM'N GUIDELINES ON EMPLOYMENT TESTING PROCEDURES (1966) (enforcing Section 703(h) of the Civil Rights Act by interpreting "'professionally developed ability test' to mean a test which fairly measures the knowledge or skill 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"); *see also* EEOC, Guidelines on Employee Selection Procedure, 35 C.F.R. § 1607 (1970) (superseding the Guidelines on Employment Testing Procedures and defining discrimination as "[t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII").

30. *See* 45 C.F.R. § 80.3(b)(6)(ii) (2014) (providing that "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of particular race, color, or national origin").

agency resolved the ambiguity about the proper baseline for measuring disparate impact under Section 5 of the VRA determining that it should be measured by the potential political power of racial minority groups, rather than the racial minority group's political strength within the existing electoral system.[31] The agencies supported each of these determinations with empirical assessments and judgments about race and racial discrimination. In the next Part, I turn to the role of agencies and how the Supreme Court has engaged in the process of convergence through denying deference to administrative interpretations of statutes that implicate constitutional values.

## III. THE CENTRALITY OF AGENCIES

By necessity, agencies responsible for administering Title VI and Title VII of the Civil Rights Act, as well as other important civil rights statutes like the Americans with Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"), developed definitions of discrimination. In doing so, the agencies have not necessarily tracked legislative or judicial standards. Instead, they often developed their own standards after consulting experts, political officials, and the public about the sources, forms, and consequences of discrimination.[32]

For example, in its early years, the EEOC addressed varied questions of statutory meaning: whether Title VII barred employment practices that had a disparate impact, whether "national origin" discrimination encompassed discrimination based on citizenship status, whether the bar on race discrimination protected whites, and whether gender discrimination included disparate treatment based on pregnancy.[33] Later, the EEOC addressed whether the ADEA barred employment actions that had a disparate impact, whether it protected younger workers, and the meaning of "disability" under the ADA.[34] The agency that administered federal education policy, HEW, examined whether Title VI's prohibition on discrimination required states and local agencies to provide equal access to non-English speakers, and whether it supported or barred affirmative action in university admissions.[35] The Justice Department, responsible for enforcing the VRA, determined the proper baseline for assessing when a voting qualification, practice, or procedure has a disparate impact; it ultimately decided on a baseline of

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31. *See* Beer v. United States, 374 F. Supp. 363, 369 n.26, 370 n.33 (D.D.C. 1974), *vacated*, 425 U.S. 130 (1976) (defining the baseline for discriminatory effect as the equal opportunity for members of minority groups to elect their candidate of choice).

32. *See* Joy Milligan, The Fragmented Integration State: Federal Agencies and Civil Rights, 1964–1980, at 6–14 (2014) (unpublished manuscript) (on file with author).

33. Bertrall L. Ross II, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 U. CHI. LEGAL F. 223, 253–68 (analyzing these examples of Supreme Court denials of deference).

34. *Id.* at 275–82.

35. *Id.* at 257–58, 265–67.

proportionality that required states to prove that their voting procedures provide racial minorities with a proportionate opportunity to elect candidates of their choice.[36]

In articulating interpretive guidelines, objections letters, and regulations, the various civil rights agencies were not merely deriving the regulatory standards from the intent or will of Congress. As argued above, Congress had no clear will or intent with respect to the standard applicable for redressing racial discrimination claims. Instead, Congress, by leaving the statutes ambiguous, implicitly delegated authority for interpreting the statute and developing the regulatory standards to agencies and courts.[37] To the extent that Congress was involved in the development of the standards, it was as a follower rather than leader. When Congress amended and re-authorized civil rights statutes, it sometimes incorporated the agencies' standards and at other times remained silent, suggesting through its inaction acquiescence to the standards developed.[38]

The contest over the meaning of civil rights statutes is therefore not merely between courts and Congress. When the Supreme Court has repudiated or narrowed disparate impact or affirmative action standards, it has not acted in the counter-majoritarian manner that Rich suggests. The enacting Congress simply never advanced clear statutory standards. Instead, the contest over statutory meaning has often been between courts and agencies. As agents of Congress and the executive branch, agencies are arguably more accountable to the people than are courts. But the arguments from counter-majoritarianism and legislative supremacy are substantially weaker when courts are overriding agency interpretations of statutes, as compared to instances of judicial overrides of statutes or executive orders.

Judicial overrides of agency interpretations of statutes, which are a primary means of constitutional-statutory convergence, are nonetheless normatively suspect for other reasons that Rich alludes to, but does not develop. Convergence does undermine opportunities for experimentation with different standards to redress racial discrimination.[39] These standards apply constitutional principles that both the Court and Congress have derived from the Constitution. Discriminatory purpose, disparate impact, and affirmative action are examples of different standards that advance overarching principles animating the Equal Protection Clause—the abolition of the racial caste system and the protection of discrete and insular classes

36. *Id.* at 262–65.

37. *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

38. *See infra* note 48.

39. *See* Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. (forthcoming 2015).

from discrimination.[40]

When institutions can apply different standards, there is an opportunity for experimentation to assess which one best advances the constitutional principle in a particular context. In the next Part, I show how the Supreme Court has limited opportunities for experimentation through the denial of deference to agency interpretations of civil rights statutes. I then elaborate on the costs of such convergence in terms of experimentation. I conclude by offering an alternative judicial interpretive framework that accounts for the value of court-agency convergence in the articulation of constitutional principles but preserves the opportunity for court-agency divergence in the development of constitutional standards.

## IV. DENYING DEFERENCE

The principal tool used by the Supreme Court to secure convergence between statutory and constitutional standards is the manipulation of deference doctrine. Since the 1970s, the Court has consistently refused to defer to civil rights agencies' interpretations of statutes that implicate ongoing constitutional controversies even when the prevailing administrative law doctrine seems to require that courts give such interpretations heightened deference.[41] In each case, after the Court has denied deference, it has proceeded to interpret the statute in a manner more consistent with its constitutional jurisprudence than the agencies' interpretations.[42]

For example, during the 1970s, a time when administrative law doctrine appeared to require that courts give "great deference" to agency interpretations of statutes, the Court refused to defer to: (1) EEOC interpretations of Title VII of the Civil Rights Act that treated pregnancy discrimination as a form of sex discrimination;[43] (2) the Attorney General's interpretation of Section 5 of the VRA establishing a baseline of proportionality for its discriminatory effects standard;[44] and, (3) the Department of Health, Education, and Welfare's regulation permitting university affirmative action admissions programs under Title VI of the Civil Rights Act.[45]

After the *Chevron* revolution in the mid-1980s established a framework of

40. *See* Plyler v. Doe, 457 U.S. 202, 213 (1982) ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."); United States v. Carolene Prods., 304 U.S. 144, 152 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .").

41. *See* Ross II, *supra* note 33, at 259–82 (analyzing these examples of Supreme Court denials of deference).

42. *See id.*

43. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–42 (1976).

44. Beer v. United States, 425 U.S. 130, 135–41 (1976).

45. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978).

heightened judicial deference that presumably applied to all agency interpretations,[46] the Court inexplicably gave minimal or no deference to agency interpretations about the meaning of discrimination under Title VII of the Civil Rights Act and the baseline for measuring discriminatory purpose under the VRA.[47] In each case, the Court rejected the agency interpretation of the statute in favor of an interpretation more consistent with its constitutional jurisprudence.

Finally, the Court in reviewing agency interpretations of civil rights statutes has deviated from the deference dichotomy established in the 2001 case of *United States v. Mead* calling for heightened deference to agency interpretations adopted pursuant to notice-and-comment rulemaking and lesser deference to other rules.[48] The Court has thus far avoided giving heightened deference to any of the EEOC notice-and-comment regulations interpreting the ADEA and the ADA defining the class of individuals entitled to statutory protection.[49] These agency interpretations implicated longstanding judicial controversies about which classes are entitled to special protection under the Constitution.[50] The Court in denying deference to these agency interpretations maintained for itself the exclusive role in making these quasi-constitutional determinations.

Convergence has thus occurred through judicial decisions to deny deference to agency interpretations implicating constitutional concerns about the meaning of equal protection and the constitutional right to vote—what scholars refer to as "administrative constitutionalism."[51] But it is important to note that the agencies in these cases were not involved in the

46. *See* Chevron USA, Inc. v. Natural Res Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (establishing the two-step heightened deference framework for agency interpretations of statutes).

47. Reno v. Bossier Parish Sch. Bd. II, 528 U.S. 320, 329–31 (2000); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 59 (1986).

48. United States v. Mead, 533 U.S. 218, 227–28 (2001).

49. *See* Gen. Dynamic Land Sys., Inc. v. Cline, 540 U.S. 581, 600 (2004) (denying heightened deference to an EEOC interpretation of the ADEA adopted pursuant to notice-and-comment rulemaking providing legal protections for younger workers making a discrimination claim against older workers); Sutton v. United Air Lines, Inc, 527 U.S. 471, 479–82 (1999) (denying heightened deference to an EEOC interpretation of the ADA adopted pursuant to notice-and-comment rulemaking finding persons with poor eyesight disabled); Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (denying heightened deference to an EEOC interpretation of the ADA adopted pursuant to notice-and-comment rulemaking finding persons with Human Immunodeficiency Virus ("HIV") disabled under the ADA).

50. *See* Ross II, *supra* note 33, at 278–82 (analyzing these examples of Supreme Court denials of deference).

51. *See* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (defining administrative constitutionalism as "regulatory agencies' interpretation and implementation of constitutional law"); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013) (defining administrative constitutionalism as "the elaboration of new constitutional understandings by administrative actors").

interpretation of the Constitution. They were merely interpreting statutes. It is also important to note that in none of the cases in which the Court denied deference did it find that the agency interpretation was unconstitutional. In fact, the Court has not even revisited the two examples in the civil rights context of congressional override of judicial interpretations in favor of agency interpretations.[52] Instead, what the Court appears to be doing in these cases is exercising power to control the meaning of statutes that implicate ongoing controversies in its constitutional jurisprudence. Through this exercise of control, the Court has been able to broadly achieve statutory-constitutional convergence.

But there is one important exception to this pattern of convergence, and Rich alludes to it in his Article. Since the 1969 decision in *Griggs v. Duke Power Company* that enshrined into doctrine the EEOC's disparate impact standard for employment discrimination claims under Title VII, the Court has allowed divergence between the Title VII statutory and the equal protection constitutional standards.[53] This example reveals an important value of constitutional-statutory divergence: constitutional experimentation.

The coexistence of the divergent Title VII and equal protection standards has allowed for experimentation about how to best eliminate the racial caste system. We have been able to see how the two standards operate and the challenges that they present for advancing the principle underlying the Equal Protection Clause. The discriminatory purpose standard, on the one hand, deters explicit bias, but cannot really get at implicit forms of bias or structural forms of discrimination based on history and ongoing societal stratification.[54] We have also learned that the discriminatory purpose standard gives employers considerable leeway to pursue employment policies without much judicial or agency intervention. Depending on whether we value employers' responses to ongoing racial stratification, this may be a good or a bad thing. The discriminatory impact standard, on the other hand, targets and redresses some of the sources of structural discrimination, but it does so at the cost of narrowing employers' scope of authority. We have learned that employers'

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52. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2010)) (overriding the Supreme Court's interpretation of Title VII in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) in favor of the EEOC's interpretation); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (adopting the agencies interpretation of discriminatory purpose under Section 5 of the Voting Rights Act after the Supreme Court rejected it in *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000)); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (overriding a series of Supreme Court interpretations of the Civil Rights Act of 1964 in favor of interpretations advanced by the EEOC).

53. *See* Rich, *supra* note 1, at 214–20.

54. *See, e.g.*, Lawrence III, *supra* note 26, at 322 (arguing much of "racial discrimination is influenced by unconscious racial motivation" and that a standard "requiring proof of conscious or intentional motivation . . . ignores much of what we understand about how the human mind works").

response to the Title VII disparate impact standard has been the reconsideration of evaluations of merit and the voluntary development of affirmative action hiring and promotion policies.[55] Both public and private workplaces are more integrated, but this has come at the cost of white male resentment to being passed over for jobs and promotion on the basis of policies that some of them perceive as unfair.[56] Finally, some have suggested that affirmative action has contributed to the stigmatization of racial minorities and the reinforcement of perceptions of racial inferiority.

The question of which standard best advances the constitutional principle is thus one that is continuously being asked. But over time, we gather more information about the effects of the two standards that could not be derived from the rejection of one standard in favor of the other. The People armed with this information are better positioned to decide through a broadly deliberative process how to best rid the country of the racial caste system in particular societal contexts. Premature convergence prevents these opportunities for information gathering and deliberation and renders us unable to adapt our laws and regulations to changing societal contexts. This is the true cost of constitutional-statutory convergence.

## V. CONCLUSION

In many respects, we currently have one law of race. Empirical and value judgments about race and racial discrimination have resulted in the Supreme Court's convergence of civil rights statutes with its constitutional jurisprudence. This convergence has occurred frequently through the Supreme Court's denial of deference to agency interpretations of statutes premised on alternative empirical judgments and value choices. The cost has been an increasingly static civil rights regime unable to adapt to changing societal contexts to achieve the goal of eliminating the racial caste system. Opportunities for divergence and experimentation will only arise when the Court gives up its stranglehold over constitutional enforcement. And this will only happen when the People challenge the Court's legitimacy as the exclusive interpreter of the Constitution—a role that it has extended into the statutory domain through its resistance to an agency role in the interpretation of statutes raising constitutional issues. Until this subtle and hidden expansion of judicial authority is curtailed, we will continue to have for better or worse, one law of race.

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55. *See* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 197–200 (1979) (describing an affirmative action program voluntarily established in response to Title VII).

56. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1055 (1978) (identifying the resentment that arises from affirmative action).