

# CONSTITUTION DAY LECTURE: CONSTITUTIONAL LAW AND TORT LAW: INJURY, RACE, GENDER, AND EQUAL PROTECTION

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- I. INTRODUCTION
- II. TORT CASES AS EQUAL PROTECTION CASES: EXAMPLES FROM HISTORY
- III. THE CONTINUING RELEVANCE OF EQUAL PROTECTION LAW TO TORTS
- IV. CONCLUSION

## CONSTITUTION DAY LECTURE: CONSTITUTIONAL LAW AND TORT LAW: INJURY, RACE, GENDER, AND EQUAL PROTECTION

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### I. INTRODUCTION

Welcome to the annual Constitution Day lecture at the University of Maine School of Law. This lecture follows the example set last year by Professor Mel Zarr who spoke about the Fourth Amendment and search and seizure law in a piece that was published by the *Maine Law Review*.<sup>1</sup> My focus today is on a different section of the Constitution, the Fourteenth Amendment, and specifically how the Equal Protection Clause<sup>2</sup> relates to tort law. First, I will talk about the Equal Protection Clause in general—what it says, and some of what it has been held to mean—particularly where government makes distinctions based on race and gender. Second, I will discuss two historical tort cases that violate equal protection on the basis of race. In doing so, I uncover the racial history of tort law that has been hidden in plain sight. I also touch on some of my broader research on race and valuation in tort damages that is discussed in my new book, *The Measure of Injury: Race, Gender, and Tort Law*. Third, I turn to one way that equal protection continues to be relevant in tort law. In talking about recent case-law, I make the argument that the use of race-based or gender-based tables to estimate life expectancy or lost earnings, as still happens in tort cases in court, is a violation of the Equal Protection Clause.

First, I will say a few words about tort law and then talk about the Equal Protection Clause. Tort law has been defined as a civil action, other than a contract action, in which a damage remedy, namely money, is sought.<sup>3</sup> It includes intentional torts, negligence, strict liability, and specific categories like medical malpractice, and defamation. What we mean by saying that torts are “civil actions” is that they are lawsuits brought by an individual (or corporation) against another individual (or corporation), rather than a “criminal action,” which would be brought by the government prosecuting an individual for a crime. Tort law is mostly state rather than federal law. It includes some statutes, and it also includes court decisions made by judges in the tradition of the common law.

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1. Melvyn Zarr, *The Supreme Court's Long and Perhaps Unnecessary Struggle to Find a Standard of Culpability to Regulate the Federal Exclusionary Remedy for Fourth/Fourteenth Amendment Violations*, 62 ME. L. REV. 265 (2010).

2. U.S. CONST. amend. XIV (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

3. BLACK’S LAW DICTIONARY, 724 (3d pocket ed. 2006).

Next, let us turn to the Equal Protection Clause: The Equal Protection Clause is part of the Fourteenth Amendment, passed in the wake of the Civil War in 1868. The relevant provision states as follows: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>4</sup> The Equal Protection Clause has become one of the most important parts of the United States Constitution. Equal protection law has been a huge part of the struggle for legal equality on the basis of race and gender. When people talk about exclusions or inequality and law, more often than not they are talking about the Equal Protection Clause. Different aspects of equal protection can be stressed and there is extensive case-law and scholarship on what exactly “equal protection” means, and what scholars want it to mean. Here, I stress the aspect that looks at treating like cases alike, at treating similar situations similarly—some call this formal equality.<sup>5</sup> We will explore more of what it means in a moment.

Now, what does “equal protection” mean? If one stands back for a minute and thinks about the language of the Equal Protection Clause, it is not intuitively clear. One might think, based on the language alone, it means if there is a safety law, it must “protect” everyone “equally.” But, as we will see, it means much more than that. Second, the language says: “No state shall.” It is a command to the State, to the state’s government in other words. This is known as the “state action requirement.”<sup>6</sup>

Now let us turn to background on equal protection: All laws draw lines of some sort. The Equal Protection Clause places limits on what sorts of laws are acceptable—laws must provide equal protection in order to be valid. The Supreme Court has worked to articulate what that means; one influential statement is that: “[T]he classification must be reasonable, not arbitrary, and *must rest upon some ground of difference having a fair and substantial relation to the object of the legislation*, so that *all persons similarly circumstanced shall be treated alike*.”<sup>7</sup> Often it is defined as the principle that likes should be treated alike, an idea that can be traced back to Aristotle.<sup>8</sup>

This raises the question, inevitably, of how similar do two situations need to be in order for there to be a requirement that the law treat them equally or the same? To take a very broad-brush example, consider Criminal A, who stole a loaf of bread, and Criminal B, who murdered someone. Both are alike in that they are criminals. But it would be silly to say that all criminals must be treated alike. Even though they are both criminals, there are very relevant and important

4. U.S. CONST. amend. XIV.

5. See *Reed v. Reed*, 404 U.S. 71 (1971). In this classic example of a decision that is classified as reflecting formal equality, the United States Supreme Court held that a state statute requiring males to be preferred over females in administering estates was a violation of equal protection. *Id.* at 74. See also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 27-28 (2005); CATHERINE A. MACKINNON, SEX EQUALITY 2-7 (2nd ed. 2007).

6. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (“The Constitution’s protections of individual liberty and equal protection apply in general only to action by the government. Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action”) (citations omitted).

7. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added).

8. See ARISTOTLE, THE NICOMACHEAN ETHICS 112-16 (J.L. Ackrill & J.O. Ormson eds., David Ross trans. Rev. ed. 1980) (stating in part that equal justice is treating equals equally).

differences between the two crimes that would justify very different treatment. Moreover, someone who stole a loaf of bread to give to his sister's hungry children is different from someone who stole bread out of spite. Maybe those two crimes should be treated differently because of the different motives involved. And so on. In order to figure out how the Equal Protection Clause applies, we need to look at the differences and similarities between people affected by the law. Law is rooted in history and custom, so it is not surprising that the types of differences and similarities that have been seen as relevant and irrelevant have changed over time.

Let's look at two classic, paradigmatic examples of laws that violate equal protection. First, we start with a law that prohibits blacks from being allowed to attend a public law school. This law treats the group of qualified people who want to go to law school at a state school differently based on their race (or what appears to be their race). As an important aside, a good deal of scholarship has been published in the past few decades arguing that race is a social construction,<sup>9</sup> but I am not going to delve into that in this lecture. Regardless of whether race is a social construction or not, perception of race has had a huge impact on an untold number of human lives, so I will refer to racial categories in this talk. There actually was a Texas law that said no blacks would be allowed in a public law school in that state, and in 1950, the United States Supreme Court found that that law violated equal protection, in part on the following basis: The racial difference, or apparent racial difference, was not a relevant or important difference between members of the group of qualified people that wanted to attend law school.<sup>10</sup> So, one example of an equal protection violation is that the law itself, the statute passed by the legislature, draws the line that the court then looks at in light of what differences are relevant and important and in light of the object of the legislation. It was easy to see that the law was treating the groups differently based on race—it said so—and plus there was a comparison group, qualified blacks who wanted to go to law school, and a member of that group was before the Court.<sup>11</sup>

A second classic example of an equal protection violation can be an individual judge's decision, in some circumstances. A judge's decision is State action, so the "state action" part of the Fourteenth Amendment is satisfied.<sup>12</sup> And if the individual judge's decision uses a racial classification without a compelling reason, this individual case can be an equal protection violation. An example is a famous custody case concerning a little white girl that actually went to the United States Supreme Court.<sup>13</sup> In that case, the trial judge awarded custody of the girl to her white father because the child's (white) mother was living with, and eventually married, a black man, having said on the record, broadly speaking—that race was the reason for the decision.<sup>14</sup> That individual case was considered to be "law" for purposes of the Equal Protection Clause.<sup>15</sup>

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9. See, e.g., Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L.L. REV. 1-62 (Winter 1994).

10. See *Sweatt v. Painter*, 339 U.S. 629, 635-37 (1950).

11. *Id.* at 631.

12. *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984).

13. See *id.*

14. See *id.* at 430-31.

15. *Id.* at 432 n.1.

The first example of an equal protection violation, of an explicit state law forbidding African-Americans from going to a certain school, is part of a familiar narrative. The legal history of the United States, of course, included slavery and a whole host of laws concerning slavery. Following emancipation, the Civil War, and the Reconstruction period, laws were passed that excluded blacks and other racial minorities from many institutions and settings. We had in this country from 1900 until the 1950s what historian Lawrence Friedman, perhaps the foremost living historian of American law, has called “an American system of apartheid.”<sup>16</sup> In addition to being subjected to economic discrimination, race-based exclusions of all sorts, pervasive threats of violence, and actual violence including lynching, blacks and other racial minorities were kept off juries, and out of law schools, as we have seen.<sup>17</sup> This history is too extensive to more than briefly touch on at this time.

In the law school case mentioned above, for example, when the case was filed, no law school in Texas admitted African-Americans.<sup>18</sup> A separate law school was started for blacks, after the litigation was filed seeking to open up the University of Texas Law School to blacks.<sup>19</sup> The hope of Texas was that if there was a white law school and a black law school, established by the state, there would be no equal protection violation.<sup>20</sup> The goal of Texas was that it could continue to treat the group of people who wanted to go to law school differently by race, and have that different treatment not count as a violation of the principle of treating likes alike. However, in the Texas case, race was not allowed to be a significant distinction and was not allowed to be grounds for exclusion.<sup>21</sup> And of course, in 1954, after an extensive litigation campaign, the United States Supreme Court, in *Brown v. Board of Education*, wrote that in public schools generally, “separate but equal” is not equal.<sup>22</sup> The equal protection case-law applying to situations where race is “on the surface” of governmental decisions has continued to develop, with great judicial suspicion of using race explicitly for any purpose.<sup>23</sup> Given time limitations, we will leave for another day the extensive equal protection case-law that has evolved pertaining to situations where racial classifications are not on the surface of governmental actions, but where governmental actions have a racially disproportionate impact.<sup>24</sup>

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16. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 117 (2002).

17. *See generally*, Jennifer B. Wiggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 *How. L. J.* 99, 104-05 (2005).

18. *Sweatt*, 339 U.S. at 631.

19. *Id.* at 632.

20. *See id.* at 635-36.

21. *Id.*

22. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954). *See generally*, MARTHA MINOW, *IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* (2010).

23. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (explaining that the Court reviews racial classifications under the strict scrutiny standard and that the state actor must demonstrate that the use of racial classifications is narrowly tailored to achieve a compelling governmental interest).

24. *See e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator v. Feeney*, 442 US 256 (1979).

## II. TORT CASES AS EQUAL PROTECTION CASES: EXAMPLES FROM HISTORY

Now, second, how can tort cases violate equal protection? Tort law is the law of injury, and once slavery was over, its principles applied generally to all.<sup>25</sup> If a railroad negligently caused injury to a person, the person could seek compensation in tort for the negligently caused injury. A railroad owed a duty of reasonable care, not just to white people, but to everyone.

One important aspect of tort law for our discussion is that the tort system is an individualized arena. Judges and juries generally do not compare outcomes and cases, or damage awards in cases. When a jury is deciding how much to award in a case where someone is injured by negligence and has a broken leg, the jury is not told anything like, “the general amount juries have been awarding for broken leg cases around here lately is \$20,000.” Philosophically, there is an idea that each case is very different. But, there are limits to this idea. If each case is completely different, then, there is no such thing as “treating like cases alike,” because no cases are sufficiently similar. If each case is totally different, there is no way to conceptualize an equal protection violation. Rather, it is all a morass of individualized adjudication. But the Equal Protection Clause applies to all government action, even to tort cases. The Fourteenth Amendment does not say no one shall be denied equal protection of the law, “except in tort cases.” Even in tort cases, then, if persons are “similarly circumstanced,” they need to be treated alike.

Yet, the history of tort law reveals cases where judges made race-based decisions—decisions where they treated black plaintiffs differently from how they treated, or would have treated, white plaintiffs. These decisions were violations of equal protection, although they were not seen as such at the time. And these cases have simply been left out of the traditional histories of both constitutional law and tort law. This racial history of tort law is a much less familiar narrative and one that my new book, *The Measure of Injury*, explores.

Here are some examples of where this phenomena appears to have taken place. In a 1911 case, where a railroad employee had been killed in an accident, the Louisiana Supreme Court reduced the verdict that a jury (all-white of course) had awarded to his mother from \$6,250 to \$1,985 with these words: “Considering the well-known improvidence of the colored race, and the irregular life these colored brakemen lead, we think that upon this evidence [the reduced amount] would lean more to the side of liberality to the plaintiff than otherwise.”<sup>26</sup> In another case, a judge in New York City presided over a trial in 1909 where a jury awarded a \$2,500 verdict to a black Pullman porter, George Griffin, against a rich financier (white of course) who had falsely accused him of stealing his wallet.<sup>27</sup> The Pullman porter apparently had been locked up overnight and then released.<sup>28</sup> After the porter won a verdict for the tort of false imprisonment, the judge—using a procedure known as *remittitur*—which allows judges to reduce clearly excessive

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25. See generally BARBARA WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920 (2001); Wriggins, *supra* note 17.

26. *Blackburn v. La. Ry. and Navigation Co.*, 54 So. 865, 869 (La. 1911).

27. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW, 52 (2010).

28. *Id.*

verdicts, reduced the verdict from \$2,500 to just \$300.<sup>29</sup> Referring to Griffin, the plaintiff, the judge said: “[I]n one sense, a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man would have . . . In [New York City] I dare say the amount of evil that would flow to the colored man from a charge like this would not be as great as it probably would be to a white man.”<sup>30</sup>

Yet, these cases and cases like this, long available publicly and on-line, are not traditionally seen as equal protection cases—they are not in the casebooks on constitutional law in the equal protection section and they are not in the casebooks on torts.

Why have they been hard to see as equal protection cases? At least four reasons come into play. One reason is historical. They were not argued as constitutional cases. When these cases and cases like them were decided, from the early twentieth century to the 1940s, there was no way to successfully use the Constitution to argue against this type of unfairness. Racial distinctions were usually acceptable.<sup>31</sup> The Equal Protection Clause had not yet been interpreted to say that distinctions based on race were problematic in many contexts. A second reason is institutional. It is unusual for tort cases to go to the United States Supreme Court, which is the final arbiter of the meaning of the Constitution.<sup>32</sup> Third, these are not statutes passed by the Legislature, which make an exclusion based on race absolutely crystal clear. Rather, they are individual judicial opinions and individual cases. Although publicly available, on the whole they are less noticeable than an exclusionary statute would be. Fourth, there is no comparison group or member of a comparison group before the court. In these cases, the judge is not deciding whether to award a tort judgment in damages to a black person or a white person—instead, the judge is deciding what to do in an individual’s case.

Despite the fact that these cases were not seen as equal protection violations, I think they quite clearly were. In a way this is obvious, but I think it is important to focus specifically on why they were. I will now turn to that question.

In making this equal protection point, when we turn to focus more on *Blackburn*, the brakeman case, we need to learn a bit about wrongful death law. Every state has a law that says if a person is killed by a tort, that person’s relatives can recover some losses, usually financial, that the relatives suffer from the deceased relative’s death.<sup>33</sup> The broad purpose of wrongful death law is to

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29. *Id.* at 53.

30. *Id.* at 53-54.

31. *But see* *Strauder v. West Virginia*, 100 U.S. 303 (1879) (law excluding all blacks from jury service violated equal protection). This case was an exception. As Sullivan and Gunther note: “In other areas of social life outside such core civic functions [as jury trials], equal treatment for the newly freed slaves and their descendants was harder to enforce.” KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 488 (16th ed. 2007).

32. This has historically been true but the Supreme Court’s recent role in reviewing punitive damages and preemption has been expanding. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412 (2003) (reviewing the amount of punitive damages a State could impose as punishment in a civil case); *Wyeth v. Levine*, 129 S.Ct. 1187, 1190-91 (2009) (determining whether the Food and Drug Administration’s approval of a drug manufacturer’s warning label was a complete defense to the plaintiffs’ civil claims).

33. DAN DOBBS, *THE LAW OF TORTS*, 803-04 (2000).

compensate surviving relatives of people killed by torts—that’s the object of the legislation. For example, imagine that Mother A has an adult Child B, and that adult Child B is supporting Mother A financially, and then that Child B is killed by a tort. Mother A’s damages are supposed to be the financial losses suffered by losing her child’s financial support. So, if the adult child is giving the mother only a little money, the mother’s financial loss is small. And vice versa of course—if the adult child is sending lots of money home to his mother, the mother’s damages, if that child is killed by a tort, will be large. Some wrongful death statutes, including Louisiana’s, allow broader wrongful death damages, including emotional losses suffered by surviving relatives.<sup>34</sup>

With that background, we can return to the 1911 brakeman case from Louisiana. If we think of a parallel case involving damages to the mother of a white brakeman, we can see that the judge was not treating similarly circumstanced persons alike, in all likelihood. The mother of the deceased black brakeman was treated differently than the mother of a deceased white brakeman would have been. By highlighting “the irregular life these colored brakemen” supposedly lead, the justices of the Louisiana Supreme Court implicitly compared two groups: a group of black brakemen and a group of white brakemen. They assumed, based on the generalization, or stereotype if you will, that “colored brakemen” sent less money home to their mothers than the imaginary white brakemen would have done, and that further, this specific deceased brakeman must have sent little money home to his mother. The justices did this for no reason related to the object of the legislation, and with no evidence, other than their feeling that this was the case. This, of course contradicted the jury’s conclusion based on whatever evidence had been presented at trial as to this individual brakeman’s support of his mother. The mother of the colored brakeman, then, was denied equal protection of the laws by the State’s highest court.

A similar point can be made about the case involving the Pullman porter, *Griffin v. Brady*.<sup>35</sup> The judge treated George Griffin differently than he would have treated a white victim of the tort of false imprisonment for no reason relevant to the purpose of the tort—just his feeling, his bias. And again, this contradicted the conclusion based on the evidence presented at trial as to this individual’s injury from the false imprisonment.

The actions taken by the judges, as well as the content of the statements made by them, make it clear that persons similarly circumstanced were not treated alike. The reductions in damages, although perhaps not large by today’s standards, were significant, and their impact ripples forward in time.<sup>36</sup> The plaintiffs were denied equal protection.

However, judges rarely made statements as explicit as the statements made in

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34. See Wriggins, *supra* note 17, at 113-14.

35. See CHAMALLAS & WRIGGINS, *supra* note 27, at 52-54.

36. Using the Consumer Price Index, an award of \$2,500 in 1909 would be \$60,800 today, while an award of \$300 in 1909 would be \$7,300 today. See Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to the Present*, [www.measuringworth.com/calculators/uscompare](http://www.measuringworth.com/calculators/uscompare) (last visited Nov. 4, 2010). A \$2,500 award in 1909 might have enabled Mr. Griffin’s family to buy a house, pay for education, or take other steps that might build wealth for future generations.

these cases. And in the Pullman porter case of *Griffin v. Brady*, the judge's statements were criticized in editorials from newspapers coast to coast, although the damages reduction was upheld on appeal.<sup>37</sup> There may have been many cases after *Griffin* where judges reduced the amounts of jury verdicts or reversed verdicts for black plaintiffs but were not so explicit about their reasons. This kind of covert decision-making makes the argument that those decisions violated equal protection much harder to prove.

It is clear that in many other cases during the first half of the twentieth century, compensation awards to African-Americans were less than to whites. It is hard to compare different cases, but I did a study of appellate wrongful death cases in Louisiana from 1900 to 1950 where I read every one that mentioned damages, and found these aggregate numbers—out of a total of 152 reported cases: the average award for the loss of a black family member was \$3,558 and the average award for loss of a white family member was \$8,245.<sup>38</sup> Similarly, the median award for the loss of a black family member was \$3,200, and the median award for loss of a white family member was \$7,021.<sup>39</sup> There are many reasons for the differences in award amounts, and there would be much to talk about if we had more time, but the pattern is powerful. I think it is fair to say that a race-based discount was applied to African-Americans' tort claims, and if so this would mean that the equal protection rights of the plaintiffs were violated.<sup>40</sup>

In these older cases, and many others, the racial aspects often were on the surface, in that judges routinely mentioned the race of the plaintiff in tort cases until about the 1950s, in those cases where the plaintiff was seen as not white.<sup>41</sup> But through an extended litigation campaign, explicit racial distinctions in law came to be seen as pretty much anathema. Starting in 1944, the United States Supreme Court, using the Equal Protection Clause, held that racial classifications were only justifiable if there was a compelling reason for them and they were narrowly tailored to further only that reason.<sup>42</sup> This is known as "strict scrutiny" and generally has meant that racial distinctions in law are treated with great suspicion and most often struck down as equal protection violations, even if aimed at furthering racial equality.<sup>43</sup> The evolution of law regarding gender classifications and equal protection has come more slowly and recently but has been similar in outcome.<sup>44</sup>

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37. See CHAMALLAS & WRIGGINS, *supra* note 27, at 52-54.

38. Wriggins, *supra* note 17, at 118.

39. *Id.*

40. See Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 REV. OF LITIG. 37 (2007); Jennifer B. Wriggins, *Whiteness, Equal Treatment, and the Valuation of Injury in Torts, 1900-1949*, in FAULT LINES: TORT LAW AS CULTURAL PRACTICE, 156-75 (David Engel & Michael McCann eds., 2009).

41. Wriggins, *supra* note 17, 110-11.

42. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

43. See, e.g., *Parents Involved in Cmty. Sch.*, 551 U.S. at 720.

44. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (holding that women could not be excluded from enrollment at the Virginia Military Institute based solely on their gender).

## III. THE CONTINUING RELEVANCE OF EQUAL PROTECTION LAW TO TORTS

Equal protection continues to be relevant to tort law in numerous ways,<sup>45</sup> but I have time only to discuss one. It has to do with how damages are computed in some cases to this day. Let me give you an example: Two nine-year-old children are injured in a ferry accident. They are the same age and gender—one is black and one is white, and they both have very serious injuries; injuries so serious that they will never be able to work in the future. The facts show that the ferry operator is at fault, and under basic principles of damages is liable for the future lost wages of those injured by its negligence. But they are kids! They have no earnings history from which you could estimate future wages. Here we have to estimate—predict—the future lost wages of the injured boys. This is quite a task, fraught with uncertainty and guess-work. In the United States, a common practice has been this: A vocational expert will testify in court with an estimate, and the estimate will be based on the race of the injured person—the expert will say, using data from the Bureau of Labor Statistics—that given the race and gender of the injured person, he or she is likely to get this much education and earn this or that amount.<sup>46</sup> For example, a recent book, *Damages in Tort Actions*, states: “In many cases, the plaintiff will not have a sufficient work history to permit the use of historical earnings in the establishment of a preaccident earnings level . . . The economist may consult data of the U.S. Dept. of Commerce to establish average educational levels by the sex and race of the plaintiff . . . [i]f the plaintiff were a white male, the economist would likely establish a base annual earning capacity of \$17,994.”<sup>47</sup> The white male figure is taken from a chart showing average annual earnings of white males with a high school education at \$1,288 more than black males with the same education.

The injured white boy will get much more than the injured black boy because these earnings and education tables will reflect that blacks on average earn less than whites on average and get less education than whites on average. And of course, if just one boy—black or white—is injured, a vocational expert also will use the race-based and gender-based tables. So, what is the problem with this one might ask? And what does it have to do with equal protection anyway?

I submit that admission of race-based data and gender-based data to predict a plaintiff’s earnings or life expectancy in court for determining tort damages is a violation of the plaintiff’s equal protection rights. We will first need to assume that if an attorney offers and a judge admits that type of expert evidence in court, this is sufficient government action to meet the “state action” requirement.<sup>48</sup> We will skip

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45. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (it is a violation of the Equal Protection Clause for attorneys in tort cases to use race as sole criterion in using preemptory challenges).

46. See CHAMALLAS & WRIGGINS, *supra* note 27, at 217.

47. JEROME H. NATES, ET. AL., *DAMAGES IN TORT ACTIONS*, § 10.02(2)(b), (2007).

48. This argument needs further development and exploration beyond this lecture. One possibility is that a judge’s decision to admit race-based or gender-based tables is in itself state action and therefore a potential basis to bring a claim under the Fourteenth Amendment. However, judicial immunity would seem to bar such a claim. See *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978). A second possibility is that an attorney’s decision to offer race-based and gender-based tables, when followed by a judge’s decision to admit such tables in court, constitutes state action. In brief, in *Edmonson*, the Supreme

a discussion of that issue because of limited time. But a black plaintiff in that situation should be able to argue that he is denied equal protection. He is like a white plaintiff in that he is a person who is injured by a tort and he is not being treated like a white plaintiff would be treated. Further, he should be able to argue that there is no compelling reason for the evidence to be admitted. But this practice, this habit in the United States, has continued for decades to now with very little question, except from legal scholars like my co-author Martha Chamallas and myself.<sup>49</sup>

However, for the first time in the United States, a person in that situation now has a decision decrying the use of race-based and gender-based tables to cite. In *McMillan v. City of New York*,<sup>50</sup> Federal District Judge Jack Weinstein was faced with the following situation: In 2003 there was a terrible accident where the Staten Island Ferry slammed into a dock at full speed because the pilot passed out.<sup>51</sup> Eleven people were killed and one man, James McMillan, was injured so seriously that he became a quadriplegic.<sup>52</sup> He was African-American.<sup>53</sup> He and others sued New York City and the evidence showed that the city indeed had been very negligent.<sup>54</sup> There was supposed to always be another pilot on duty, but this rule was violated on that day and on many days.<sup>55</sup> Mr. McMillan sued for his injuries,

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Court held in a 6-3 decision that it would be an equal protection violation in a tort case for private attorneys to exercise their peremptory challenges solely on the basis of race. 500 U.S. at 616-28. The Court held that jurors' equal protection rights were violated and held that the black plaintiff could raise that violation where the defense attorney had used peremptory strikes to remove black jurors from the jury. *Id.* The Court applied the "state action" framework set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), which considers first whether the claimed governmental action resulted from the exercise of a right or privilege having its source in state authority, and second whether the private party charged with the deprivation could be described "in all fairness" as a state actor. *Edmonson*, 500 U.S. at 621 (citing *Lugar*, 457 U.S. at 939-42). The first aspect of *Lugar's* "state action" requirement was satisfied in *Edmonson* because the state statute on peremptory challenges authorized private actors to exercise such challenges. *Edmonson*, 500 U.S. at 621. The second requirement was satisfied since the conduct was governmental in character and was only possible because of the state's involvement. *Id.* at 625-27. The Court was particularly concerned that jury exclusions based on race affected the system of justice and the courtroom and "raise[] serious questions as to the fairness of the proceedings conducted there." *Id.* at 628. Here, arguably, the first requirement is met if a private party offers racially discriminatory evidence that is admitted in court because the combination of offering evidence and admitting evidence has its source in state authority. And arguably the second requirement, that the private party charged with the deprivation could be described "in all fairness" as a state actor, is met because the conduct is intimately connected with the quintessentially governmental function of trials and because the fairness of judicial proceedings is centrally important in our constitutional system. *See id.*

49. *See* Martha Chamallas, *Civil Rights in Ordinary Torts Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005); Wiggins, *Damages in Tort Litigation*, *supra* note 40.

50. 253 F.D.R. 247 (E.D.N.Y. 2008).

51. *In re City of New York*, 475 F. Supp. 2d 235, 236-37 (E.D.N.Y. 2007), *aff'd* 522 F.3d 279 (2d Cir. 2008).

52. *McMillan v. City of New York*, 2008 U.S. Dist LEXIS 76711 at \*\*2-5 (E.D.N.Y. 2008).

53. *McMillan*, 253 F.D.R. at 248.

54. *See In re City of New York*, 475 F. Supp. 2d 235 (E.D.N.Y. 2007), *aff'd* 522 F.3d 279 (2d Cir. 2008).

55. *Id.*

which included his future medical expenses for the rest of his life.<sup>56</sup> The City offered life-expectancy tables for quadriplegics, divided by race, which showed that African-American quadriplegics had lower life expectancies than white quadriplegics, on average, and claimed that the African-American quadriplegic life expectancy tables should be used for Mr. McMillan.<sup>57</sup> When the judge questioned this practice and gave New York City's attorneys the opportunity to brief the issue, they did not. In October 2008, Judge Weinstein, remarkably, held that use of the tables was a violation of equal protection and due process rights of Mr. McMillan.<sup>58</sup> Instead of African-American quadriplegic life expectancy tables, he used blended male tables.<sup>59</sup> In his opinion he talked a lot about how inaccurate tables divided by race are, particularly in our multiracial society and where status changes over time.<sup>60</sup> He talked about how race is a social construction and how factors such as socioeconomic status often overlap with race, creating data that look race-based but are really about socioeconomic status.<sup>61</sup> However, he did not talk very specifically about exactly why the use of race and gender based tables is an equal protection violation. I will briefly begin to do that in the next few minutes.

A challenge might go like this: A race-based table used as evidence in court, is a race-based category or classification and these are rarely acceptable under current understandings of equal protection. Strict scrutiny, mentioned above, should be applied. To apply strict scrutiny, as noted above, requires that the governmental classification be in support of a compelling governmental interest and that it be narrowly tailored to support only that interest. So, to satisfy equal protection, we would need to figure out what is the compelling governmental interest furthered by the racial classification.

What about "accuracy in determining tort damages"? Is that compelling? And what does it mean? Particularly, what does it mean if we have a situation where we are trying to estimate future losses—in *McMillan* the inquiry focused on the future medical expenses of the injured person. In other cases, the inquiry is what would the future earnings of the injured person have been? The object of the inquiry is inherently uncertain. Moreover, as we have seen, torts are individualized. There is no one correct amount of damages. So the idea of "accuracy" in determining damages makes no sense. In addition, there are real issues of "accuracy" of broad tables divided by race and gender, given how much life expectancy varies by region, socioeconomic status, and other variables, and given the arguable indeterminacy of racial categories.<sup>62</sup> Also, tables are based on past data, and to apply them into the future assumes that we know the rate of future change of facts, such as educational participation and wage earning by race and gender, when we do

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56. *McMillan*, 2008 U.S. Dist. LEXIS 76711 at \*1.

57. *McMillan*, 253 F.D.R. at 248.

58. *Id.* at 255-56.

59. *Id.* at 248-49.

60. *Id.* at 249-55.

61. *Id.*

62. Christopher J. L. Murray, et. al., *Eight Americas: Investigating Mortality Disparities Across Races, Counties, and Race-Counties*, PLOS MEDICINE, (Sept. 2007), <http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.0030260> (last visited Nov. 14, 2010).

not know those things. Experts disagree about future rates of change. So to use these tables for predictions reinscribes past differences on the future. “Accuracy of determining tort damages” makes no sense on its own terms.

Even if it makes sense on its own terms, it is just not compelling when compared to recognized, compelling governmental interests—the classic one is national security.<sup>63</sup> Another compelling state interest is the interest in “safeguarding the physical and psychological welfare of . . . minor[s].”<sup>64</sup> Accuracy of tort damages simply is much less compelling than these.

There is a final step of the analysis: Even if “accuracy of determining tort damages” is a compelling governmental interest, is using this classification narrowly tailored to further only that interest? No. I argue that using the classification in court to determine damages does much more than just promote “accuracy.” It also fails to recognize human potential, and it legitimizes inequality to use this evidence in court to measure an injured individual’s damages.<sup>65</sup> As mentioned above, it inscribes past inequality—in wages and education—at least some of which derives from past discrimination on the basis of race and/or gender, on individuals and on the future. Admitting race-based tables, and gender-based tables, then, in tort litigation, is an example of treating like cases not alike, and for no compelling reason. It is therefore a violation of equal protection and should stop.

#### IV. CONCLUSION

This talk has been about just one aspect of the Constitution. I have shown some ways in which the interpretation of the Equal Protection Clause has changed over time, and I have emphasized the value of equality in the Constitution. There are many other aspects of the Constitution that are also important that I have not touched on in this lecture. A very broad point that I will end with is this: In these very challenging times, we are fortunate to have in the Constitution a durable framework for our democracy. Of course it is imperfect, and of course it is flawed. But its structure, its framework, its stability, have helped our country endure, improve, and grow. And hopefully the Constitution will continue to do that going forward.

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63. *Korematsu*, 323 U.S. at 219-20.

64. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

65. One of the most powerful articulations of this idea is the Israeli Supreme Court’s decision in *Migdal Ins. v. Rim Abu Hanna*, which discussed the appropriate way to compute an award to an Arab girl who was seriously injured in a road accident when she was a baby. CA 10064/02 Migdal Ins. v. Rim Abu Hanna, [2005] (Isr.). The defendant argued that women living in the child’s poor village were generally not employed outside the home and tried to argue for damages based on those local conditions. *Id.* The court ruled that a more egalitarian measure of the child’s potential was necessary to ensure that “every child of whatever sex, origin, race, or religion” is treated in accordance with a “conception of universal justice, the justice that requires equality, that requires recognition of the right to autonomy, and that nourishes hope.” CHAMALLAS & WRIGGINS, *supra* note 27, at 163; Eliezer Rivlin, *Thoughts on Referral to Foreign Law, Global Chain-Novel, and Novelty*, 21 FLA J. INT’L L. 1, 21-28 (2009). Canadian courts have also confronted some of the equality issues discussed here. See CHAMALLAS & WRIGGINS, *supra* note 27 at 163-64.