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# Making Black Lives Matter: Properly Valuing the Rights of the Marginalized in Constitutional Torts

Helen E. White  
*Yale Law School*

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HELEN E. WHITE

## Making Black Lives Matter: Properly Valuing the Rights of the Marginalized in Constitutional Torts

**ABSTRACT.** Black lives are systematically undervalued by constitutional enforcement remedies. Section 1983 adopts, wholesale, the damages scheme from torts, which not only permits, but encourages, the consideration of race and gender to calculate actuarially “accurate” damages figures. Given that Blacks earn seventy-five percent of what white men earn on average, it’s no surprise that this results in significantly lower damages awards. This Note argues that the use of race-based actuarial tables in constitutional torts is both unconstitutional and theoretically unsound. Yet, plaintiffs rarely challenge this practice and often even stipulate to its use. This presents a puzzle—why does a bad practice go unchallenged?

Furthermore, the largely unchallenged adoption of race-based actuarial tables is symptomatic of constitutional law’s broader, unquestioned embrace of the corrective justice framework. Corrective justice’s appeal is that it ostensibly allows judges to focus on the narrow task of returning plaintiffs to a prior baseline rather than requiring legislative-type determinations of whether that “baseline” is normatively desirable. But, when the legal dispute turns on a government actor’s violations of a citizen’s constitutional rights, the harms and benefits exchanged between plaintiff and defendant are more complex and indeterminate than between purely private parties. The complicated relationship between parties in constitutional torts makes corrective justice’s determinate inquiry uncertain and unsatisfactory. Indeed, the selection of a prior baseline requires judges to engage in value-laden choices about which harms and benefits—among the innumerable exchanged between citizen and government—are counted toward the plaintiff’s baseline. Thus, this Note reveals that the purported normative neutrality that commends corrective justice in private torts is a mere illusion in the constitutional tort context.

Finally, this Note argues that distributive justice emerges as a viable alternative framework for developing constitutional tort remedies. Under that framework, remedial schemes should be premised on moving toward a more ideal distribution rather than limited to returning plaintiffs to a particular baseline. While distributive justice is often rejected in tort litigation, the framework has much to offer in the constitutional tort context. Yet, much of constitutional law and scholarship has overlooked distributive justice and adopted a narrow, tort-like version of corrective justice—a doubly value-laden choice. This Note demonstrates that selecting between the two frameworks should be a contested question—one that has broader implications for our understanding of constitutional law.



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## INTRODUCTION

On the evening of April 19, 2017, a Texas police officer fired four shots into a vehicle driving away from a high-school party.<sup>1</sup> One of those bullets struck and killed Jordan Edwards, a fifteen-year-old Black boy who was sitting in the passenger seat. Jordan's parents have since filed a civil rights lawsuit against the officer arguing that the officer used excessive force when he shot Jordan.<sup>2</sup>

Since the 2014 shooting of another young, unarmed black man by a police officer in Ferguson, Missouri, activists have campaigned for a societal recognition that "Black Lives Matter."<sup>3</sup> Scholars and commentators have advocated for new standards for police use of force<sup>4</sup> and brought to light the disproportionate impact of certain police practices on minority communities.<sup>5</sup> Protests have erupted as a series of police officers were acquitted of various forms of criminal homicide, if the officers were ever charged at all.<sup>6</sup> This has led to the common

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1. See Kurtis Lee, *Faith, Family, Football: How a Texas Town Is Healing After a Cop Killed a Black Teenager*, L.A. TIMES (Oct. 19, 2017), <http://www.latimes.com/projects/la-na-jordan-edwards> [https://perma.cc/VL97-FS88]; Stephen Young, *Police Officer Who Shot Jordan Edwards to Death Is a Long Way from Prison*, DALL. OBSERVER (May 9, 2017, 4:15 AM), <https://www.dallasobserver.com/news/police-shooting-expert-philip-stinson-explains-what-will-happen-to-jordan-edwards-killer-9447417> [https://perma.cc/YVX3-MDSR].
  2. *Edwards v. Oliver*, No. 3:17-cv-01208, ECF No. 1 (N.D. Tex. May 5, 2017).
  3. See *What We Believe*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/what-we-believe> [https://perma.cc/P7Q4-M5MJ].
  4. See, e.g., Olevia Boykin et al., Opinion, *A Better Standard for the Use of Deadly Force*, N.Y. TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/01/opinion/a-better-standard-for-the-use-of-deadly-force.html> [https://perma.cc/4TKN-G9L7]; *Limit Use of Force*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/force> [https://perma.cc/8DK3-MUXB]; *Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform> [https://perma.cc/S65M-TC5A].
  5. See, e.g., *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters from 2007-2010*, ACLU (2014), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf> [https://perma.cc/7FDF-D5K6].
  6. See, e.g., Charlotte Alter, *Black Lives Matter Protest in New York Attracts New People*, TIME (July 10, 2016), <http://time.com/4400211/Black-lives-matter-new-york-protest> [https://perma.cc/6XWW-VSL7] (describing a Black Lives Matter (BLM) protest in New York); Nassim Benchaabane, *Protesters March on Street, at Police Headquarters in Ferguson*, ST. LOUIS POST-DISPATCH (Oct. 6, 2017), [https://www.stltoday.com/news/local/crime-and-courts/protesters-march-on-street-at-police-headquarters-in-ferguson/article\\_7a04468c-30fi-5d4b-928b-cbb933dc4a9f.html](https://www.stltoday.com/news/local/crime-and-courts/protesters-march-on-street-at-police-headquarters-in-ferguson/article_7a04468c-30fi-5d4b-928b-cbb933dc4a9f.html) [https://perma.cc/FC44-3LRZ] (describing a BLM protest in Ferguson, Missouri); Elvia Malagon & Morgan Greene, *Anti-Violence Protesters to Shut Down the Dan Ryan Expressway on Saturday: 5 Things To Know*, CHI. TRIB. (July 6, 2018, 5:00 AM), <http://www.chicagotribune.com/news/ct-met-five-things-protest-dan-ryan>

refrain that “Black Lives Matter” and that our criminal justice system must begin to reflect that fact.<sup>7</sup> However, little attention has been paid to the fact that Black lives are systematically undervalued even when governments *do* compensate victims of police violence.<sup>8</sup>

The *literal* undervaluation of Black lives is the result of constitutional torts’ adoption of a corrective justice approach to calculating damages. More specifically, Black lives are compensated at a discount because courts use race-based actuarial tables to calculate how much defendants must pay plaintiffs. To understand how this works, we must first consider the scheme used to calculate tort damages.<sup>9</sup> When a young person is killed or seriously injured by a tortfeasor, such as a negligent driver, courts rely on actuarial tables to try to calculate damages. The tables help calculate how much the victim would have earned, how long they would have worked, and how long they would have lived. So too when a child is shot by a police officer, in violation of the Fourth Amendment, or denied medical treatment while incarcerated, in violation of the Eighth Amendment.

But these tables are not simply the average expected outcome for a “typical” or “average” person. Rather, the tables show the average member of a group defined not only by such metrics as age and income but *also by race*.<sup>10</sup> Problematically, this results in lower damages valuations for Black lives since the tables estimate that they will live shorter lives and earn less money. It is shocking enough that tort law relies explicitly on such measures. It is even more startling that our civil rights enforcement mechanisms have adopted tort law’s race-based approach to valuing lives.

Consider the example of a fifteen-year-old Black boy, like Jordan Edwards. When an adolescent is killed or seriously injured, estimating damages in a subsequent lawsuit is a major challenge. Little is known about the victim’s future educational attainment, health habits, or employment prospects. So, in light of

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-20180706-story.html [https://perma.cc/J8DH-ZK9C] (describing a BLM protest in Chicago).

7. See, e.g., *Herstory*, BLACK LIVES MATTER, <https://Blacklivesmatter.com/about/herstory> [https://perma.cc/U48P-9K8Y]; *Limit Use of Force*, *supra* note 4; *Platform*, *supra* note 4.
8. This Note does not address the substantive question of when or whether officers are liable for such shootings, only the damages that result once the officers have already been found liable and not shielded by qualified immunity.
9. DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 480 (2d ed. 2018) (“When the defendant’s violation of the plaintiff’s constitutional right causes physical harm to the plaintiff, courts can grant ordinary compensatory damages equivalent to those awarded in common law tort cases.”).
10. Elizabeth Arias et al., *United States Life Tables, 2013*, 66 NAT’L VITAL STAT. REP. 3 tbl.A (2017), [https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66\\_03.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_03.pdf) [https://perma.cc/32PX-JDXV].

this uncertainty, experts must guess. In doing so, forensic damages experts almost always use two factors to approximate an individual's life expectancy and earnings: sex and race.<sup>11</sup> Jordan would be expected to live another 58.4 years.<sup>12</sup> The average weekly wage for a Black man in 2016 was \$718.<sup>13</sup> Based on these numbers, Jordan's lost earnings would be worth about \$2.1 million, without adjusting for future inflation or discounting to present value. If Jordan were white, however, his lost earnings would be just under \$3 million.<sup>14</sup> Under our civil rights law, a Black boy's life is worth about seventy percent of a white boy's.

As of early 2019, Jordan's case had yet to be resolved<sup>15</sup> and, like many such lawsuits, is likely to end in settlement. But there is ample evidence that race-based damages calculations in § 1983 civil rights cases are common.<sup>16</sup> In one case,

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11. See Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 662 (2017) (quoting a forensic economist); *id.* at 671-72 (citing Robert J. Thornton & Frank Slesnick, *New Estimates of Life Expectancies for Persons with Medical Risks*, 10 J. FORENSIC ECON. 285 (1997)); *id.* at 676-78; see also Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994) (arguing that "the use of explicit race-based and gender-based economic data [in tort litigation] is unconstitutional").
  12. Arias et al., *supra* note 10, at 3 tbl.A.
  13. Bureau of Labor Statistics, *Median Weekly Earnings of Full-Time Wage and Salary Workers by Selected Characteristics*, U.S. DEP'T LAB. (2018), <https://www.bls.gov/cps/cpsaat37.pdf> [<https://perma.cc/K8YH-ZXL9>].
  14. Arias et al., *supra* note 10, at 3 tbl.A; Bureau of Labor Statistics, *supra* note 13.
  15. See Docket, *Edwards v. Oliver*, No. 3:17-cv-01208 (N.D. Tex. Jan. 11, 2019); *City of Balch Springs Challenges Jordan Edwards Wrongful Death Lawsuit*, FOX4NEWS (Oct. 11, 2018, 5:37 PM CDT), <http://www.fox4news.com/news/city-of-balch-springs-challenges-jordan-edwards-wrongful-death-lawsuit> [<https://perma.cc/JR38-9B4H>].
  16. See, e.g., Economic Expert Certification of Gary S. Barach, *Murray v. City of Philadelphia*, No. 2:11-cv-06900 (E.D. Pa. Sept. 22, 2015), 2015 WL 13530909 (using, in a plaintiff's expert report, the mean wages of "high school graduating, Black males in the 18 to 24 age cohort" to calculate damages for death caused by an allegedly unconstitutional shooting by police); Life Care Plan and Cost Analysis, *Bean-Kemp v. City of Houston*, No. 4:10-cv-03111 (S.D. Tex. Mar. 25, 2013), 2013 WL 10629666, at \*20-21 (calculating, in a plaintiff's expert report, the life expectancy for "African American males" in determining damages from an injury caused during an alleged unreasonable police seizure); Deposition Transcript of Glenda Glover, *Williams v. City of Cleveland*, No. 2:10-cv-215-SA-DAS (N.D. Miss. Aug. 8, 2011), 2011 WL 9918674, at \*14 (eliciting an expert's testimony that she used the life expectancy of "the average Black male" in determining damages for death allegedly caused by unconstitutional police Taser use); Report to Raymond Schlather, Attorney at Law of Robert Smith, *Jackson v. Johnson*, No. 87-cv-00613 (N.D.N.Y. Feb. 15, 1999), 1999 WL 35137569, at \*1 (disputing the calculation of damages conducted by plaintiff's expert because the "calculations take no account of the earnings and employment disadvantages still suffered by Black Americans—disadvantages that crucially affect the expected earnings of [the plaintiff]"); Transcript of Proceedings Volume VI, *Jones ex rel. Jones v. Ralls*, No. 96-0612-cv-W-5 (W.D. Mo. Apr. 24, 1998),

an expert witness who had performed thousands of lost-income analyses across his career testified that “no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases.”<sup>17</sup> Even when cases settle, this near-consensus approach to damages calculations informs the parties’ initial bargaining positions and, by extension, the ultimate settlement.<sup>18</sup> Therefore, these tables are at the center of how we value the rights and lives of people harmed by others – including victims of unconstitutional state violence.

Yet plaintiffs’ lawyers rarely challenge the use of race-based actuarial tables in court. Surprisingly, parties routinely *stipulate* to their use.<sup>19</sup> Indeed, plaintiffs’ lawyers have generally overlooked how race-based tables reduce plaintiffs’ recovery amounts, even as they target other factors for that very reason. Consider the following perplexing example: In *Estate of Gaither ex rel. Gaither v. District of Columbia*, a plaintiff’s expert used race to calculate damages in a case alleging unconstitutional conditions of imprisonment.<sup>20</sup> By using tables that undervalue Black lives, the plaintiff’s expert considerably reduced the potential award. Yet, at the same time, the plaintiff challenged the defendant’s expert’s use of the client’s socioeconomic status in calculating lost earnings.<sup>21</sup> If the plaintiff’s lawyer was concerned about improperly reducing the award amount, why rely on a race-based table in the plaintiff’s own report?

Similarly in *Woodson v. City of Richmond*, another constitutional tort case, the plaintiff’s expert objected to the city’s use of an online life-expectancy calculator that considered multiple factors not included in the standard actuarial tables,

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1999 WL 34688064 , at \*5 (eliciting expert testimony as to the life expectancy of “a Black male” in damages calculation in a § 1983 excessive force case).

17. *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004), *rev’d sub nom.* *United States v. Serawop*, 410 F.3d 656 (10th Cir. 2005). Though this was a criminal restitution case, the expert’s observation is relevant because, like torts cases, the matter involved the damages calculation for death or disability. Ronen Avraham and Kimberly Yuracko conducted numerous interviews with forensic damages experts and plaintiffs’ lawyers, who all made similar comments. Avraham & Yuracko, *supra* note 11, at 677 n.75. The lawyers they interviewed had no idea how experts generated their figures and “had never thought about questions of race and gender discrimination in this context.” *Id.*
18. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2493 (2004) (“To bargain in the shadow of trial, the parties must first forecast the likely trial outcome.”).
19. See, e.g., *Bedonie*, 317 F. Supp. 2d at 1316; see also *supra* note 16 and accompanying text.
20. Present Value of Lost Future Earnings & Household Serv. of Mikal Gaither, *Estate of Gaither ex rel. Gaither v. District of Columbia*, 771 F. Supp. 2d 5 (D.D.C. 2011) (No. 03-01458), 2008 WL 5940055.
21. *Estate of Gaither ex rel. Gaither v. District of Columbia*, No. 03-01458, 2013 WL 12320079, at \*3 (D.D.C. Sept. 11, 2013) (order denying plaintiff’s motion).



such as diet, exercise, and other lifestyle factors.<sup>22</sup> One of the objections the plaintiff's expert raised was that this calculator was impermissible because it was not sufficiently individualized, in part because it did not consider race.<sup>23</sup> Taking *Woodson* and *Estate of Gaither* together with the widespread practice of stipulating to the use of race-based tables suggests that there is an assumption—even by plaintiffs' lawyers—that race is relevant to calculating constitutional tort damages.

Though the use of race-based tables means Black lives are systematically undervalued, few courts have considered their constitutionality. Indeed, in the constitutional tort context, no court has ever struck down the use of race-based tables on constitutional grounds. And, in nonconstitutional cases, just three courts have struck down their use.<sup>24</sup> But even these courts were primarily squeamish about the reliability of the tables, not their constitutional implications. In short, these courts reasoned that because the defendant had not shown *this* particular person of color would live a shorter life or earn less money, the race-based figure was not a reliable way to calculate damages. This line of reasoning, however, is as much an argument against actuarial tables and statistical modeling as it is against the use of any particular factor in calculating damages. It does not address the uniquely problematic aspects of race-based tables and their potential equal protection implications.

This Note argues that the acceptance by plaintiffs' lawyers of race-based tables and courts' concerns about accuracy arise out of the same flawed assumption: that the goal of constitutional tort remedies is to restore a plaintiff to the position she was in before the unconstitutional conduct. This Note demonstrates that this seemingly value-neutral, technocratic fashion of calculating damages is anything but. Instead, the very selection of a narrow, private-tort-like framework smuggles in a value judgment that entirely ignores background conditions of inequality. Once the normativity of the current approach is laid bare, competing approaches—such as distributive justice or more historically sensitive corrective justice—that have long been discounted by scholars (and are thus undertheorized) become viable.

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22. Report or Affidavit of Michael D. Freeman, *Woodson v. City of Richmond*, 88 F. Supp. 3d 551 (E.D. Va. 2015) (No. 3:13CV134), 2014 WL 11099572 (evaluating plaintiff's life expectancy in an action for damages arising from life-threatening heatstroke allegedly caused by unconstitutional prison conditions).

23. *Id.* at n.3.

24. See G.M.M. *ex rel.* *Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015); *McMillan v. City of New York*, 253 F.R.D. 247, 252 (E.D.N.Y. 2008); *Bedonie*, 317 F. Supp. 2d at 1319.

Analytically, the question of how damages *should* be calculated comes before the question of whether some external constraint – such as the feasibility or constitutionality of the chosen method – permits that approach. In other words, there are two separate questions of constitutional law at play in this Note: (1) by what metric should we evaluate methods of calculating constitutional tort damages?; and (2) is the current method constitutional? But, in the interest of breaking before fixing and laying bare the tort-like assumptions in the current approach, Part I of the Note explores the constitutionality of the use of race-based tables in constitutional torts. Prior scholars have argued these tables are unconstitutional in the context of private torts. Part I builds on those arguments, emphasizing the important ways that the analysis is changed and strengthened when the defendant is a government actor and the plaintiff is seeking to remedy violations of constitutional rights.

Part II of the Note then focuses on the unexamined use of corrective justice in constitutional tort cases. This Part lays bare the fact that scholars, courts, and plaintiffs' lawyers have uncritically accepted a corrective justice framework for constitutional tort remedies, even when there are viable alternatives. Corrective justice, as it is discussed in this Note, refers to a remedial scheme where the goal is to make the wrongdoer pay for the harm he has caused. Of course, terms like "wrongdoer," "harm," and "cause" are open to many interpretations, and, as a result, there are many conceptions of how corrective justice should operate. But generally speaking, the overarching goal of corrective justice is to restore the plaintiff to some prior baseline.

In private torts, that baseline is where the plaintiff was before the harm caused by the defendant. Part II argues that the narrow baseline conceived of in private torts is inappropriate for constitutional torts because of the government's entanglement with, and partial responsibility for, the plaintiff's original baseline. In short, unlike the usual tort, the plaintiff and defendant in a constitutional tort case are not strangers drawn together by unfortunate happenstance.<sup>25</sup> This renders the original appeal of corrective justice – its seeming neutrality – an illusion. This Note builds on the work of prior scholars, but suggests, for the first time, that these analytical complications undermine the appeal of corrective justice, in all its varied forms, in the context of constitutional torts.

Part III explores distributive justice as a viable alternative to corrective justice in constitutional torts precisely because of the government-citizen relationship. This Note defines "distributive justice" to mean a remedial scheme where the goal is to make the distribution of entitlements in society more just. In the same

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25. Daryl Levinson has pointed out these analytical complications, but no author has extended the argument to propose that these complexities undermine the appeal of corrective justice itself. See Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1332 (2001).

way that corrective justice may take multiple forms (because concepts like “wrongdoer,” “harm,” and “cause” are slippery), so too can distributive justice (because what is “just” has many answers). The debate in constitutional tort remedies scholarship has centered on whether the government should pay *at all* and on how best to import narrow, tort-like corrective justice frameworks to the calculation of damages.<sup>26</sup> Proposing the use of a distributive justice framework is entirely new to this body of scholarship.

To be clear, this Note does not attempt to advance a universal theory of distributive justice or provide a firm answer to the question of what is “just” in the context of constitutional tort awards. This Note leaves it to future scholars to flesh out the precise contours of that approach, once accepted. Instead, this Note argues that the traditionally recognized drawbacks of distributive justice that have prevented its use in the private tort context do not preclude its use in the constitutional tort context. And, this Note argues, the combination of the increased viability of distributive justice and the problems that emerge with corrective justice in constitutional torts should produce a legitimate and difficult choice between the two frames. But first, distributive justice must be justified as a viable alternative to corrective justice. Accordingly, this Note argues that two features of constitutional torts make distributive justice frameworks especially apt.

First, constitutional torts—especially police shootings and prison conditions—perpetuate racial hierarchies. This racial injustice, in turn, alters the baseline and makes the use of race-based tables especially problematic. In other words, constitutional torts have distributive ripple effects. Second, because the government (i.e., taxpayers) and not a specific tortfeasor pays out damages, distributive justice has a special appeal. To be sure, even as distributive justice fixes many of the analytical problems with corrective justice raised in Part II, it admittedly introduces its own distinct issues, which the Note also explores. By drawing out the various trade-offs between the two approaches, this Note lays bare the value choices currently being made only implicitly in the selection of a narrow, tort-like corrective justice approach to constitutional tort remedies.

Finally, in Part IV, the Note argues that the use of race-based tables is a symptom of a broader embrace of a particular, tort-like vision of corrective justice in the civil rights context, which explains why the practice has largely gone unchallenged. In light of the advantages and disadvantages of both corrective and distributive justice described in Parts II and III, the Note concludes by suggesting that debate over which of the two frames should be used is much needed and tries to identify the trade-offs between the two. In doing so, the Note highlights

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26. See *infra* notes 128-134 and accompanying text.

the potential implications of that discussion for substantive areas of constitutional law.

### I. THE CONSTITUTIONALITY OF RACE-BASED ACTUARIAL TABLES

Numerous scholars have argued that the use of race-based actuarial tables is unconstitutional in calculating private tort awards.<sup>27</sup> None have considered the related question of their constitutionality in constitutional torts, where the government or a government official is a party to the litigation. Although these constitutional tort actions borrow significantly from private torts,<sup>28</sup> this context differs from the private tort context in two critical respects. First, for purposes of this Note, both § 1983 and *Bivens* are causes of action to seek damages for constitutional violations,<sup>29</sup> which usually require that the conduct be deemed state action. Section 1983 applies to state and local officials, whereas *Bivens* actions apply to federal officials. Second, § 1983 has a separate, statutory requirement that the defendant be acting “under color of” state law.<sup>30</sup> Thus, the legal standard at the heart of the claim varies from private torts and the universe of possible defendants is more limited.

All of the prior scholarship, as well as the few cases that have considered the constitutionality of these tables in the private tort context, have predicated part of their analysis on the perceived inaccuracy of the tables.<sup>31</sup> These scholars and judges argue that the use of the tables erroneously assumes racial and gender inequality will persist at current levels in the future and that the victim would have been subject to an average amount of discrimination.<sup>32</sup> In contrast, this Note’s analysis of the tables’ constitutionality does not rely on casting doubt on the accuracy of the tables. Rather, this Note argues that even if the tables were

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27. See, e.g., Chamallas, *supra* note 11, at 77 (arguing that race-based actuarial tables violate equal protection); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 337-69 (2018).

28. See *Manuel v. City of Joliet*, 137 S. Ct. 911, 920-21 (2017) (“In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts.”).

29. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Monroe v. Pape*, 365 U.S. 167 (1961) (finding that the purpose of § 1983 was to “give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position”).

30. 42 U.S.C. § 1983 (2018).

31. See Chamallas, *supra* note 11, at 77; Yuracko & Avraham, *supra* note 27, at 339-40; *supra* note 24 and accompanying text.

32. Chamallas, *supra* note 11, at 115-16.

accurate, their use to calculate remedies for constitutional torts would still violate the Equal Protection Clause.

Before diving into the constitutional argument, it is useful to set forth how these tables are used in practice, as this will help illuminate the state-action analysis. After a tort is committed and a suit for damages is brought, in addition to litigating the issue of liability, the plaintiff must show the amount of damages he would be owed if the defendant is found liable, and the defendant may contest this figure. Different jurisdictions operate differently,<sup>33</sup> but the most common pattern is that the race-based actuarial tables are introduced by experts retained by each party to prepare damages estimates.<sup>34</sup> These estimates are usually exchanged as full reports explaining methodologies and conclusions during the discovery phase of the litigation.<sup>35</sup> The experts are often then deposed.<sup>36</sup> Prior to trial, each party has the opportunity to object to the evidence proffered via motions in limine (motions made prior to trial to prevent the jury from hearing inadmissible evidence)<sup>37</sup> or to object to the other side's expert's methodology entirely through a *Daubert* challenge.<sup>38</sup> As discussed above, the use of race- or gender-based tables is rarely the basis of such a challenge.<sup>39</sup> Indeed, those tables often appear in *both* sides' expert reports and testimony. If there is no challenge (and thus usually no exclusion of the tables by the court), the experts will testify at trial, and juries will be left to pick a damages figure, often with little guidance in the jury instructions about what factors are or are not relevant.

#### A. State Action in Private Torts

Because the Equal Protection Clause applies to states, not private individuals, any plaintiff bringing an equal protection claim must show state action.<sup>40</sup> As a starting point, this Note does not dispute prior scholars' conclusions that the use

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33. Loren D. Goodman, Note, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353, 1362-65 (2017) (describing how race- and gender-based actuarial data is introduced in private tort cases in various jurisdictions).
  34. *Id.* Usually, each party retains its own forensic economist.
  35. See FED. R. CIV. P. 26(a)(2) (requiring disclosure of written reports by most expert witnesses during the discovery phase of litigation).
  36. See FED. R. CIV. P. 30 (permitting depositions).
  37. See FED. R. EVID. 103(d) & advisory committee's notes.
  38. *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579, 589-95 (1993) (setting the standard for admitting expert testimony in federal courts).
  39. See *supra* notes 19-23 and accompanying text.
  40. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972) (discussing the state-action requirement).

of race-based tables by private litigants in private torts is unconstitutional and constitutes state action. But it is a much closer call in the private tort context than in the constitutional tort context because it is harder for plaintiffs to show state action. Indeed, there are only two plausible points of state involvement in a private tort case: (1) judicial enforcement of a damages award with racially discriminatory, if unchallenged, origins under *Shelley v. Kraemer*;<sup>41</sup> and (2) the judge's inaction by failing to reject, sua sponte, racially biased testimony by both sides' experts under *Edmonson v. Leesville Concrete Co.*<sup>42</sup> Both of these arguments require a somewhat contentious expansion of state-action doctrine.

The first argument—that judicial enforcement of private actions grounded in, or affected by, discrimination constitutes state action—is fraught. In *Shelley v. Kraemer*, the Supreme Court held that judicial enforcement of private, racially restrictive covenants constituted state action.<sup>43</sup> The contours of this attribution theory—that is, that the underlying substantive discrimination in the covenant must be attributed to the courts if they enforce the covenant—seemed capacious but were not clearly defined at the time. After *Shelley*, the Court has hesitated to hold that judicial enforcement of an underlying private action is per se state action. In several post-*Shelley* cases involving racially restrictive provisions in wills or trespassing cases arising out of sit-ins at privately segregated restaurants, the Court refused to invoke *Shelley* even though it would clearly suffice to establish state action.<sup>44</sup> Instead, the Court looked for other sources of state involvement, such as racially inflammatory statements by local officials, local ordinances authorizing segregated establishments, or even local “customs” that the Court treated as having the force of law.<sup>45</sup> The upshot of the post-*Shelley* case law is that *Shelley*'s principle has rarely been extended beyond the facts of the case itself. And it is likely for that reason that the *Shelley* line of cases has not been the

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41. 334 U.S. 1 (1948) (holding that racially discriminatory housing covenants cannot be judicially enforced).

42. 500 U.S. 614 (1991) (holding that lawyers cannot use peremptory strikes to remove jurors in civil lawsuits solely on the basis of race).

43. 334 U.S. at 18-23.

44. Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 461-66 (2007) (recounting post-*Shelley* Supreme Court cases declining to adopt its reasoning to other state-action questions, but noting at least one other case to which *Shelley* has been extended).

45. *Id.*

primary hook on which recent scholars have hung their state-action arguments.<sup>46</sup>

Yet, despite scholars' bearish outlook on the continued relevance of *Shelley*, the only trial judge to consider the constitutionality of race-based actuarial tables, Judge Weinstein of the Eastern District of New York, relied exclusively on *Shelley*, albeit cursorily, when finding the use of these tables to amount to state action.<sup>47</sup> But Judge Weinstein did not explain why *Shelley* allowed a finding of state action in these cases, nor did he grapple with any of the post-*Shelley* case law that severely limited its application.

Moreover, as a practical matter, the Constitution permits states to authorize and even enable private individuals to engage in discriminatory conduct, even when the state itself may not. For example, a private homeowner may decline to invite guests of particular races to his property<sup>48</sup> and a church may decline to hire priests of a certain gender. So, a capacious reading of *Shelley* is likely insufficient grounds on which to establish state action.

At least one scholar, Martha Chamallas, has argued along the same lines as *Shelley*—even while not citing to it—that judges' admission of private litigants' racially discriminatory tables is unconstitutional state action. Chamallas does so by framing the tables' use as equivalent to common law. In other words, Chamallas argues that a judge's admission of the evidence “authorizes the jury to base its decision on the race or gender of the plaintiff.”<sup>49</sup> This, Chamallas says, functionally “establish[es] a common law rule that the future earning capacity of a plaintiff depends upon the plaintiff's gender and racial classification.”<sup>50</sup> Since common law rules are treated no differently in a state-action analysis than legislation,<sup>51</sup> the tables' introduction thus constitutes state action. Or so the argument goes.

Chamallas's argument, however, depends on several untested assumptions. First, it conflates normative and descriptive relevance when discussing the judge's role in admitting only relevant evidence and the expressive effect that

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46. In fact, Yuracko and Avraham explicitly reject this reading of *Shelley* as the basis for finding state action when actuarial tables are used in the private tort context. Yuracko & Avraham, *supra* note 27, at 351-52.

47. *McMillan v. City of New York*, 253 F.R.D. 247, 255 (E.D.N.Y. 2008) (citing *Shelley*, 334 U.S. at 14-21); *cf. G.M.M. ex rel. Hernandez-Abrams v. Kimpson*, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015) (citing *McMillan*, 253 F.R.D. at 249-56).

48. Yuracko & Avraham, *supra* note 27, at 351.

49. Chamallas, *supra* note 11, at 105-06.

50. *Id.* at 106.

51. *Id.* (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-6, at 1711 (2d ed. 1988)).

admission has on the jury.<sup>52</sup> If we accept that race is correlated with longevity and earning power, then the race-based tables are descriptively relevant to the question of how much this plaintiff would have earned in his or her life. By suggesting that the judge is expressing anything beyond the table's descriptive power, Chamallas contends that the judge *should* be policing what evidence may *normatively* be considered. But Chamallas does not identify any basis upon which the trial court judge may exclude descriptively relevant evidence on normative grounds. The trial court judge would, of course, exclude the evidence if its admission was unconstitutional. But that fact does little to help evaluate whether the admission of the evidence is state action—and thus covered by the Equal Protection Clause—in the first place.

Second, Chamallas's argument assumes that issues or practices stipulated to by litigants can somehow form binding common law rules that constitute state action. But this defies the basic organizing principle of our adversarial legal system, which allows federal courts to make law only where there are live cases or controversies between the parties before them.<sup>53</sup> It is possible that the consistent and repeated use of these tables creates some sort of custom or other basis for finding state action, but that, too, would be a significant expansion in the scope of state-action doctrine. And although it might be difficult to articulate why the constitutionality of the use of tables themselves should turn on whether private litigants ever raise that issue in a way that requires judicial ruling, it is equally difficult to explain why private parties' agreements may generate common law rules. But the point is that the assumptions that underlie this reasoning are far from ironclad.

This brings us to the second basis for finding state action on which scholars rely: the *Edmonson* framework.<sup>54</sup> In *Edmonson v. Leesville Concrete Co.*, the Court found that a private party's racially discriminatory peremptory challenge to a juror in a civil case constituted state action.<sup>55</sup> Under *Edmonson*, two requirements must be met for a finding of state action: (1) "the claimed constitutional deprivation [must have] resulted from the exercise of a right or privilege having its

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52. Chamallas attempts to distinguish this case from the admission of a potentially faulty eyewitness account by noting that the concern in that case is with *accuracy* as opposed to *relevance*. See Chamallas, *supra* note 11, at 106. She argues that the jury is likely to believe that the judge thinks the eyewitness account is relevant, but the judge has made no statement, implicit or explicit, on its credibility. *Id.* But this distinction relies on psychological assumptions about what juries do or do not gather about a judge's leanings based on the evidence presented—assumptions that lack citation or support in Chamallas's work.

53. U.S. CONST. art III, § 2.

54. Chamallas, *supra* note 11, at 106-11.

55. 500 U.S. 614 (1991).



source in state authority,” and (2) “the private party charged with the deprivation [must be able to] be described in all fairness as a state actor.”<sup>56</sup>

Chamallas argues that the *Edmonson* framework provides a basis for finding state action when private tort litigants use race-based tables. In order to satisfy *Edmonson*’s first prong, Chamallas analogizes the expert testimony using actuarial data to the aspects the *Edmonson* Court found persuasive about peremptory challenges: each is regulated by a series of statutory and decisional rules and the special status of expert testimony, like peremptory challenges, has “no significance outside a court of law.”<sup>57</sup> Chamallas’s analysis is persuasive here, and it is equally true in the constitutional tort context.

To satisfy the second *Edmonson* prong, however, Chamallas reverts back to her arguments about the judge’s admission of evidence, the implicit creation of common law rules, and the unique governmental nature of a courtroom.<sup>58</sup> These arguments suffer from the same shaky assumptions identified above. Indeed, this atmospheric argument that judicial proximity to or enforcement of private discrimination constitutes state action is undermined by the Court’s reticence to rely on or extend *Shelley*, even if Chamallas does not cite *Shelley* for support on this particular argument.

None of this is to say that the state-action argument in the context of private torts is a nonstarter. Rather, it is merely to recognize that the argument is messy and uncertain, in part because this area of jurisprudence “ha[s] not been a model of consistency”<sup>59</sup> and in part because the court is overseeing quintessentially private cases concerning issues about which the parties agree.

### B. State Action in Constitutional Torts

The state-action analysis is much cleaner in constitutional torts because a government actor is a party to the lawsuit. Here, *Edmonson*’s test is easier to satisfy because the defendants are government employees who have been sued pursuant to actions taken in the name of the state, litigating the scope of the government’s power vis-à-vis citizens. This means that actions taken by the defendant and through his counsel are more clearly a source of state action. Even though *Bivens* and § 1983 actions must be brought against private defendants, these suits are the primary means of both constitutional interpretation and enforcement in areas like excessive force and prison conditions. Therefore, these suits – and by extension the actions of defendant’s counsel – themselves serve a

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56. *Id.* at 620.

57. *Id.*; Chamallas, *supra* note 11, at 107.

58. Chamallas, *supra* note 11, at 108-09.

59. *Edmonson*, 500 U.S. at 632 (O’Connor, J., dissenting).

state function. To be clear, the arguments below supplement, rather than supplant, the analysis provided by Chamallas, as each of her arguments is still relevant to the constitutional tort context.

In constitutional torts, the analysis of *Edmonson*'s first prong is roughly equivalent to the private tort analysis, with one additional fact militating in favor of finding state action in many cases. Because many states and municipalities are statutorily required to provide representation to officers sued under § 1983<sup>60</sup> – and many more elect to do so without such a statutory requirement<sup>61</sup> – the defendant often presents the discriminatory evidence through a statutorily provided attorney and pays the expert witness with government funds. Thus, unlike the private tort defendant, in many cases the constitutional tort defendant's entire (discriminatory) case “result[s] from the exercise of a right or privilege having its source in state authority.”<sup>62</sup> Thus, while the first *Edmonson* prong weighs in favor of finding state action even in private tort suits, the case is only made stronger where the defendant's counsel is provided by the government.

The second prong – the “factbound inquiry” of whether the actor can “be described in all fairness as a state actor”<sup>63</sup> – is where constitutional tort defendants differ most drastically from their private counterparts. To determine whether the second *Edmonson* prong is satisfied, the following three factors are relevant: (a) “the extent to which the actor relies on governmental assistance and benefits”; (b) “whether the actor is performing a traditional governmental function”; and (c) “whether the injury caused is aggravated in a unique way by the incidents of governmental authority.”<sup>64</sup> Each of these factors demonstrates that the use of race-based actuarial tables by a constitutional tort defendant is state action.

First, constitutional tort defendants unquestionably rely on governmental assistance and benefits in mounting their defense. As discussed above, a constitutional tort defendant is typically represented by a government attorney or an attorney paid for by the government.<sup>65</sup> By extension, this means the expert applying the discriminatory tables to reduce the awards paid to Black plaintiffs is paid with state dollars. In funding the litigation, the government “has not only made itself a party to the [biased act], but has elected to place its power, property

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60. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 915 (2014).

61. See *id.* at 915-16.

62. *Edmonson*, 500 U.S. at 620.

63. *Id.* at 620-21.

64. *Id.* at 621-22.

65. Schwartz, *supra* note 60, at 915.

and prestige behind the [alleged] discrimination.”<sup>66</sup> Thus, the role of the government or government-provided lawyer is analogous to prosecutors using race-based peremptory challenges, which the Supreme Court held to be state action<sup>67</sup> even before *Edmonson* found unconstitutional *all* discriminatory peremptory challenges, regardless of who exercised them. Accordingly, the close nexus between the state and the constitutional tort defendant’s lawyer bolsters a finding of state action in this context.

Second, the constitutional tort defendant and her lawyer are performing a “traditional government function.” Although—due to sovereign immunity—§ 1983 and *Bivens* suits are typically brought against state, municipal, or federal officers in their individual capacities,<sup>68</sup> these individuals are nearly universally indemnified by their governmental employers. In fact, governments pay over 99.9% of the dollars recovered by plaintiffs in police-misconduct suits.<sup>69</sup> Thus, at stake in these disputes is whether the government will have some financial exposure as a result of their employees’ actions. Moreover, the role of defending government from legal liability is traditionally a function of government. For example, if a government contractor sues the government for breach of contract, an attorney from the Department of Justice, state attorney general’s office, or city attorney’s office would typically be expected to defend against the suit.

To be sure, a police-officer defendant is not formally representing the government—by definition, he is being sued in his personal capacity—but the Supreme Court’s precedents in *Polk County v. Dodson*<sup>70</sup> and *West v. Atkins*<sup>71</sup> demonstrate that courts take a functional, not formalist, view on this issue. In *Polk County*, the Court held that a public defender was not a state actor in his general representation of a criminal defendant.<sup>72</sup> In reaching this conclusion, the Court evaluated the alignment of the public defender’s function with interests of the

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66. *Edmonson*, 500 U.S. at 624 (internal quotation marks omitted) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

67. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *Carter v. Jury Comm’n*, 396 U.S. 320, 330 (1970).

68. *E.g.*, *Ex parte Young*, 209 U.S. 123 (1908). *But see Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

69. Schwartz, *supra* note 60, at 936. Police departments also rarely pay the costs of litigation. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1032 (2010); Schwartz, *supra* note 60, at 957.

70. 454 U.S. 312 (1981).

71. 487 U.S. 42 (1988).

72. *Polk County*, 454 U.S. at 324-25.

state in light of his particularized role.<sup>73</sup> Since this relationship is inherently “adversarial,” public defenders were deemed not to be state actors when representing criminal defendants.<sup>74</sup>

By contrast, in *West*, the Court held that a private physician contracted by a state prison to provide medical care to incarcerated people was a state actor.<sup>75</sup> Again, the Court looked to the individual’s “function within the state system, not the precise terms of his employment” to evaluate state action.<sup>76</sup> Because the State exercised its authority to incarcerate the plaintiff in that case and because the physician, while not a state employee, was hired in order to further the State’s obligation to provide adequate medical treatment to the plaintiff, he was properly considered a state actor.<sup>77</sup> In other words, there was full alignment between the physician’s function in the state system and the state’s interests.

A government employee, sued in her personal capacity but indemnified by the government and represented by a government lawyer or government-funded lawyer, falls closer to *West* than *Polk County*. Near universal indemnification of police officers means that the interests of the defendant and the state are fully aligned—indeed, the state may even have a greater interest in a favorable outcome than the defendant. Moreover, the lawyer presenting evidence on the defendant’s behalf is typically a government employee, in which case there is no delegation of a government function—the function is in fact being performed by the government. And even in the case where the government provides private counsel, that lawyer is in a contractual relationship with the government and is acting in alignment with government interests.

The fact that the defendant is sued in a personal capacity arguably introduces a wrinkle into the analysis, but that, too, is mistaken. The obvious point is that the individual must already have been adjudged a state actor for the purposes of the Constitution with respect to the conduct at the heart of the suit and thus, functionally, the defendant is only there because of his role in the government apparatus. More subtly, even as they sit in the courtroom, constitutional tort defendants are serving the government function (under either § 1983 or *Bivens*) of

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73. *Id.* at 320 (“[I]t is the function of the public defender to enter ‘not guilty’ pleas, move to suppress State’s evidence, object to evidence at trial, cross-examine State’s witnesses, and make closing arguments [on] behalf of defendants. All of these are adversarial functions.” (footnote omitted)).

74. *Id.* at 318, 324-25.

75. *West*, 487 U.S. at 55.

76. *Id.* at 55-56.

77. *Id.* at 54-56.

providing a remedy for state misconduct. In *West*, the Court did not simply consider the doctor's role in providing medical care in determining that he was a state actor but also considered the liability of the doctor as essential to avoid "depriv[ing] the State's prisoners of the means to vindicate their Eighth Amendment rights."<sup>78</sup> Thus, part and parcel in acting on behalf of the state for purposes of § 1983 is providing a remedy to citizens whose rights have been violated.<sup>79</sup>

This governmental role of providing an avenue for redress for citizens is in fact the driving force behind the very legal fiction requiring that defendants be sued in their personal capacity. Officers are only sued in their personal capacities because sovereign immunity precludes governments from direct suit.<sup>80</sup> And when the Supreme Court created this workaround in *Ex parte Young*, it did so in order to ensure a remedy would lie when states, through their officials, deprive individuals of their constitutional rights.<sup>81</sup> And on a structural level, constitutional tort suits are often the only means by which constitutional interpretation and enforcement of rights under the Fourth and Eighth Amendments occur, and thus these suits provide a crucial explanatory function for state officers going forward. Therefore, in a very basic sense, even though the defendants are sued in their personal capacity, the officer is serving a government function.

The third and final factor—whether the injury caused is aggravated in a unique way by the incidents of governmental authority—is the most slippery, but it, too, counsels in favor of finding state action. In *Edmonson*, the Court found that "[r]ace discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there."<sup>82</sup> This, of course, is true of private torts, too. But the issue is aggravated even more in the constitutional tort context for two reasons. First, it is worse for racial discrimination in the courtroom to be initially proffered by a government-affiliated party. The discriminatory position is not merely being tacitly endorsed (as in private torts or peremptory challenges in civil cases) by the government. Rather, the government is actively advocating for, and seeking to benefit from, racial discrimination. On a purely expressive level, the fact that race-based actuarial tables are being used to value a constitutional violation implicitly tells plaintiffs not only

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78. *Id.* at 56.

79. Indeed, *West* approvingly quotes the partial dissent below, which warned that if a strictly formalist approach to state action were followed, "the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for vindication of those rights, whose protection has been delegated to 'private' actors, when they have been denied." *Id.* at 56 n.14 (internal quotation marks omitted) (quoting *West v. Atkins*, 815 F.2d 993, 998 (4th Cir. 1987) (Winter, C.J., concurring and dissenting)).

80. *Ex parte Young*, 209 U.S. 123 (1908).

81. *See id.* at 163.

82. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

that their government values their lives less, but that the Constitution does, too. Given the Constitution's evolving project of promoting racial equality in post-Civil War America, it is hard to see how such a proclamation does not aggravate discrimination.

Second, and more importantly, the nature of the violation at issue in these cases aggravates the discrimination in the courtroom. As the rest of the Note will discuss at length, a constitutional violation is critically different from a simple private tort. This is because the racial subordination reflected in the tables and the kinds of constitutional claims in which they are used are mutually reinforcing. Police violence both perpetuates and reflects the very racial caste embedded in the race-based tables. If constitutional violations against members of marginalized communities are undervalued, they will be underdeterred, and the state will continue to play a role in marginalizing those communities.

Thus, the *Edmonson* factors are more easily satisfied by defendants' use of race-based tables in constitutional torts than in private torts. Indeed, the use of these tables in constitutional tort litigation is state action and should be subject to equal protection analysis. As the next section will show, they do not survive that analysis.

### C. *Classifications, Narrow Tailoring, and Compelling State Interests*

It can hardly be disputed that the tables classify on the basis of race, as their entire purpose is to provide different predictive data based on the race of the individual. As such, they "must be analyzed by a reviewing court under strict scrutiny."<sup>83</sup> This means that the tables' use is "constitutional only if [it is] narrowly tailored to further compelling governmental interests."<sup>84</sup> While "narrow tailoring does not require exhaustion of every conceivable race neutral alternative," strict scrutiny does require a court to examine with care, and not defer to [a defendant's] 'serious, good faith consideration of workable race-neutral alternatives.'<sup>85</sup>

Here, the compelling government interest would be a compensatory scheme for constitutional torts that accurately reflects life expectancy and wages. While this Note later contends that the government's interest in a narrow, tort-like compensatory scheme is, in fact, not all that compelling, this interest is unlikely

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83. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

84. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (quoting *Grutter*, 539 U.S. at 326).

85. *Id.* at 2420 (quoting *Grutter*, 539 U.S. at 339-40 (emphasis added)).

to pass constitutional muster even under current understandings of the purpose of constitutional tort compensation.

Indeed, the Supreme Court has rejected appeals to accuracy when the “precision” imports or perpetuates private racial biases.<sup>86</sup> In *Palmore v. Sidoti*, for example, the Court struck down the consideration of race in a custody battle between a white father and a white mother who had recently begun cohabitating with a Black man. State law required consideration of the “best interest of the child,” and the Florida trial court considered the difficulties the child would face by being raised in a mixed-race household.<sup>87</sup> On appeal, the Supreme Court found it would “ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated” but held it would nonetheless be constitutionally impermissible to consider them.<sup>88</sup> The Court added that “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect” to the detriment of a marginalized group.<sup>89</sup>

Though this Note challenges the notion that the racial discrepancies reflected in the actuarial tables are *solely* the result of private biases – rather, this Note contends that government action is also a contributing factor<sup>90</sup> – the tables nevertheless give effect to this discrimination. Thus, under *Palmore*, a simple preference for “accuracy” in computing damages cannot constitute a compelling state interest. This seems especially true because, in *Palmore*, the need for accuracy was part of an analysis of child welfare – which could involve danger or other deleterious effects to the child if calculated incorrectly – whereas here, the need for accuracy in the damages analysis is less obvious. Given the lack of a compelling state interest, the use of race-based tables falls short at the first step of the analysis and is therefore unconstitutional.<sup>91</sup>

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86. See *Palmore v. Sidoti*, 466 U.S. 429, 433-34 (1984).

87. *Id.* at 431.

88. *Id.* at 433.

89. *Id.* The Court similarly declined to permit litigants to manipulate real private biases to their advantage when it held race- and gender-based peremptory challenges of jurors to be unconstitutional. See *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986). That analogy, however, is only so helpful, because the Court in those cases also relied on the discriminatory effect of the challenge to impair the *jurors'* right to participate as a juror, rather than just the effect of biased jury selection on the defendant's criminal trial. *Id.* at 87 (“[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror.”); see also *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994) (“[I]ndividual jurors themselves have a right to nondiscriminatory jury selection procedures.”).

90. See *infra* Part III.

91. Professor Chamallas also convincingly extends these arguments to gender-based tables, Chamallas, *supra* note 11, at 117-22, despite recognizing that their use is slightly more complicated

To be clear, this Note does not argue that *all* race-based predictive classifications are inherently suspect. Instead, these particular classifications – race-based actuarial tables that result in lower valuation of some lives relative to whites – have the undeniable effect of disadvantaging historically marginalized groups on the basis of a protected characteristic. This is unlike the more hotly contested context of affirmative action, wherein racial classifications have been allowed by the Supreme Court to aid historically marginalized groups in university admissions. In that context, a debate emerges between two wings of the Supreme Court, with the more conservative members viewing equal protection as prohibiting classification on the basis of race and more liberal justices understanding equal protection to prohibit subordination on that basis.<sup>92</sup> The debate between

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for two reasons. First, the governing constitutional standard is more lenient in permitting sex-based classifications. *Id.* at 118-19. Second, women, the historically marginalized group, are disadvantaged by discrimination in employment but would be advantaged by tables because they, on average, live longer lives than men. *Id.* at 119-21.

Still, Chamallas finds the consideration of these characteristics unconstitutional. The use of gender-based wage tables reflects discrimination arising from society's embrace of traditional gender roles, an assumption the Supreme Court has refused to permit to be woven into law. *See id.* at 117; *see also, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (holding that gender-based distinction in the Social Security Act violated the Constitution because it discriminated against women as wage earners); Reed v. Reed, 404 U.S. 71 (1971) (rejecting a state statute that said males must be preferred to females as administrators of estates as a violation of the Equal Protection Clause). And "worklife expectancy" tables, which incorporate data about the average hours and years that women spend in the workforce, result in similar problems. Women's average hours and years in the workforce tend to vary from men's in part because of time taken off for child care, a differential that arises largely from the adoption and imposition of sex stereotypes around caregiving and gender roles. Moreover, gender-based life-expectancy tables, which could be seen as predicated on "real" differences between the sexes, have already been rejected by the Court under Title VII. Chamallas, *supra* note 11, at 120; *see, e.g.,* L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding that women could not be required to make larger pension contributions than men on the basis of longer life expectancy).

92. *Compare* Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race . . . because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."), *with* Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 381 (2014) (Sotomayor, J., dissenting) ("Race matters . . . . The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."). The debate between anticlassification and antisubordination proponents is not one that takes place at any one step of the constitutional analysis, but rather, these ideas are "mediating principles" or "conflicting visions of how the commitment to racial equality should be understood and how the ideal might be most effectively realized." Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 784 (1987). Because these two views are mediating principles, defining them "solely with reference to . . . doctrinal debates" can result in "fundamentally mischaracteriz[ing] the development of American antidiscrimination law" and



these two views of equal protection is central to understanding the stakes of the remedial frameworks chosen in this area. But the relevant point, for now, is that under either an anticlassification or antisubordination understanding of equal protection, race-based actuarial tables flunk the constitutional test as they classify and subordinate on the basis of membership in a protected class without satisfying the requirements of strict scrutiny.

#### D. Lingering Concerns About Accuracy

None of the preceding constitutional analysis turns on the accuracy of the tables, yet scholars and courts still take the time to cast doubt on the tables' accuracy when contending they are unconstitutional. Chamallas supplements her constitutional arguments by suggesting that the use of these tables creates inaccurate results, much as Judge Weinstein did in *McMillan* and *G.M.M.*<sup>93</sup> However, this argument is not limited to the consideration of protected characteristics in generating damages awards: actuarial tables provide only a statistically calculated median result. Thus, there will always be a chance that the tables are inaccurate for a given individual, even when additional information can be inputted to further tailor the analysis. Even potentially innocuous characteristics, like educational attainment, include outliers; some college dropouts go on to be billionaires.

More importantly, these concerns about accuracy serve primarily to assuage fears that the resulting neutral tables will not create huge skews or results any more unrealistic than the current statistics. But of course, Chamallas and Weinstein likely would not be satisfied (and neither would the Constitution) if a perfectly accurate model, reflecting the many complexities and changes over time in the nature and degree of racial and gender discrimination, was used instead.<sup>94</sup> Indeed, it is the fact that these tables reflect and perpetuate something real, true,

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downplaying the fact that “antisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice.” Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MICH. L. REV. 9, 13 (2003).

93. See Chamallas, *supra* note 11, at 115 (“Moreover, it is far from clear that reliance on race-based data generates the most accurate estimation of future earning capacity.”); see also *G.M.M. ex rel. Hernandez-Abrams v. Kimpson*, 116 F. Supp. 3d 126, 140, 152-54 (E.D.N.Y. 2015); *McMillan v. City of New York*, 253 F.R.D. 247, 255-56 (E.D.N.Y. 2008).

94. Notably, Judge Weinstein’s opinions invoke concerns about accuracy atmospherically and in analyzing a potential due process problem, not equal protection. *G.M.M.*, 116 F. Supp. 3d at 140, 152-54; *McMillan*, 253 F.R.D. at 255-56. Yet the point remains that these scholars and judges go out of their way to undermine the accuracy of the tables, even when it is not legally necessary. This further illustrates the latent assumption that accuracy is the driving normative force in evaluating damages schemes for constitutional torts, rather than some other metric.

and pernicious that creates cause for concern. The question, then, is what should replace them and what role, if any, should a need for this conception of “accuracy” play in answering that question.

## II. CORRECTIVE JUSTICE AND CONSTITUTIONAL TORTS

To determine what should replace race-based tables—and to understand scholars’, courts’, and practitioners’ focus on accuracy—this Part will explore the theoretical framework in which the use of race-based tables arose: corrective justice. Constitutional tort law borrows this framework from private torts, but a closer comparison of the two contexts shows that a more complex approach to damages calculations for constitutional torts is required.

### A. *The Origins and Appeal of Corrective Justice*

The use of corrective justice in the constitutional tort context likely arises from the fact that it is a very good framework for private torts. As this Section will explain, the combination of intuitive moral principles, like requiring wrongdoers to pay for the harm they have caused and the relative ease with which that harm may be measured and quantified, makes corrective justice a good fit for the relatively circumscribed social problems—civil wrongs between strangers—that tort law seeks to address.

Corrective justice is the tidy moral notion that the “harm-doer” should pay only for the harm they cause.<sup>95</sup> And one of the organizing principles of private tort law is “achieving corrective justice between the parties.”<sup>96</sup> To be clear, corrective justice does not itself provide answers to questions about how to define harm or determine causation; rather, it establishes what this Note will call a “framework” through which a remedy may be evaluated. Corrective justice is the dominant framework for evaluating damages in tort law,<sup>97</sup> and as the paradigmatic case of corrective justice in action, tort law’s scope informs common understandings of corrective justice. This Note argues that the reflexive embrace of

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95. See DOBBS ET AL., *supra* note 9, § 11; Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1326 (2017); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002).

96. Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 903 (2001) (quoting Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997)).

97. *Id.*

accuracy by scholars and courts stems from an assumption that damages for constitutional torts should restore the plaintiff to precisely his position in the moment before the constitutional violation.<sup>98</sup>

This assumption of corrective justice has its merits. Corrective justice’s moral intuition that we should pay for the harm we cause is attractive and feels relevant to assigning liability. It produces efficient results by requiring defendants to internalize the costs of their behavior without saddling individuals with the responsibility to pay for harms they did not create.<sup>99</sup> Given the ad hoc nature of tort cases, there is a social appeal to avoiding what feels like disproportionate costs for occasional negligence.

In addition to its clear moral intuition, tort-like corrective justice is an easy-to-administer standard. The court looks to the status quo ex ante, or the world before the accident, and then looks at the plaintiff’s current state of affairs.<sup>100</sup> However “worse off” the plaintiff appears to be as a result of the tort is the amount the defendant must compensate the plaintiff for his or her trouble. Another way to put it is that the court is trying to compensate the plaintiff enough to put the plaintiff in the same position that she would have been in had the harm never occurred. There are, of course, valuation problems with this (how much do you value your life?), but at least the harm to be converted into dollars is clearly identified.

The administrability of the standard has a related perceived benefit: judges are not engaged in abstract, quasi-legislative value judgements.<sup>101</sup> A bedrock principle of our legal system is that our federal courts may only exercise their judicial power to resolve “cases or controversies” before them,<sup>102</sup> which serves to protect the separation of powers between the judiciary and the political

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98. *See id.* (noting that the Supreme Court has borrowed the corrective justice framework for constitutional torts).

99. Even the “eggshell plaintiff rule,” which requires defendants to take plaintiffs as they find them, still centers on a bilateral conception of harm. The harm defendants must pay for might be larger than expected, but it still arises out of the accident at hand and disclaims social and distributive questions. *See, e.g., Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891).

100. *See* John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1070 (2003) (describing corrective justice’s driving metaphor as one of “arithmetic balance”).

101. *See* *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) (explaining that evaluating “the manner in which a particular law reverberates in a society”—i.e. its relationship to background conditions of equality—is a legislative and not a judicial responsibility); *cf.* Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11-12, 20-21 (2013) (noting that judicial involvement in remedying background conditions of racial inequality engendered fears of judicial overreach, leading to the discriminatory purpose standard in disparate impact cases).

102. U.S. CONST. art. III, § 2, cl. 1.

branches.<sup>103</sup> In private torts, judges do not need to comment, in any way, on the state of affairs before the accident. The system is value-neutral. Though it might seem unjust or inefficient for a low-wage worker to need to fully compensate a CEO for damages to his luxury car arising out of a parking lot accident, that is not a judgment for the court to make.<sup>104</sup> Indeed, judges need not worry about the justness or propriety or efficiency of the world *ex ante*.<sup>105</sup> They may rely on other societal mechanisms, like tax and transfer,<sup>106</sup> to handle those questions and focus on the narrow and temporally defined question in front of them: how do we return the plaintiff back to his position before the accident?

*B. The Incomplete Importation of Corrective Justice from Private Tort Law*

Constitutional tort law adopts private torts' damages scheme, and thus its reliance on corrective justice. But the two types of harms, and the substantive law underlying each type of action, are very different. While Daryl Levinson has noted that private tort law's focus on a very narrow conception of corrective justice might be misplaced in some areas of constitutional law,<sup>107</sup> this does not go far enough. This Section explores the differing nature of private and constitutional torts and why those differences undermine the traditional rationales for

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103. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (describing the “single basic idea” animating the standing doctrine as “the idea of separation of powers”); F. Andrew Hessick, *The Separation-of-Powers Theory of Standing*, 95 N.C. L. Rev. 673, 684-701 (2017).

104. Several scholars have used a similar hypothetical scenario to explain this aspect of corrective justice. E.g., David Weisbach, *Negligence, Strict Liability, and Responsibility for Climate Change*, 97 IOWA L. REV. 521, 559 (2012) (“Tort law imposes liability on negligent injurers regardless of income: if you negligently run over me with your car, you are liable even if you are poor.”); Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 145 (2008) (describing a hypothetical scenario where a “poorer” person who struck Bill Gates would be forced to compensate Gates for that tort).

105. E.g., Levinson, *supra* note 25, at 1332 (“[T]he corrective goal of adjudication is to maintain background distributive neutrality by restoring the pretransactional level of welfare.”); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 408 (2000) (noting that corrective justice theories “bracket[] the background distribution and focus[] solely on the bilateral interaction between wrongdoer and victim”). Disclaiming responsibility for background conditions, either out of the difficulty of crafting a remedy or concern about judicial role, is the central function of the invidious intent requirement in disparate impact cases. See Siegel, *supra* note 101, at 20-21 (discussing the introduction of discriminatory purpose by *Washington v. Davis*, 426 U.S. 229 (1976), as a product of concern over an unlimited judicial role in remedying background conditions of inequality).

106. Levinson, *supra* note 105, at 404-05 n.191 (placing tax and transfer as the preferable and dominant vehicle for redistribution).

107. Levinson, *supra* note 25, at 1332.

relying on corrective justice as the dominant theoretical framework in constitutional tort damages.

Corrective justice's appeal lies in its simplicity, which finds its origins in private tort law's narrow vision of its role in society. The paradigmatic case involves two strangers colliding on the street. Their lives intersect for one brief moment – the accident – but often in no other way. In this case, tort law's moral intuition is that the person at fault must correct for the harm done by the accident but nothing else. The baseline against which the harm is defined is narrow and thus easy to measure: it is the victim's position before the injurer caused harm.

For these reasons, tort law is an odd vehicle to address the discrimination that produces different wage and life expectancies for Blacks and whites. It is hard to say that texting while driving causes, in any meaningful way, the kinds of racial hierarchies that explain why Blacks make less wages and live shorter lives than whites. Should negligent drivers assume the responsibility to “correct for” centuries of discrimination if they accidentally hit a Black child? We probably do not think so – in part because who ends up bearing the burden of these ad hoc reparations is essentially random. Rectifying racial inequality through a tax on bad drivers does not make much intuitive sense.

And, as Levinson notes, private tort law takes a very narrow view of the transaction between the injurer and the victim – both because of their typical status as strangers and the intuitively discrete nature of the harms in private torts. For example, Levinson explains that “a surgeon who operates on a patient without consent and causes pain and suffering may be able to offset the value of future pain and suffering averted by the operation,”<sup>108</sup> but we would not think that a surgeon who had previously treated a patient pro bono could offset the costs of that operation against the harm caused by a future, botched procedure.

But, Levinson argues that the continuous exchange of harms and benefits between the government and citizens makes it much harder to set a baseline against which to measure harm. This is because, in many instances, those harms and benefits exchanged between the government and citizens that private tort law would deem legally and intuitively irrelevant to the transaction are, in fact, legally and intuitively relevant.<sup>109</sup> He provides the example of a tugboat operator who sought compensation during World War II for a government taking of the boat.<sup>110</sup> In that case, the operator sought the market value of the boat, but the

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108. *Id.* at 1320-21.

109. *Id.* at 1332-38. Though Levinson refers to transactional “frames” to describe the set of harms and benefits that a court considers in setting a baseline in a given case, this Note will, for clarity, refer to transactional “scope.”

110. *See id.* at 1314-15 (discussing *United States v. Cors*, 337 U.S. 325 (1949)).

Court considered the fact that the government—through its war waging—was driving the demand in the market.<sup>111</sup> In other words, because of the unique relationship between the government and the tugboat owner, the government’s activity was responsible for an artificially high baseline for the owner and the Court adjusted the remedy accordingly.

Similarly, in constitutional torts, like police shootings, citizens and officers of the state are, in no meaningful sense, “strangers” such that the only harms and benefits that could possibly be considered are those taking place at the moment of the shooting. Rather, the police shooting is just one event in a lifetime of interactions between the victim and the government.<sup>112</sup> And, like the government’s demand for tugboats, these interactions build and shape the baseline to which the plaintiff would be restored under a narrow understanding of corrective justice akin to the one used in private torts.

For example, before the shooting, the victim might have previously benefited from the government’s public schools, been harmed by the segregated nature of those schools, benefitted from the safer streets created by an active police force, and been harmed by the effects of mass incarceration. The government’s relationship to the victim’s socioeconomic outlook extends back long before the victim was born to the advantages or disadvantages conferred on his or her parents and grandparents. In short, the tidy picture corrective justice envisions is much more complicated in the constitutional tort context because the harm-doer and victim share a long, complicated history. Thus, the narrow, tort-like conception of corrective justice is less apt, so we must ask the more difficult question: what harms and benefits are relevant in calculating the “harm” that must be corrected for?

Levinson identifies at least three axes across which line-drawing problems emerge—“over time, over subject-matter scope, and over groups of individuals”<sup>113</sup>—each of which complicates the project of identifying the right baseline for purposes of corrective justice. And it is relatively simple to see how these axes could be outcome determinative in certain cases. Imagine a plaintiff was unconstitutionally stopped because of racial profiling on one day but was *not stopped* on a different day when police used racial profiling to target a different race. If the police department can expand the temporal scope of the transaction to include both days, the harms and benefits offset each other. Turning to group aggregation, consider a plaintiff alleging that a pattern of de facto school segregation harms his educational prospects as a minority. If the transaction includes

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111. *Id.*

112. Because of the widespread practice of officer indemnification, Schwartz, *supra* note 60, at 936-37, the officer is a stand-in for the government writ large in these encounters.

113. Levinson, *supra* note 25, at 1317.

the experiences of other members of the same minority group, the government could offset the plaintiff's claims by showing that other minority children are advantaged by a system of affirmative action in the city's magnet schools.

Subject-matter aggregation is equally intuitive. Returning to the case of police brutality, the city could claim an offsetting benefit in the form of the public education provided to the plaintiff. Though in some ways this seems irrelevant to the question at hand, there could be constitutional transactional scope that consider the government's role in generating the lost earning potential.<sup>114</sup> Each of the examples provided here use offsetting *benefits*, but the line-drawing problem applies equally when trying to introduce additional *harms* across these axes. The point is that the "correction" is not easily identifiable.

Levinson saves this approach from complete indeterminacy by suggesting that each constitutional rule should guide which harms and benefits are inside or outside of a transaction.<sup>115</sup> For example, the Takings Clause is understood to be directed at preventing individualized, targeted harms resulting from capricious government activity—in other words, a narrow transactional scope. Thus, under any view of the Takings Clause, the government may not point to the public benefits, or even the private benefits to a neighboring property owner, in order to offset its liability to the citizen whose property was taken. Yet, when a citizen complains that a government policy violates the Equal Protection Clause, part of the inquiry is whether there is a "government interest" that justifies the action. This is merely another way of saying that courts consider whether there are offsetting benefits to whatever harm is imposed on the plaintiff in a particular case. Thus, the scope of a transaction for a Takings Clause violation is different from the scope for an equal protection violation.

This seems tidy enough, but these constitutional rules are all contested themselves. The role of the Equal Protection Clause in remedying historical subordination versus preventing future racial classification is hotly debated.<sup>116</sup> This debate could also infect the search for a principled transactional scope, with anti-classification advocates likely drawing a much smaller transactional scope than antidisubordination advocates. Therefore, as Levinson explains, for a corrective justice approach to accurately reflect the harm done by a state to its citizens in any principled fashion, judges must interpret constitutional rules underlying the citizen's claim and determine what transactional scope such rules apply. But, of course, questions of constitutional interpretation—in equal protection and beyond—are often deeply disputed normative questions. Thus, even for relatively settled constitutional issues, this realization about the complexity of transac-

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<sup>114.</sup> See, e.g., *id.* at 1314–15 (describing *Cors*, 337 U.S. 325).

<sup>115.</sup> See *id.* at 1383.

<sup>116.</sup> See sources cited *supra* note 92.

tional scope undermines corrective justice's claims of objectivity and simple administration.

Levinson's tidy solution leaves out another lurking problem of expanded transactional scopes: proving causation and attribution. Even with an expanded transactional scope, the moral intuition at the heart of corrective justice remains that defendants should pay for the harm they cause and no more. But evidentiary and attribution problems emerge. Even if the government has, in some way, caused the racial disparities in the tables, the question remains: *how much* of that disparity have they caused? And therefore, how much are they responsible for correcting? This further suggests that corrective justice's administrability and objectivity rationales are flawed, or at least significantly less availing than in the private torts context, where the underlying substantive law has set a narrow transactional scope.

*C. Applying a Broader Transactional Scope Within a Corrective Justice Framework to Actuarial Tables*

Unlike the negligent driver in a private tort, the government has, in a meaningful way, *caused* significant harms to people of color that are reflected in the life-expectancy and wage gaps in the actuarial tables. However, those harms are only counted if the transactional scope is expanded to include them. The evidence that government policies have contributed to persistent racial inequality is overwhelming.<sup>117</sup> But determining which harms and benefits to include and which to exclude is difficult.<sup>118</sup> The current baseline inequality is the product of

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117. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2011) (discussing the impact of criminal justice policy on racial inequality); MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017) (discussing fiscal policy); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (discussing housing policy). Of course, the government is not a unitary actor, so some might argue that one part of the government should not be responsible for rectifying the harms of another part of the government. This, however, is just another way of pointing out that sometimes courts might allow parties to expand the transactional scope across subject matter and other times they might not. When and how this is allowed to happen is, according to Levinson, answered by excavating such norms from the underlying constitutional rule. It need not be so tricky, however, since corrective justice seeks to ensure that the "wrongdoer" pays for the harm. For example, in all these cases, it is *taxpayers* paying these awards, so one could easily craft a rule that looked simply to whether the same set of taxpayers would be paying both damages awards if two lawsuits were brought.

118. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (allowing affirmative action to only remedy historical discrimination by a precise city department, not more general discrimination); *Milliken v. Bradley*, 418 U.S. 717, 741-43 (1974) (rejecting a remedy for school segregation that would require busing between school districts).



historical harms, harms conferred in different subject-matter areas as well as harms that have arisen out of mistreatment of other members of the same race. Mapping these onto a constitutional rule involves significant judicial intervention. A brief review of just one of these inputs shows how challenging a task this would be for courts to administer.

Modern-day criminal justice policies are perhaps the most immediate harm that could be included in the transaction. In *The New Jim Crow*, Michelle Alexander demonstrates both that policies of mass incarceration fall unevenly on the shoulders of Black and Latino men and that these policies have the collective effect of “ensur[ing] the subordinate status of a group defined largely by race.”<sup>119</sup> For example, although rates of drug use and distribution are roughly the same across Blacks and whites,<sup>120</sup> in some states, “[B]lack men have been admitted to prison on drug charges at rates twenty to fifty times greater than white men.”<sup>121</sup> These crimes are investigated and prosecuted by law enforcement, the very same entities whose conduct is being challenged in these constitutional tort suits.<sup>122</sup> In a labor market where employers may discriminate on the basis of felony convictions (but not race), these racially disparate interactions with the criminal justice system have significant long-term collateral economic consequences, further reducing the average wages of Black men.<sup>123</sup> Indeed, nearly a third of Black men not currently incarcerated are unemployed.<sup>124</sup> These are the numbers reflected in the race-based actuarial tables used to compensate victims of police violence. In other words, racial discrimination has a compounding effect; it makes Blacks a more likely target of law enforcement, which, in turn, reduces how much the government has to pay to Black victims.

And, for women of color, the effect of the tables is even more damaging because it incorporates not only the racial discrimination discussed above, but also

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119. ALEXANDER, *supra* note 117, at 13.

120. *Id.* at 7.

121. *Id.* (citing HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (2000)). More recent studies also confirm the continued disproportionate representation of Black men in America’s prisons and jails. See, e.g., Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT’G PROJECT 3 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/LF8Q-2SWN>].

122. The vast majority of prisoners are in state and local custody. See E. Ann Carson, *Prisoners in 2016*, BUREAU JUST. STAT. 4 (2016), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/NM5V-JZF7>]. This suggests that the vast majority of investigations, arrests, prosecutions, and law enforcement interactions generally are conducted by state and local law enforcement, who are subject to § 1983 claims, rather than *Bivens* suits.

123. ALEXANDER, *supra* note 117, at 151-54.

124. *Id.* at 152 (citing BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 90 (2006)).

gender discrimination. And, as Kimberlé Crenshaw has argued, there is something additive about being both a woman and a person of color that makes the whole of the discrimination worse than the mere sum of its parts.<sup>125</sup> This is particularly true given the government's extensive role in controlling and disincentivizing women's earning capacity through policies concerning reproductive health care, the taxation of two-earner households, the availability of public day care, pregnancy-discrimination protections, and the social stereotyping aided and perpetuated by such policies.

This example of our criminal justice system's relationship to men of color, however, makes plain the difficulty of a corrective justice approach in properly considering a defendant's input to existing inequality. The government has imposed policies that disproportionately harm Blacks and Latinos, but it is primarily private-sector employment choices that convert those government-imposed disadvantages into racially disparate wage tables. This means that a corrective justice approach has not one but *two* evidentiary issues. The first is the difficulty of showing that government action in a broadened transactional framework *caused harm* to the plaintiff. The second is the difficulty of quantifying *how much* of that harm was caused by the government's conduct.<sup>126</sup>

Therefore, in order to properly set damages in a corrective justice framework, a court would need to: (1) identify potential harms to the plaintiff; (2) rule those harms in or outside of the transactional framework based on the underlying constitutional rule; and (3) apportion responsibility for those harms between the defendant and other actors. Corrective justice, in this view, maintains its tidy moral intuition—pay for the harm that you cause—but loses the clean administration and relatively constrained judicial inquiry that recommended it. Of course, courts could choose to maintain the current narrow, tort-like method, but that is simply a product of a separate, systemic value judgment that either government has no role in generating the current baseline or that the constitutional rule is disinterested in that role. Regardless of what approach courts choose, it is a normative choice.

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125. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

126. This becomes even more complex when considering different subdivisions of government and attributing liability to them. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741-43 (1974).

### III. DISTRIBUTIVE JUSTICE AND CONSTITUTIONAL TORTS

Corrective justice is not the only framework through which damages could be analyzed, though it is the only one that can explain the current model's focus on accuracy. Under a *distributive* justice framework, many of the analytical complications discussed above fall away, and an argument in favor of supercompensatory damages emerges.<sup>127</sup> Distributive justice prioritizes reallocation of resources based on societal values and commitments rather than as pure remedy for past harm. Choices of distributive justice lie at the heart of our tax-and-transfer system, for example. To be clear, as with corrective justice, distributive justice is a framework for evaluating remedies, not a particular method of calculating damages. Distributive justice asks whether the remedy makes the distribution of entitlements more "just" but does not itself provide answers to what constitutes a "just" distribution, much in the same way corrective justice does not contain an internal definition of "wrongdoer," "harm," or "causation."

Under a distributive justice framework, the question is whether the directional flow and allocation of entitlements (or in this case, cash) reflects our societal commitments. Rather than correcting back to a status quo ex ante (i.e., what the world *did* look like in the absence of the harm), distributive justice seeks to move toward some ideal (i.e., what the world *should* look like in the absence of the harm). By definition, the distributive justice framework seeks to shift the baseline in response to events, rather than to restore the baseline. The baseline-identifying problems with corrective justice are thus moot.

This Part will first explain why the drawbacks that argue against applying distributive justice to private torts, including the arbitrariness of the redistribution and redistribution's impact on deterrence, do not apply—or are less worrisome—in the constitutional tort context. The Part then turns to the affirmative case under a distributive justice framework for the supercompensatory tables that would result from striking down the race-based tables currently in use. Finally, the Part explains how distributive justice could be applied to the constitutional tort damages context under various competing theories of the scope and role of equal protection. In doing so, the Part demonstrates that distributive justice is an appropriate framework for damages in constitutional torts, but that, like corrective justice, its practical application is dependent on answering contested questions in substantive constitutional law.

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127. If the race-based tables are held unconstitutional, or if their use simply stops, they would be replaced by neutral tables or white-male tables, either of which would be, technically speaking, supercompensatory.

A. *Distributive Justice as Applied to Constitutional, Rather than Private, Torts*

There are two primary debates in the existing literature on constitutional tort remedies. One debate centers on how to import certain corrective justice principles from tort law into the constitutional tort context.<sup>128</sup> This debate not only assumes that corrective justice is the proper framework but also assumes that constitutional tort cases should have a similar transactional scope to private tort cases.<sup>129</sup> The disregard of distributive justice in the area is striking. Even in debating the role of fault—which is intuitively required in corrective justice, where a “wrongdoer” must be identified, but not in distributive justice—in constitutional tort damages, John Jeffries, Jr. and Sheldon Nahmod both quickly dismiss the idea that distributive justice could or should be the motivating framework behind constitutional tort compensation.<sup>130</sup> These scholars reach their conclusions by focusing on whether an *individual* harmed by a constitutional tort is particularly deserving of wealth transfers and arguing that they are not because many people suffer similar or worse uncompensated harms at the hands of the government.<sup>131</sup>

The second debate centers on whether constitutional tort damages should exist *at all*, given the problems with corrective justice—such as the slipperiness of transactional scope and the fact that, in practice, the wrongdoers (i.e., individual officers) are typically fully indemnified and thus are not themselves correcting for the harm they cause.<sup>132</sup> Here, too, the scholarship dismisses the applicability of distributive justice by wondering what makes the recipient of the constitutional tort award more deserving than those who are harmed by changes in the tax code, “economic recessions, illnesses or hurricanes.”<sup>133</sup> Thus, both sides of both debates have dismissed distributive justice as an alternative framework entirely.<sup>134</sup> As this Part will explain, a redistributive rationale becomes

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128. See, e.g., John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 93–96 (1989); Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1009–10 (1990).

129. See Jeffries, *supra* note 128, at 94 (“The payment from wrongdoer to victim retraces the moral relationship between them.”); Nahmod, *supra* note 128, at 1009–10.

130. Jeffries, *supra* note 128, at 92 (“[C]ompensation for constitutional violations cannot be justified on the grounds of distributive justice.”).

131. *Id.* at 90–92.

132. See, e.g., Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854–56, 861 (2001); Levinson, *supra* note 105, at 407.

133. Levinson, *supra* note 105, at 406–07.

134. See, e.g., Jeffries, *supra* note 128, at 92 (“[C]ompensation for constitutional violations cannot be justified on grounds of distributive justice.”); Levinson, *supra* note 105, at 406 (dismissing

more appealing when we consider whether a particular *class* of individuals might be uniquely deserving of supercompensatory damages and when that deservingness is derived in part from the disproportionate perpetuation of constitutional torts of this sort on that class of individuals. And, of course, this Part also recognizes that redistribution through ad hoc tort remedies is a second-best solution to a problem—racial inequality—that is unlikely to be solved via legislative means.

Distributive justice is historically disfavored in private tort law because of the perceived disconnect between the kind of conduct at issue and the nature of the potential redistribution.<sup>135</sup> There is not much to commend in “taxing” carelessness through tort liability to correct for existing inequality.<sup>136</sup> But in the context of constitutional torts, distributive justice is a more appealing moral framework because of the preexisting relationship between the parties, the nature of the misconduct, and the unequal distribution of the harms.<sup>137</sup>

One of the frequent knocks on distributive justice in tort law is the unfairness of saddling one person (or a relatively small number of people) with the costs of distributional inequities.<sup>138</sup> However, in constitutional torts, it is the government—state, local, and federal—paying the damages. Despite the fact that these

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distributive justice as a rationale for making the government pay for harms caused by constitutional violations); Nahmod, *supra* note 128, at 1019 (disagreeing with Jeffries’s conclusions but accepting the premise of corrective justice as the framework for constitutional tort damages). See generally Dauenhauer & Wells, *supra* note 96 (arguing that corrective justice provides sufficient justification for compensation in constitutional torts).

135. See, e.g., Ronen Avraham & Issa Kohler-Hausmann, *Accident Law for Egalitarians*, 12 LEGAL THEORY 181, 182-83 (2006) (identifying corrective, rather than distributive, justice as the traditional moral framework of tort law); see also *Stockberger v. United States*, 332 F.3d 479, 480-81 (7th Cir. 2003) (noting the limited duties owed by citizens to one another); *Gipson v. Kasey*, 150 P.3d 228, 231-32 (Ariz. 2007) (same); *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993) (same); cf. DOBBS ET AL., *supra* note 9, § 251 (“Where the defendant does not create or continue a risk of harm, the general rule . . . is that he does not owe an affirmative duty to protect, aid, or rescue the plaintiff.”).
136. See Levinson, *supra* note 25, at 1380. However, there is some debate in the scholarship over whether this *should* be the case. Compare Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing that redistribution via legal rules rather than taxes provides no advantage and may reduce efficiency), with Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000) (discussing adjustments in legal rules away from pure efficiency to address redistribution considerations).
137. See Levinson, *supra* note 25, at 1380 (“Inasmuch as redistribution in various forms is a crucial part of government’s role, it would be nonsensical for legal regimes regulating its conduct to mandate distributive neutrality in the same way common-law regimes mandate distributive neutrality for private actors.”).
138. *Id.*

suits must usually be brought against individual officers,<sup>139</sup> governments paid over 99.9% of the dollars recovered by plaintiffs in cases involving the seventy biggest law enforcement agencies between 2006 and 2011.<sup>140</sup> The government, in turn, supports these damages awards through taxes, functionally passing the liability onto taxpayers in proportion to their tax burden.<sup>141</sup> Thus, distributive justice, in the context of constitutional torts, does not unduly concentrate the costs of rectifying inequality on a particular group.

The flip side of the equation is that the benefits of this redistribution are concentrated in a single victim of police violence. Distributive justice is most effective in a tax-and-transfer setting, where taxes are assessed and benefits are redistributed systematically.<sup>142</sup> Detractors from distributive justice in the constitutional tort setting might object to limiting these redistributions only to victims of constitutional torts when the entire marginalized community suffers from the background conditions of inequality. However, simply because the constitutional tort setting engages in tax and transfer on an ad hoc, individual basis does not preclude it from being a defensible second-best system for advancing distributive justice. Distributive justice in constitutional torts will not, on its own, cure the racial inequities inherent in the baseline but it might improve them. In the interest of not letting the perfect get in the way of the good, distributive justice in constitutional torts should not be discounted simply because better modes of redistribution theoretically exist.

And importantly, reform through constitutional tort damages is significantly more feasible as a political matter than a major overhaul of the tax-and-transfer system. The Fair Calculation in Civil Damages Act of 2016,<sup>143</sup> which would have prohibited the use of these tables in federal courts, had bipartisan cosponsors in the House of Representatives.<sup>144</sup> Yet major tax or public-benefits spending is

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139. See *Ex parte Young*, 209 U.S. 123 (1908).

140. Schwartz, *supra* note 60, at 936-37. Police departments also rarely pay the costs of litigation. See Schwartz, *supra* note 69, at 1032.

141. See Levinson, *supra* note 105, at 408.

142. *Id.* at 407-08; see also Kaplow & Shavell, *supra* note 136 (arguing that redistribution via legal rules rather than taxes provides no advantage and may reduce efficiency); cf. JOHN RAWLS, A THEORY OF JUSTICE 87-88 (1971) (arguing that distributive justice principles best apply at the structural, rather than individual, level).

143. S. 3489, 114th Cong. § 3(a) (2016).

144. Dariely Rodriguez & Hope Kwiatkowski, *How Race, Ethnicity and Gender Impact Your Life's Worth: Discrimination in Civil Damages Awards*, LAW. COMMITTEE FOR C.R. 8 (2018), [https://lawyerscommittee.org/wp-content/uploads/2018/07/LC\\_Life27s-Worth\\_FINAL.pdf](https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf) [<https://perma.cc/QHA4-HE9Z>] (listing Joseph Kennedy III (D-MA) and Mia Love (R-UT) as the bill's sponsors in the House).

subject to considerable partisanship.<sup>145</sup> Thus, there is little reason to dismiss a legislative or judicial step in the right direction, even if ad hoc, in favor of waiting on a massive and politically fraught redistributive tax-and-transfer scheme to remedy the effects of past and present racial discrimination.<sup>146</sup>

The second reason distributive justice is more appropriate in the context of serious physical injuries resulting from constitutional torts is the unequal distribution of the violations themselves. Constitutional torts leading to physical injury or death arise primarily in two situations – police brutality and prison conditions – that disproportionately affect Blacks. Between 2010 and 2014, Blacks were nearly three times more likely to be killed by police than whites.<sup>147</sup> Studies suggest bias affects the behavior of police officers, likely leading toward more constitutionally “risky” situations.<sup>148</sup> Even if the risk of injury from unconstitutional prison conditions is equally distributed across prisoners, the unrepresentative share of Black men in prison suggests a distributional skew, too. Simply put, the types of violence these tables are used to compensate for are disproportionately brought to bear on people of color.

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145. See, e.g., Nash Jenkins & Maya Rhodan, *The Republican Tax Bill Proves that Bipartisanship Is Dead*, TIME (Dec. 20, 2017), <http://time.com/5072678/gop-tax-reform-bipartisan> [<https://perma.cc/N9CU-FTK8>]; Alicia Parlapiano et al., *How Each Senator Voted on Obamacare Repeal Proposals*, N.Y. TIMES (July 18, 2017), <https://www.nytimes.com/interactive/2017/07/25/us/politics/senate-votes-repeal-obamacare.html> [<https://perma.cc/J4LL-FDK8>].
146. But see Max Ehrenfreund, *The Cost of Slavery Reparations Is Now Within the Boundaries of the Politically Acceptable*, WASH. POST (Sept. 29, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/09/29/the-cost-of-slavery-reparations-is-now-within-the-boundaries-of-the-politically-acceptable> [<https://perma.cc/38JM-HC7R>].
147. James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010-14*, 107 AM. J. PUB. HEALTH 295, 295-96 (2017). Law enforcement officers killed Native Americans at a still higher rate. Elise Hansen, *The Forgotten Minority in Police Shootings*, CNN (Nov. 13, 2017), <https://www.cnn.com/2017/11/10/us/native-lives-matter/index.html> [<https://perma.cc/8LJM-NZ9P>] (reporting that between 1999 and 2015, Native Americans were killed by police at 2.9 times the rate of whites and Blacks were killed at 2.6 times the rate of whites).
148. See, e.g., Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSY. 1006, 1015 (2007) (finding that, in simulations, police officers are faster to shoot Blacks than whites, but that the criteria to shoot was the same for both groups); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSY. 876 (2004) (finding that police and others are implicitly biased against Blacks); Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOCIAL PSY. 526 (2014) (finding that police and others are more likely to dehumanize Black boys than white boys and that such dehumanization is dangerous); Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSY. 292 (2008) (finding that American citizens implicitly associate Blacks with apes).

Scholars have also argued that this distributional skew has further feedback effects that generate and perpetuate racial hierarchies. Paul Butler, for example, has argued that racialized stop-and-frisk policies – often resulting in unconstitutional stops<sup>149</sup> – perpetuate hierarchies by humiliating Black men and asserting state control over their bodies.<sup>150</sup> Aggressive policing can have the unintended consequence of making community members less likely to assist police in calling in or investigating crimes, making these communities less safe and less stable.<sup>151</sup> Surely excessive and unequal violence has a similar effect.<sup>152</sup> Thus, the very misconduct being litigated can be tied to the racial hierarchies enshrined in the tables.

With the exception of particularly systematic and large tortfeasors – perhaps including the government – who can shift their operations to “take advantage” of the racial disparities in damages awards,<sup>153</sup> many private torts are accidents. Thus tortfeasors’ biases or victim-based economic incentives are not particularly salient.<sup>154</sup> And, indeed, part of the reason we use damages (i.e., liability rules)

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149. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 582 (S.D.N.Y. 2013) (suggesting that a “conservative” estimate of 200,000 unjustified stops resulting from New York City’s stop and frisk program likely “significantly undercounts” the total number of constitutional violations).
150. Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 59 (2014).
151. See Debo P. Adegbile, *Policing Through an American Prism*, 126 YALE L.J. 2222, 2235-37 (2017); see also Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 264-65 (2008) (arguing that “procedural justice will be the central antecedent of legitimacy”); Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 776 (2014) (finding that “being repeatedly stopped by the police on the street or in a car led people to experience their direct encounters with the police as both less fair and less lawful”); cf. Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 657-66 (2009) (describing the increased community trust and police legitimacy produced by alternatives to aggressive policing).
152. Cf. Office of Cmty. Oriented Policing Servs., *Final Report of the President’s Task Force on 21st Century Policing*, U.S. DEP’T JUST. 9, 12-13, 20-23 (May 2015), [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [<https://perma.cc/WBQ9-C7QR>] (identifying trust and legitimacy of police as essential aspects of policing safe communities and making various recommendations about the use of force and review thereof as means to improve trust in and the legitimacy of police).
153. Avraham & Yuracko, *supra* note 11, at 685-92 (providing examples of large potential tortfeasors shifting their operations to take advantage of differential tort liability between wealthy whites and low-income people of color).
154. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 917 (2010) (“Accidents – in the sense of unintended outcomes – are even at the center of the most commonly taught intentional tort cases.”).



rather than injunctions (i.e., property rules) in tort law is because we cannot identify the tortfeasor and victim before the accident occurs.<sup>155</sup> Moreover, when private torts victimize communities of color, they arguably are not the sorts of harms that perpetuate a racial hierarchy. The same cannot be said of constitutional violations resulting in serious physical injury or death, such as the shooting of Jordan Edwards. Rather, constitutional torts often play a key role in expressing, and thus fortifying, the United States' racial hierarchy.

*B. Evaluating Supercompensatory Damages for Constitutional Torts in a Distributive Justice Framework*

The damages framework that emerges in the absence of race-based tables is supercompensatory, at least as compared to the narrowly conceived private tort baseline (i.e., the status quo ex ante). Distributive justice eschews corrective justice's focus on accurately tabulating and quantifying harms in favor of moving toward some ideal distribution. In the context of excessive force claims and actuarial tables, the question is whether "taxing" the government—requiring it to pay more than the pure cost of compensation—for each incident of unconstitutional conduct leading to death or bodily injury against a marginalized group and transferring that "tax revenue" to the member of that marginalized group that suffered the harm moves society closer to that ideal.

The answer to this question will almost always depend on answers to highly contested questions like "what does equality mean?" and "what is the government's role in advancing that vision of equality?" Judges may deeply disagree on the answers to these questions,<sup>156</sup> but the questions themselves are not foreign to constitutional inquiries.<sup>157</sup> Moreover, they involve no more judicial interven-

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155. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1127 (explaining that we use liability rules in tort law because "[t]he only level at which, before the accident, the driver can negotiate for the value of what he might take from his potential victim is one at which transactions are too costly").

156. See sources cited *supra* note 92.

157. See, e.g., *Washington v. Davis*, 426 U.S. 229, 248 (1976) (refusing to impose a disparate impact test that would "be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

tion than decisions concerning the appropriate transactional scope in the corrective justice framework. Each framework requires judges to derive and adjudicate contested issues of constitutional and statutory meaning.

Some visions of distributive justice may even resemble the corrective justice framework. For example, Robert Nozick argues that the only distributively just form of redistribution is to rectify specific prior harms.<sup>158</sup> And so, just as with corrective justice, transfers under such a theory would accept background conditions as they are and transfers would occur *only* for purposes of rectification.<sup>159</sup> In those cases, where the government (or the defendant generally) has no role in background conditions and no role in redistribution, distributive justice and tort-like corrective justice converge; a plaintiff need only be restored to his or her position at the moment precisely before the accident. However, this conception of distributive justice is hard to apply to civil rights laws, which are usually passed with a purpose of remedying a status quo that the political branches—and, by extension, the public—deem unjust.

It would, however, be particularly difficult to argue that these precise types of § 1983 suits have no distributive component given the histories of the Fourteenth Amendment and § 1983. Section 1983 and the Fourteenth Amendment were passed in a moment of pervasive and extreme oppression of Black Americans. The modern § 1983 traces its origins to the Reconstruction-era Ku Klux Klan Act.<sup>160</sup> As the Supreme Court has explained, the original drafters of that Act were primarily concerned with the complete and utter lack of protection for Black Americans and Union sympathizers in the South against the abuses of the Ku Klux Klan.<sup>161</sup> One speaker in favor of the bill, Representative George Hoar of Massachusetts, described the purpose as protecting and elevating the rights of minorities:

The question is not whether a majority of the people in a majority of the States are likely to be attached to and are able to secure their own liberties . . . . It is, whether a majority of the people in every state are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to

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158. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-53 (1974).

159. *Id.*

160. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; *see also* *Monroe v. Pape*, 365 U.S. 167, 168-71 (1961) (“[Revised Statute] Section 1979 [also known as Section 1983] came onto the books as [Section] 1 of the Ku Klux Act of April 20, 1871.”).

161. *Monroe*, 365 U.S. at 174 (citing CONG. GLOBE, 42d Cong., 1st Sess., app. 166-67 (1871); S. REP. NO. 1 (1871); JAMES GARFIELD RANDALL, *CIVIL WAR AND RECONSTRUCTION* 857 (1937)).

insure that under no temptation of party spirit, under no political excitement, under no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights.<sup>162</sup>

Of course, when this bill was passed in 1871, there had at no point in our nation’s history been a state where civil freedoms were equally extended to all citizens. For the bill to accomplish what Representative Hoar and others in Congress desired,<sup>163</sup> it could not merely have a *corrective* (or status-quo preserving) purpose.

Even assuming the Fourteenth Amendment had no underlying distributional goals, race-based tables cannot be squared with either of the competing equal protection frameworks. As this Note has already explained, the current use of these tables violates the Equal Protection Clause either under an anticlassification framework, which is hostile to “all racial classification[s],” even benign ones,<sup>164</sup> or under an antistatutory framework, which is “inherently suspect” of categorization that subordinates historically subjugated groups.<sup>165</sup> Thus, moving from a scheme that is explicitly race-conscious to the detriment of a historically marginalized groups to a remedies scheme that is invariant to race would be a step in the right direction.

Assuming, then, for the purposes of illustration, an antistatutory proponent’s vision of the Fourteenth Amendment, supercompensatory damages for constitutional torts against historically marginalized groups becomes extremely attractive. Under such a view, the Equal Protection Clause can play an affirmative role in rectifying persistent racial inequality.<sup>166</sup> And these damages mark a way to make a dent in the unequal background conditions that have persisted for centuries. Because the damages are functionally paid out proportionally to tax burden, they will be progressive and, statistically speaking, are most likely to

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162. CONG. GLOBE, 42d Cong., 1st Sess. 334-35 (1871).

163. See *Monroe*, 365 U.S. at 172-84 (collecting legislative history in support of the bill’s role in protecting racial minorities in the South).

164. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (embracing an anticlassification framework).

165. *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971); see also Balkin & Siegel, *supra* note 92, at 13 (discussing both the antistatutory and anticlassification frameworks and how their underlying principles sometimes overlap).

166. Cf. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (“As members of the judiciary tasked with intervening to carry out the guarantee of equal protection, we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.”).

flow from wealthy whites<sup>167</sup> to poor Blacks and Latinos.<sup>168</sup> If the goal is to improve background conditions of inequality, this would work, on an ad hoc basis, to even out that distribution.

Additionally, the *kind* of conduct taxed here is an appropriate trigger for redistribution. As discussed above, unconstitutional conduct toward a historically marginalized minority is not just reasonable conduct to be taxed but also the sort of governmental conduct that perpetuates that marginalization.<sup>169</sup> Taxing this particular conduct has two benefits. First, it ties redistribution to conduct that is related to the inequality being remedied. This neatly adopts part of the moral intuition of corrective justice into distributive justice; the government is being “taxed” on morally culpable behavior and that revenue is being used to remedy the same *type* of harm, even if in excess of the harm caused as a result of that exact behavior. Second, it improves the deterrence effect vis-à-vis people of color relative to a perfectly compensatory scheme by making damages for killing a person of color as high or higher than those for killing a white person.<sup>170</sup> Making unconstitutional conduct toward racial minorities as or more expensive than

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167. See Richard Schmalbeck, *Race and the Federal Income Tax: Has a Disparate Impact Case Been Made?*, 76 N.C. L. REV. 1817, 1835 (1998) (noting that the progressive nature of the income tax means whites bear a disproportionate burden of the income tax). Interestingly, the income tax may have *horizontal* distributional racial inequities—that is, individuals with the same income, but different racial identities, may be differentially situated. See generally Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (finding the Internal Revenue Code to disadvantage Blacks relative to similarly situated whites because of unique socioeconomic characteristics). This further supports the idea of distributive justice through constitutional torts as a supplement to remedying racially imbalanced background conditions.

168. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560 (S.D.N.Y. 2013) (“[A]fter controlling for suspected crime and precinct characteristics, blacks who were stopped were about 14% more likely . . . than whites to be subjected to the use of force.”); Buehler, *supra* note 147, at 296 (showing that Blacks and Latinos are disproportionately the victims of lethal police violence).

169. Butler, *supra* note 150. See generally ALEXANDER, *supra* note 117 (arguing that the aggressive policing of Black men and mass incarceration have led to the perpetuation of a racial caste system).

170. A great deal of ink has been spilled about the extent and degree to which damages against the government change police behavior. See, e.g., Gilles, *supra* note 132, at 854–56, 861; Levinson, *supra* note 105, at 347; Schwartz, *supra* note 60, at 1032. However, the Supreme Court has been clear in its qualified immunity jurisprudence that it believes government actors to be so sensitive to damages payouts as to warrant protection for officers from liability where constitutional rules are not “clearly established.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982). Therefore, unless the Supreme Court is ready to do away with this underlying assumption about responsiveness to incentives altogether, courts should not continue to craft remedies that differentially deter constitutional violations against one racial group over another.

similar conduct toward whites would incentivize policy changes to minimize such conduct. Indeed, even in a world of widespread indemnification by local governments, there is some evidence that insurance companies who insure local governments against payouts resulting from unconstitutional use of force have introduced policy and training requirements to minimize the risk of constitutional violations.<sup>171</sup>

While this reform may not equalize the deterrent effect, it does at least improve the incentives and specifically disincentivizes unconstitutional police violence toward the already marginalized group. This works to both counteract the biases that make these kinds of violations more likely than violations against privileged groups<sup>172</sup> and reduce the differential political power between those groups in setting policing priorities in the first place. As a result, a race-neutral damages scheme has positive distributional effects in two ways: it equalizes the background distribution of wealth and it makes more equal the future distribution of constitutional violations.<sup>173</sup>

It is also worth noting that moral hazard—a potential argument against supercompensatory damages—is less likely in the constitutional tort context. Moral hazard occurs when potential victims are incentivized *not* to prevent or reduce a harm they are “insured” against.<sup>174</sup> Generally, moral hazard provides a reason to compensate tort victims only as much as they lost, since overcompensation incentivizes potential victims to be less careful. But that concern is undaunting in the constitutional tort context. As an initial matter, standard compensatory damages for death or serious physical injury rarely compensate the individual for the full harm suffered. Part of this is because people tend not to think about their lives or limbs in terms of dollars.<sup>175</sup> When presented with a deal to receive any amount of money in exchange for certain death, few people,

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171. See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1573-87 (2017).

172. See *supra* note 148.

173. Race-based tables are also used in negligence actions against the government, but this Note limits its focus to constitutional torts because of the unique nexus between the kind of governmental activity, the underlying law alleged to be broken, and the racial and gender disparities enshrined in the table. Because of this nexus, the argument for distributive justice is strengthened because both the conduct at issue is particularly amenable to taxation and the plaintiff-transferee is particularly deserving.

174. See Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238-40 (1996) (defining and describing moral hazard).

175. See generally Margaret Jane Radin, *Incommensurability*, 43 DUKE L.J. 56 (1993) (arguing that monetary compensation fails to properly reflect how individuals think about certain types of physical harm, including death).

if any, would take the deal. Therefore, moral hazard is unlikely to change behavior in cases of death or significant permanent injury. And, unlike private torts, constitutional torts lack a comparative or contributory negligence regime. This means that the law already fails to incentivize individuals to take precautions to avoid constitutional harms. Finally, the victim likely does not perceive his or her life to be less valuable because of his or her race, so this damages regime tracks, rather than overshoots, plaintiffs' expectations.

A few examples demonstrate how courts could use a distributive justice framework to craft remedies in these cases. First, the natural result of abandoning race-based tables would be to use race-neutral tables. This is itself a distributive move because it rejects disparate treatment that is, at least in a narrow sense, rational.<sup>176</sup> However, a judge taking a more expansive view of equal protection's distributive commitments could argue that race-neutral tables are insufficient because they incorporate a background distribution in which minority wages are artificially depressed due to existing inequality and discrimination. Under this view, the appropriate remedy would be to use white men's tables, which do not incorporate wages that are artificially depressed by racial and gender discrimination.

Of course, white men's tables reflect privilege, the flip side of the discriminatory coin. But a proponent of using these tables could argue that discrimination and privilege do not operate as a zero-sum game—that is, not every dollar lost to racial minority goes into the pocket of white men. Therefore, the proponent would say, race-neutral tables do not necessarily reflect a discrimination-free world and may undercompensate everyone. But if we cannot know what minorities would earn absent oppression, the wage tables of white men are a good and identifiable proxy. If it results in overcompensation, advocates of this vision of distributive justice can argue that this overcompensation is permissible, because the overcompensation still flows in a direction that makes the background distribution more just.

Taking the argument one step further, advocates could argue that even where the wage history of a victim is known (i.e., for older victims with work history), the victim's actual wage data could be multiplied by some factor that compensates for persistent racial wage-gaps. Under a distributive framework, the goal is to remedy the racial inequities that the baseline or status quo reflect. Thus, it should not matter whether the victim had identifiable wage data or whether the projection was based on actuarial tables. Instead, a distributive vision of equal protection would require remedying that baseline by counteracting the baseline's

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176. Notably, by eliminating the legal relevance of racial classifications, the use of race-neutral tables would align with an anticlassificationist perspective. Thus, even an anticlassification view of equal protection can be consistent with a redistributive framework.

effect on an individual's earning capacity. Unlike under a corrective justice approach, courts in these situations would not need to narrow the defendant's culpability to the specific harm caused by the tort. Rather, since the government played a role in creating the background racial inequalities affecting the plaintiff, underlying constitutional guarantees would come into play. Specifically, equal protection's underlying substantive promise might empower courts to use the constitutional tort as an appropriate trigger to transfer entitlements from the government to the victim.

The fact that these distributive arguments can be advanced beyond the immediate and obvious step of striking the use of race-based tables suggests a problem of limiting principles. But this problem is not unique to the distributive justice framework. Corrective justice poses similar line-drawing problems regarding the scope of transactions and is limited by a similar, contested source: the underlying substantive constitutional guarantee at issue in a particular case. Corrective justice is also functionally limited by historical proof, but that limitation is hardly principled. Even when courts struggle to find the precise causal link that would justify expansive relief, they often admit that the racial disparities at issue are the product of historical discrimination. Levinson suggests that constitutional law should develop norms around transactional scope,<sup>177</sup> but courts and scholars could also develop rules about when and how constitutional rules constrain distributive commitments. Thus, the difficulties that might plague distributive justice are similar to the obstacles faced by corrective justice.

In short, theorists have failed to acknowledge that the distributive framework is a viable alternative, and that its drawbacks are equally applicable to corrective justice (i.e., the status quo). This failure is mirrored by the behavior of practitioners. Despite the constitutional and theoretical defects of using race-based tables, plaintiffs' lawyers and jurists rarely challenge their use. To the contrary, plaintiffs' lawyers frequently *stipulate* to their use even though race-based tables undermine their clients' interests. It is difficult to imagine other examples of plaintiffs' lawyers readily adopting a standard that *reduces* the amount they may recover for their clients. The next Part argues that this paradoxical behavior is the natural outgrowth of the narrow, tort-like conception of corrective justice that pervades civil rights law and scholarship.

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177. See Levinson, *supra* note 25, at 1383.

#### IV. TOWARD A DISTRIBUTIVE CONSTITUTION? TRADE-OFFS AND IMPLICATIONS

Theorists have long overlooked distributive justice as a viable framework for conceptualizing remedies for civil and constitutional right violations. By demonstrating the problems with applying a corrective justice framework to this narrow class of constitutional tort damages, this Note serves as an invitation for a much-needed debate in the scholarship between corrective and distributive justice in civil and constitutional rights more generally. Prior scholars have underemphasized (or ignored) the line-drawing issues inherent in a corrective justice framework. More importantly, they have failed to notice that the many advantages of a corrective justice framework in the private tort context disappear when constitutional rights are at issue. The perception that corrective justice aligns with courts' institutional role—that is, to limit themselves to resolving disputes between harm-doers and victims—undervalues the quasi-legislative judgments courts must make when determining the appropriate baseline. Under a corrective justice framework, courts usually adopt a narrow transactional view that perpetuates inequality and discounts the harms caused by the government tortfeasor beyond the immediate dispute. And when courts do choose to grapple with the wider scope of harms inflicted by the government, they necessarily face difficult questions about transactional scope and causation.

To be sure, a distributive justice framework can pose similar issues. Even under a distributive justice framework, judges must identify a status quo ideal on which to base the redistribution. This inquiry is certainly value-laden but no more so than the baseline choice under a corrective justice framework. In some ways, the scope of the inquiry is more clearly defined in the distributive justice context, because the court does not need to rule on historical proof or the scope of a transaction. Instead, the administrability problems arise in actually assessing the amount of compensation because it is not tethered to some *ex ante* baseline but rather to a normative ideal. But this inquiry has the benefit of expressive clarity. When a court assesses an amount of compensation, it expresses an explicit normative message about society's redistributive goals and commitments of equality. Unlike the corrective justice framework, which hides its moral valence under a veneer of neutrality, distributive justice embraces an explicit normative vision.

This is not to say that distributive justice is necessarily preferable in the constitutional tort context. Rather, it merely shows that the unquestioned embrace of corrective justice is problematic when distributive justice is a viable alternative. At a minimum, the question about which framework is preferable should be contested and should be properly conceived of as a substantive value judgment. Yet, the majority of constitutional law and constitutional tort remedies



scholarship has simply assumed a narrow corrective framework while pretending that this choice is value-neutral.

A debate over which framework we should adopt matters because the framework we ultimately choose will dictate the terms of the constitutional debate. If corrective justice is the goal, the debate will inherently be backward-looking and center around attributing responsibility for inequality. This has the benefit that those being asked to make reparations have been deemed responsible by society but has the drawback of raising difficult questions about which past harms and how much to include.<sup>178</sup> Even where corrective justice is expanded to account for a greater scope of harms, this expansion may raise issues of its own. It may, for example, breed division and resentment by ascribing (or failing to ascribe) responsibility for present wrongs to a historical group and, by extension, their heirs. Meanwhile, if distributive justice is the goal, the debate will be forward looking and center around divining shared societal commitments about equality and justice. But this too has its drawbacks. The resulting redistributive choices may be deemed illegitimate if the sources of those commitments seem too indeterminate or unrelated to moral culpability.

In light of these trade-offs, the question is not whether distributive justice or corrective justice is the one-size-fits all answer to framing constitutional remedies. Rather, the puzzle is that civil rights and constitutional law scholarship has assumed that corrective justice provides the right framing without interrogating the trade-offs between the two options.<sup>179</sup> Based on the contested nature of the value judgments each framework must make and the trade-offs between them, this should be a live debate both in the scholarship and in the courts.

Moreover, beyond simply assuming corrective justice rather than distributive justice, the case law and scholarship (with the notable exception of Levinson) adopt a very narrow, tort-like view of the transaction. Thus, rather than openly grappling with the contested value judgments inherent in Levinson's more nuanced understanding of corrective justice frameworks, courts have predetermined the scope of the transaction. And they have done so narrowly. When these value judgments are predetermined and implicit, it is easy to think of corrective justice as an appealing, value-neutral answer. Yet, once this veneer of neutrality

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178. See generally *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting post-*Brown* busing to only within a school district because of a lack of evidence that any of the suburban school districts caused segregation in urban Detroit schools, even though the Court agreed that the constitutional rights of Blacks in Detroit had been violated).

179. See *supra* note 134 and accompanying text.

is stripped away, the conception of justice that applies to constitutional torts and civil rights violations should be up for debate.<sup>180</sup>

The consequences of this debate are far-reaching and serious, especially for those who believe constitutional and civil rights litigation has a role to play in correcting societal inequities. The fundamental limitation on corrective justice, even in its most capacious understanding, is the theoretical fiction that there is always some alternate timeline in which the harm did not occur that sets the baseline to which the plaintiff must be restored. But when the set of harms that might be corrected for includes the Atlantic slave trade, Jim Crow laws, or a racially discriminatory system of mass incarceration, the alternate timeline that flows from an unspoiled baseline is nearly impossible to conceptualize. Yet any baseline selected thereafter includes the harms that flow from those original sins. Thus we are left with three options: decide that those harms are not relevant in constitutional litigation, leave those harms uncorrected because our remedial framework cannot contemplate them, or look for a different framework. This

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180. For example, quotas would be a relatively uncontroversial proposition under a distributive justice approach to affirmative action, yet the Supreme Court has struck down their use as violating equal protection. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978). Indeed, in *Croson*, the Court identified the compelling interest in a city's affirmative action program as only extending to "remedy[ing] prior discrimination," *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989), ultimately striking down the program because there was no record of "prior discrimination by the government unit involved," *id.* at 485 (quoting *J.A. Croson Co. v. Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987)). While there was "no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for Black entrepreneurs," that did not justify a quota to make the awarding of city construction contracts to minority business owners proportional to their share of the population. *Id.* at 499.

However, this assumes a narrow corrective frame—that cities may only take measures to advance the status of marginalized groups to the extent the city itself caused *the exact kind* of disadvantage suffered by the marginalized groups—which we know is itself a value judgment that can bend to multiple outcomes. Importantly, a distributive justice approach does not demand a certain result. The Fourteenth Amendment could conceivably require that courts stay out of race-conscious redistribution altogether. However, a distributive justice account would be invariant to whatever historical facts could be proved to explain current racial disparities. Thus, under a distributive justice framework, a court would need to explain why this sort of redistribution is inconsistent with equal protection principles, instead of merely relying on a lack of historical proof to strike down the policies.

Affirmative action is just one example of corrective justice's role in shaping substantive constitutional law. Corrective justice also permeates deeper structural aspects of constitutional law, such as the scope of Congress's enforcement power under Section Five of the Fourteenth Amendment and the requirement of invidious intent in disparate impact cases. Presenting a distributive justice version of these two doctrines is beyond the scope of this Note, but each must be reevaluated in light of this Note's argument that corrective justice is not the clearly dominant or correct conception of justice in civil and constitutional rights.

**MAKING BLACK LIVES MATTER**

pressing and essential question in constitutional law should not be answered covertly or by implication.