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## SHOULD THE LEFT DISSENT?

**PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION.** By Robert L. Tsai.<sup>1</sup> W. W. Norton & Company, 2019. Pp. 276. \$27.95 (Cloth).

*Nelson Tebbe*<sup>2</sup>

### I.

When a political community is as polarized as America is today, people on the left often will be unable to protect core principles, such as equal membership, basic liberty, and distributive justice. They will find themselves thwarted by opponents who are unable or unwilling to embrace an egalitarian vision. (And conservatives will face a converse challenge, of course.) This situation is difficult, to say the least. Not only is political polarization unpleasant, but it can impede the functioning of democratic self-governance.

In his creative and beautifully articulated book, *Practical Equality: Forging Justice in a Divided Nation*, Robert L. Tsai suggests a way forward. To his main question, “[w]hat is to be done to confront injustice when the timing doesn’t seem right or the odds are stacked against you?,” Tsai responds that egalitarians should pursue “equality by other means” (p. 3). Practical equality describes a method or strategy of embracing second-best solutions when ideal outcomes are unattainable. Constitutional concepts that can approximate equality include procedural due process, rationality review, the prohibition on cruel and unusual punishment, and freedom of expression. Pursing these alternatives is smart strategy, for Tsai, but it is also required by “constitutional duty” or moral obligation (p. 7). Moreover, practical equality can produce consensus, or at least majority support, for an outcome, partly because its techniques do not

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require a finding of bias on the part of government decisionmakers.<sup>3</sup>

Tsai's first example is President Trump's signature travel ban. The outlines of this story are well known. Soon after he was inaugurated in January of 2017, Trump fulfilled his campaign promise to effectuate a "total and complete shutdown" on Muslim travel to the United States.<sup>4</sup> He signed an executive order that effectively excluded travel into the country by citizens of several Muslim-majority nations, among other measures.<sup>5</sup> Chaos ensued at airports and other ports of entry, lawyers brought challenges, and courts quickly invalidated the executive order. Shortly thereafter, Trump issued a revised ban, which also was quickly invalidated.<sup>6</sup> Courts offered different rationales for these judgments. Some judges held that the travel ban violated immigration statutes, others found violations of due process, and still others decided that Trump had discriminated against Muslims in violation of the Establishment Clause.<sup>7</sup> Ultimately, the Supreme Court upheld the third and final version of the travel ban.<sup>8</sup> Chief Justice Roberts reasoned that the executive's decisions on immigration issues deserved deference, and that the administration's findings were sufficient to satisfy that deferential review, irrespective of any impermissible bias against Muslims that might have motivated Trump, who was the sole lawmaker in this situation.<sup>9</sup>

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3. On consensus, *see infra* note 44. Tsai takes equality law as he finds it, probably for pragmatic reasons. *See, e.g.*, p. 81 ("Who exactly was doing the discriminating [in *McCleskey*]? . . . One couldn't simply say 'the system,' at least not without dramatically altering the way that equality questions had long been resolved."). Another strategy would be to imagine a different and more substantive equal protection jurisprudence, one that would protect vulnerable groups against government policies that have a disparate impact on them. That would allow courts to rule against the government without having to find that officials acted with a discriminatory motive. *Cf. Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Based State Action*, 49 *STAN. L. REV.* 1111, 1113-14 (1997) (arguing that the equal protection requirement of discriminatory purpose may be an example of "preservation through transformation").

4. *Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018).

5. Executive Order No. 13769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 82 *Fed. Reg.* 8977 (2017).

6. *Protecting the Nation from Foreign Terrorist Entry into the United States*, 82 *Fed. Reg.* 13209 (2017).

7. *See Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (due process); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (statutory grounds); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017) (Establishment Clause).

8. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

9. *Id.* at 2420-21.

How should a practical egalitarian handle such a case? Tsai notes that a group of law professors argued that the travel ban was motivated by religious animus and therefore violated the Establishment Clause (p. 10 & n.3).<sup>10</sup> Tsai does not endorse that approach.<sup>11</sup> Instead, he prefers the ruling of the Ninth Circuit, which reasoned that the travel ban violated due process in various ways, such as by altering the rights of green card holders without giving them notice and an opportunity to be heard (pp. 75-76).<sup>12</sup> The Ninth Circuit's decision was "textbook use of alternative means to promote equality" and it was productive because it "repeatedly forced the administration to modify a deeply unequal policy," so that ultimately three countries were dropped from the ban and several exemptions were created (p. 79). Anything more would be too much to ask of courts, Tsai suggests, because judges "can't stop ethnonationalist agendas on their own" — that can only be done through raw politics (p. 80).

Tsai's argument has significant power. Where full equality cannot be achieved because of implacable opposition, it makes good sense to support rationales that can relieve suffering to some degree. Think of Justice Kennedy's decision to protect LGBT people against discrimination using rational basis review without deciding whether they constituted a suspect class, at an early moment when taking that step likely would have sparked opposition that would have been significant and probably disabling.<sup>13</sup> Moreover, second-best solutions can sometimes pave the way for first-best solutions. These reminders are particularly valuable in our historical moment, when egalitarians are likely to face significant obstacles, particularly in courts. In issuing them, Tsai is building on an argument for constitutional borrowing that we made together in an earlier article.<sup>14</sup> I am delighted to be

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10. For the Supreme Court version of the amicus brief, see Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents, *Trump v. Hawaii*, 2018 WL 1605673 (March 30, 2018). I was one of the principal authors of that brief, which we filed in several courts.

11. He suggests that although it would be easy to become "enamored" with the straightforward equality argument, "that's a mistake" because serious arguments existed on the other side, including the government's contention that the travel ban was necessary to protect national security (p. 3).

12. Discussing *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

13. Cf. pp. 131-32, offering *Romer v. Evans*, 519 U.S. 620 (1996), as "the perfect roadmap for equality by other means."

14. See p. 239 n.37, citing Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

associated with Tsai in this way, though I take no credit for his work in this book, which is entirely original, characteristically careful, and admirably constructive.

Yet there is another way that egalitarians could respond to nonideal conditions, one that receives less attention in *Practical Equality*—they could dissent. Tsai is focused almost exclusively on the judiciary in this work, and his unit of analysis is a court, taken as a decisionmaking body. That focus makes sense given his audience, which seems to include both lawyers on the left who are seeking outcomes in litigation and members of the political community who are urging and evaluating judicial action. But a consequence of that choice is that he does not separately address sympathetic judges, and he does not centrally consider what their responsibilities or best strategies might be, when faced with conservative colleagues who will outnumber them or appellate courts who will overrule them. Should egalitarian judges who find themselves unable to achieve ideal outcomes also engage in practical equality, or should they dissent?

Think furthermore about constitutional actors outside of courts—in legislatures, administrative agencies, local governments, nonprofit organizations, educational institutions, media outlets, social movements, and political mobilizations. Egalitarians in these settings also regularly make constitutional arguments, and they regularly face obstacles. Should they seek equality by other means, or should they forcefully urge an alternative constitutional vision of what full and equal membership in the democratic community looks like in a society that is well ordered and just?

To ask these questions is not to answer them. Likely, the effectiveness of various constitutional strategies will vary by context. But considering these issues opens up an important discussion about the comparative merits and demerits of different approaches—a discussion that I imagine Tsai will welcome. One of these approaches is “equality by other means”; another is dissent.

## II.

A scenario in which it might be better for constitutional actors to dissent is where disagreement is necessary to manage the range of acceptable arguments and outcomes. In the situation I

am imagining, embracing a second-best solution makes egalitarian arguments seem extreme or radical. That cost may be too great, especially where the outcome is not in question because the opposition is certain to prevail, but perhaps also in some situations where the outcome is uncertain.

On this view, there is at any given moment a range of constitutional positions that carry authority or weight with the relevant decisionmaker. Outside that range, positions are considered unthinkable or at least unserious. Theorists sometimes refer to this category of recognized arguments as the Overton Window.<sup>15</sup> Jack Balkin describes something similar when he argues that some constitutional arguments count as “on the wall” at any given historical moment, whereas others are “off the wall.”<sup>16</sup> Interpretations can move back and forth between unacceptable and acceptable, unthinkable and thinkable. Moreover, the size of the window can be expanded or contracted, and the entire window can move leftward or rightward, to use crude political terms. The mechanisms by which these changes occur are complex, contingent, and at least partially extralegal. Regardless, the key insight is that the breadth and location of the range of colorable interpretations can have profound effect on constitutional conflicts.

Where the outcome of a particular dispute is certain to be inequalitarian, shirking from dissent can have deleterious effects on the acceptability of equality arguments. It can isolate those constitutional interpretations, casting them as immoderate. Over time, that impression can prove meaningful, if not on in litigation itself than in the wider sphere of constitutional politics where the Court is the dominant player.

Under conditions of political polarization, moreover, conservative interpretations are likely to shift rightward (just as liberal positions are shifting leftward, though not necessarily

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15. See Nelson Tebbe, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 393–94 (2015) (“Joseph Overton observed that in a given public policy area, such as education, only a relatively narrow range of potential policies will be considered politically acceptable.”) (citing *The Overton Window: A Model of Policy Change*, MACKINAC CTR. FOR PUB. POL’Y, [www.mackinac.org/OvertonWindow](http://www.mackinac.org/OvertonWindow)).

16. Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-main-stream/258040> (describing how arguments once considered “off the wall” become “on the wall” through contestation and argument).

symmetrically).<sup>17</sup> If egalitarians on the Court respond by embracing second-best solutions that are less likely to be divisive and more likely to win converts among conservatives, that could promote a rightward shift of the range of acceptable outcomes. By contrast, a practice of persistent dissent could stabilize the range of recognized positions, or at least force it to expand rather than simply shift.

Outside courts, egalitarians on the left face choices that are analogous though not identical. If they know that they will be unable to obtain a particular outcome—an assumption I will relax in a minute—then pursuing equality by other means may come with a cost. Voicing strong dissent, by contrast, might help to preserve plausibility for positions on questions of justice that then will have a better chance of carrying the day sometime in the future.

As an example, return to the travel ban case.<sup>18</sup> There, the Supreme Court upheld (the third and final version of) Trump’s restriction on travel from certain countries to the United States. Writing for a narrow majority of five votes, Chief Justice Roberts applied a deferential standard of review to the executive action, insulating it against the claim that Trump had acted out of animosity toward Muslims in violation of the Establishment Clause. Because the case concerned immigration and national security, that is, Roberts reasoned that the travel ban should be upheld if it could be supported by legitimate national security concerns, independent of any unconstitutional motives, and he found that it could be supported that way.<sup>19</sup> He therefore put to one side the history of statements by Trump that strongly suggested that his effort to craft a travel ban was driven by unconstitutional bias against Muslims.<sup>20</sup>

Tsai seems to suggest that the majority opinion, “disappointing though it may have been,” was the best we could have hoped for from courts (pp. 79-80). By the time the Supreme Court ruled, the due process defects had been ameliorated, if not

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17. Cf. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018) (analogizing to “asymmetric polarization” in politics).

18. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

19. *Id.* at 2420–21.

20. See *id.* at 2416–18 (describing Trump’s statements regarding the travel ban, including that he intended to effect a “total and complete shutdown of Muslims entering the United States”).

completely eliminated, and without the need to accuse the president of acting out of antireligious animus.

Yet imagine what the effect would have been if some of the dissenters—say, Justices Breyer and Kagan—had adopted this rationale in a concurrence or even joined the majority opinion. As it was, Justice Breyer, joined by Justice Kagan, wrote a dissent in which he argued that the administration may well have been applying the ban’s many exemptions in a manner that bolstered the animus conclusion, and he called for a remand to explore that evidence further.<sup>21</sup> However, he also said clearly that if a remand were impossible, he would set aside the travel ban on the basis of the president’s statements, as documented by Justice Sotomayor in her separate dissent, joined by Justice Ginsburg.<sup>22</sup> If Justices Breyer and Kagan had not dissented, they would have isolated Justice Sotomayor’s opinion, and they would have further marginalized the argument that Trump in fact promulgated the final travel ban as part of a sustained effort to exclude Muslims, exactly as he had promised during his campaign.<sup>23</sup>

After all, the Ninth Circuit’s due process opinion was not the only source of constitutional resistance to the travel ban, nor was it the most prominent or persistent one. The Fourth Circuit also repeatedly found against Trump’s program, and it did so on straightforward Establishment Clause grounds, holding that the president likely had acted out of “animus toward Islam.”<sup>24</sup> It’s far from clear—to me, at least—that the administration revised the travel ban solely in response to the Ninth Circuit’s due process ruling, when the Fourth Circuit had also been holding that the ban likely violated the Constitution. Moreover, the Ninth Circuit’s later rulings, against versions two and three of the travel ban, abandoned the due process argument and substituted statutory

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21. *Trump v. Hawaii*, 138 S. Ct. at 2433 (Breyer, J., dissenting).

22. *Id.* (“If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor’s opinion, a sufficient basis to set the Proclamation aside.”).

23. This is not to say that Justice Breyer’s opinion did not already fracture the dissent. It is to say only that failing to dissent would have done even more to promote the impression that Justices Sotomayor and Ginsburg were outliers.

24. *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 257 (4th Cir. 2018) (en banc); *see also Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 597 (4th Cir. 2017) (finding the plaintiffs likely to succeed on the merits of their Establishment Clause challenge to the second version of the travel ban).

grounds.<sup>25</sup> So it's possible that some of the credit that Tsai claims for practical equality should actually go to first-best egalitarianism, rather than to second-best approaches.<sup>26</sup>

Contrast the travel ban case to *Masterpiece Cakeshop*, which was decided the same month and which also turned on a claim of religious animosity.<sup>27</sup> There, the Court ruled for Jack Phillips, a Christian baker who refused to provide a wedding cake for the celebration of Charlie Craig and David Mullins, who were planning a celebration of their marriage. The Court reasoned, in part, that Colorado officials had relied on antireligious “hostility” when they ruled in the couple’s favor, because two state officials had made remarks about religion that the Court considered to be disparaging.<sup>28</sup> I want to put aside the merits of that controversial holding and focus instead on the votes of Justices Kagan and Breyer. They joined the majority because, as Justice Kagan explained, they agreed that Colorado officials had not showed Phillips “neutral and respectful consideration.”<sup>29</sup> Their signatures made the decision 7-2, with only Justices Sotomayor and Ginsburg dissenting.

Justices Kagan and Breyer *might* have been pursuing a form of practical equality. They could well have counted noses after oral argument and concluded that Jack Phillips was going to prevail. (Certainly, I had that sense on reading the transcript.) And they might further have calculated that a narrow decision based on the unusual evidence of bias in Colorado was preferable to a broad holding that religious objectors have a presumptive

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25. See *Hawaii v. Trump*, 859 F.3d 741, 761 (9th Cir. 2017) (finding that the second version of the travel ban violated the Immigration and Naturalization Act); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (finding that the third version of the travel ban also violated statutory immigration law).

26. Admittedly, several of the improvements Tsai mentions were procedural, but several others appeared designed to defend against the accusation of religious discrimination. Adding North Korea and Venezuela to the list of banned countries, in particular, blunted the force of the argument that every country on the list was virtually entirely Muslim. That “the President’s inclusion of North Korea and Venezuela does little to mitigate the anti-Muslim animus that permeates the” travel ban doesn’t mean those additions weren’t designed to do just that. *Trump v. Hawaii*, 138 S. Ct. at 2442 (Sotomayor, J., dissenting).

27. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com’n*, 138 S. Ct. 1719 (2018).

28. *Id.* at 1731. Whether the comments were in fact disparaging has been questioned. Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 138–43 (2018).

29. *Masterpiece*, 138 S. Ct. at 1732 (Kagan, J., dissenting).

right to exemptions from core civil rights laws. Rather than dissenting, then, they sought to shape a majority opinion that was as narrow as possible—Justice Kagan even wrote separately, joined by Justice Breyer, to urge an interpretation of the majority opinion that avoided one particularly broad reading.<sup>30</sup> Even if that wasn't exactly equality by other means—Craig and Mullins lost, after all—it could have counted as practical equality, because it might have helped to blunt an opinion that otherwise would have been more damaging.

Yet the strategy came with a cost. Making the *Masterpiece* vote 7-2 isolated the strong dissent by Justice Ginsburg, joined by Justice Sotomayor. It marginalized their perspective, which otherwise might have drawn four votes. That dynamic may well influence the Court when a wedding vendor case returns to the Court, as it surely will, or indeed whenever the Court next confronts any similar tension between religious freedom and equality law. Now, that cost may be overborne by the benefits of the strategy I am imagining for Justices Breyer and Kagan. My only point here is that when we are evaluating options in a nonideal world, our evaluation should be comparative—it ought to include the option of dissent.

A pattern is emerging, at least in religious freedom cases. Justices Breyer and Kagan are forging a position, or a set of positions, somewhere between the majority on the right and the dissenting justices to their left. Of course, it is possible that they are doing this for entirely principled reasons, and with no thought for judicial strategy. But it is also possible that Breyer and Kagan believe their approach has instrumental advantages even on a Court where Justice Kennedy has been replaced by Justice Kavanaugh, and where Chief Justice Roberts now sits near the center of the balance of power—a center that has shifted appreciably to the right.<sup>31</sup>

Perhaps they believe that they can slowly bring Roberts along by building trust and solidarity with him incrementally—in a series of cases rather than all at once. Guided by the examples of how Justices Souter or Kennedy became less conservative over the course of their judicial careers, Justices Breyer and Kagan

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30. *Id.* at 1733–34. For a different rejection of that reading, see Lawrence G. Sager & Nelson Tebbe, *The Reality Principle*, 34 CONST. COMMENT. 171 (2019).

31. Of course, it is also conceivable that Justices Breyer and Kagan are acting out of some complicated mix of principled and pragmatic rationales.

may believe that they can sway Roberts through force of reason and moral suasion, if and only if they can avoid sparking a defensive reaction. But what if they are wrong? What if Roberts turns out to be a very different thinker from Souter or Kennedy, sitting on a transformed Court, at a markedly distinct political and historical moment? That possibility has to be considered.

### III.

Tsai has addressed some related matters, and he's done so with characteristic elegance and exactitude. Most importantly, he rejects the strategies of "deferral" and "appeasement" and he distinguishes them from practical equality (p. 6).

Deferral means putting off equality enforcement so that public opinion and cultural attitudes have time to adjust, and so "legal rulings seem more democratic and are less likely to be openly defied" (p. 4). That approach sounds reasonable, in the nonideal world that he addresses, but Tsai is quite skeptical. He believes the costs of delay are often underestimated and generally too high for those suffering from unjust practices (p. 5).<sup>32</sup> Moreover, the strategy introduces considerable uncertainty, because attitudes may never progress sufficiently to allow enforcement (p. 5). Referring once more to the example of the travel ban, Tsai argues that travelers and especially refugees should not suffer uncertainty or indefinite postponement (pp. 4-5).

Why these costs are greater than the downsides of practical equality is not completely clear. Those who did not benefit from the administration's adjustments to the travel ban—adjustments that Tsai credits to the Ninth Circuit's due process ruling—are now permanently deprived of relief. Maybe Tsai is correct that their suffering, summed over time, is comparatively less than the harm experienced by all those initially subject to the ban, if it was allowed to persist for a temporary period. But that calculation is complicated.

Appeasement, for Tsai, means "openly adopting the objections of your opponents as your own" in order to achieve a measure of recognition for egalitarianism rather than none at all.

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32. See also p. 127 (criticizing the Court's deferral in *Korematsu*, which was not released until after the president announced closure of the camps); *id.* ("[D]eferral is like a lousy rerun. We've seen it before and it never gets better.").

(pp. 5-6; see also pp. 35-36) Tsai is wary of this strategy as well, because he thinks that colluding with opponents can work to perpetuate injustice. What he means, I think, is that appeasers aim to neutralize the aggression of another but they end up with the opposite effect—they unintentionally energize their opponent (p. 7).<sup>33</sup> As Micah Schwartzman and I have put the point, the term appeasement usually refers to a situation where one side accedes to another's demands with the intent of disarming them, "but where that concession has the self-defeating effect of emboldening the other."<sup>34</sup>

Turning once more to the travel ban, Tsai argues that it would have been a mistake to concede that refugees could be blocked, even if that were the price for invalidating the prohibition on other travelers (p. 6). Nor would it have been wise to allow an emergency exception that made discrimination against Muslims permissible for reasons of national security (p. 6). Yet the majority opinion did effectively create a national security exception. So why Tsai equivocates on the wisdom of the travel ban decision (pp. 79-80) is somewhat puzzling.

More generally, distinguishing practical equality from appeasement can sometimes be difficult. On the one hand, certain second-best solutions carry little risk of empowering discriminators. When the Ninth Circuit invalidated the travel ban on procedural grounds, for instance, Trump's hand was not strengthened (pp. 75-76). On the other hand, however, some instances of practical equality are harder to distinguish from appeasement. In *United States Agriculture v. Moreno*, the Court invalidated a provision of the Food Stamp Act that excluded people who lived with anyone unrelated to them.<sup>35</sup> The Court held that the provision was not rationally related to the prevention of fraud. Tsai cheers this outcome because it did something to protect indigent people, who were more likely to have roommates from outside their families (p. 110). But was it appeasement?

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33. "[T]he flaw with appeasement is that justice in half measures could leave future generations worse off" (p. 7).

34. Micah Schwartzman & Nelson Tebbe, *Against Establishment Clause Concession*, TAKE CARE (Mar. 1, 2019), <https://takecareblog.com/blog/against-establishment-clause-concession>. We explicitly disclaimed any historical reference carried by the term appeasement.

35. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

*Moreno* was decided in the early 1970s, a time when constitutional actors were engaged in a serious debate over whether and how to protect poor people from government actions that worsened one of the most significant sources of inequality in America—and indeed over what inequality on the basis of wealth and income even entailed, as a matter of political morality and constitutional justice. In decisions like *Moreno*, the Court stopped short of declaring indigency to be a suspect classification, government use of which would have triggered a presumption of unconstitutionality under the Equal Protection Clause.<sup>36</sup> Did that decision embolden those who wished to insulate market ordering from judicial oversight and constitutional critique? Did it contribute to the contemporary situation, in which indigent Americans find themselves without constitutional resources for arguing against historic levels of distributive injustice?<sup>37</sup> Those questions seem hard to answer, and I am not sure how Tsai would respond.<sup>38</sup>

#### IV.

In response to this moment of political polarization, a trope seems to be emerging. Principled positions are characterized as divisive because they tend to stimulate defensive reactions that are equally strong, whereas pragmatic approaches promote reconciliation and offer a pathway to productive action. Tsai sets up a similar tension between principle and practicality<sup>39</sup> and he is

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36. See Bertrall Ross, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 341 (2016) (“For a brief seven-year period in the late 1960s and early 1970s, classifications on the basis of wealth stood on the same level as classifications on the basis on the basis of race—traditionally disfavored and subject to heightened judicial scrutiny. But after the addition of four conservative Justices in the early 1970s, the Court reversed course and ultimately determined that wealth was not a suspect classification and that the poor were not a suspect class.”). A key decision in the reversal, handed down the same year as *Moreno*, was *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

37. But see Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U.L. REV. 671 (2014) (exhuming an American constitutional tradition supporting socio-economic rights).

38. For an example that Tsai considers appeasement, consider the decision by some LGBT supporters to advocate for civil unions in the 1990s and 2000s (pp. 36–37). Did that decision encourage the impression that something short of civil marriage was all same-sex couples were entitled to, or was it a pragmatic step forward at a moment in history when marriage equality was not attainable?

39. See, e.g., p. 6 (describing a “tussle between principle and realism”); p. 11 (arguing that practical equality “would best balance principle and realism”), p. 91 (describing

not alone—he has distinguished company.<sup>40</sup> In his book, however, Tsai introduces an inventive twist, arguing that the principle of equality can be pursued without principled argument, by using other constitutional means to achieve ends that are the same or similar.

But principle does not work that way, or at least it need not work that way. People use inductive reasoning to identify values or commitments that fairly abstract from more particular judgments that have withstood examination over time. These abstract commitments, or principles, are not rules that rigidly dictate outcomes.<sup>41</sup> People use them to deduce solutions to contemporary problems, but that process is always complex and contestable. Moreover, principles don't suggest outcomes alone—they work together with concrete judgments, or precedents, to form a coherent set of convictions. Where the Constitution is involved, those convictions include text, history, structure, and past decisions that have come to be regarded as authoritative.<sup>42</sup> In this manner, interpreters work toward solutions to contemporary problems that fit together not only with principles, but also with precedents and pragmatic considerations. And this way of thinking is dynamic, so that every element is revisable, including principles.

Understood like that, constitutional interpretation does not necessarily pit principle against practical considerations. To say that it does is to dismiss the power of dissent prematurely, calling it rigid, without appreciating its dynamism or contingency. Many of the decisions that Tsai praises throughout his book could be understood as consistent with principle, on such a view. For instance, the Ninth Circuit's decision in the travel ban case was

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equality by other means as “both principled and pragmatic”), p. 39 (“pragmatism shies away from fixed principles and closed systems”).

40. ANDREW KOPPELMAN, *THE UNNECESSARY CONFLICT BETWEEN GAY RIGHTS AND RELIGIOUS LIBERTY* 1, 4 (forthcoming, 2020) (“Principles are a distraction, which make each side's claims seem more uncompromisable than they are . . . . Lawyers are trained to think about conflict resolution by devising abstract principles that should cover all future cases, and which incidentally entail that their side wins. But this is not the only way to think about conflict. Sometimes, the right thing to do is not to follow a principle, but to accurately discern the interests at stake and cobble together an approach that gives some weight to each of those interests.”).

41. *See, e.g.*, RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–23 (1977) (distinguishing principles from rules).

42. This paragraph draws on NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 25–36 (2017).

not unprincipled—rather, it emphasized the importance of procedural due process (as well as substantive due process). That the court may also have responded to the political difficulties that an Establishment Clause opinion finding religious animus may have faced in the Ninth Circuit itself, or on certiorari review, does not mean that its opinion did not implement the norm of due process, an important constitutional ideal. Nor was the *Moreno* decision any more practical than it was principled—after all, the conviction that government may only coerce people on the basis of reasons that are public in the sense that they are accessible to those coerced is basic to liberal-egalitarian democracy.

Lawyers on the left should welcome compromise in the many instances in which it can be supported by considerations of justice as applied to the real world. But where it cannot, compromise in itself may not be worth pursuing.<sup>43</sup> Actually, I do not think Tsai himself suggests otherwise.<sup>44</sup> But others who value the reduction of today's political tension for its own sake may be constructing agreement on an unfirm foundation. Democratic principles can hold the United States together, and the United States is not likely to be held together without them.

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43. See Nelson Tebbe, *Conscience and Equality*, 31 J. C. R. & ECON. DEVEL. 1, 64–66 (2018) (distinguishing between two forms of compromise, reasoned and unreasoned, and raising concerns about the second). There is a developed literature about compromise in political theory; I plan to address it in upcoming work.

44. Tsai does sometimes seem to value consensus in itself (pp. 70–71, 75). Practical egalitarians want courts to make the right decisions, but they may not need consensus to do that, and there does not seem to be a necessary reason why consensus would have independent value, especially within a court.