

2019

## **Practical Equality and the Limits of Second Best Strategies for Justice**

Franita Tolson

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

### **Recommended Citation**

Tolson, Franita, "Practical Equality and the Limits of Second Best Strategies for Justice" (2019).  
*Constitutional Commentary*. 1205.  
<https://scholarship.law.umn.edu/concomm/1205>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

PRACTICAL EQUALITY AND THE LIMITS  
OF SECOND BEST STRATEGIES FOR  
JUSTICE

**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).

*Franita Tolson*<sup>2</sup>

In *Practical Equality: Forging Justice in a Divided Nation*, Professor Robert Tsai argues that doing the hard work of equality sometimes requires the use of doctrines that are not expressly equality-based but can achieve the same goals as equality doctrine. These “second-order” doctrines, which include fair play, reasonableness, anti-cruelty, and free speech, are vehicles through which equality can be vindicated without triggering the controversy that often walks hand in hand with the quest for equal treatment. Even for those of us who believe in making overt demands for equality, we do not always agree on the proper means of achieving these goals. Moreover, these demands can complicate the struggle to protect equality norms when they are under assault, as they are now; second order doctrines are important alternatives when the goal is to preserve gains as opposed to breaking down existing barriers. Professor Tsai’s book is not only important, but it lays out a much-needed path forward for achieving equality in challenging times. For all of its attributes, however, the book also raises important questions about the circumstances in which the demand for equality must be overt, express, and uncompromising. While second-order doctrines are an important part of any strategy seeking to create a more just society, it is vital that they do not replace first-order calls for equality and justice. Equality must be both practical and radical.

---

1. Professor of Law, American University.

2. Professor of Law and Vice Dean for Faculty and Academic Affairs, University of Southern California Gould School of Law. Thanks to Emily Kong for research assistance.

## PART I: EQUALITY BY ANY MEANS NECESSARY?

There are many wonderful themes and concepts in *Practical Equality* around which even those with diametrically opposed views of equality can coalesce. The book does an excellent job of tying equality to broader notions of dignity and fairness underlying the second-order doctrines that it advocates, illustrating that its themes are not about progressive ideals but universal ones. Liberal organizations like the NAACP get similar treatment in the book as the conservative Lambs Chapel, showing how reliance on doctrines other than equality can transcend the differences that tend to prevent agreement about what equal treatment requires (p. 195). For this reason, the use of second-order doctrines to achieve the goals of equality is attractive—it avoids antagonizing opponents, seeking to find common ground where none existed before, and it does so all in the name of justice.

For example, the doctrine of fair play resolved difficult cases when courts were reluctant to commit to a broad reading of the Fourteenth Amendment in most contexts. In criminal justice cases, in particular, fair play has served to deliver justice to African-Americans accused of heinous crimes who confess only because of ill treatment at the hands of the police. While the equality implications of these cases might be clear to those who are committed to its terms, even courts unsympathetic to the plight of African-Americans in that space were forced to confront the fundamental injustice of coerced confessions (pp. 51-60). Because fair play is, according to Professor Tsai, based on “widely shared intuitions about how crucial decisions should be made,” it is, in some ways, more attractive than resolving cases by defining the scope of equal protection (pp. 67-68).<sup>3</sup> Instead, it is far easier to determine what fair play prohibits. Wider reliance on notions of fair play could have special resonance in the death penalty context, where equality arguments have explicitly failed (pp. 80-92). As Professor Tsai argues, statistics show that people are less in favor of criminal justice reform where they associate the criminal justice system with blackness, even while conceding that the challenged policy is cruel (pp. 80-92).<sup>4</sup> Being aggressive in

---

3. Tsai notes that, with fair play, “[w]e don’t have to decide up front what kind of autonomy is involved or what its full scope should be in this context. We don’t even have to agree about every single element that would make something truly fair and equitable, as if we were designing an ideal process from scratch.”

4. See also pp. 148-49, discussing Supreme Court decisions in the 1970s striking

policing cruelty through fair play (and also through anti-cruelty doctrine) can do some of the work that equality doctrine would otherwise be tasked with in this context.

Similarly, the rule of reasonableness is also attractive as an equality substitute. The rule is familiar, easy to implement, and it is a fundamental part of equality doctrine. The Equal Protection Clause, and its requirement of rationality, is simply another way of requiring the government to act reasonably. When the government departs from this baseline of reasonableness, which often occurs in the context of laws that favor discrete and insular minorities, the rule of reasonableness can fill the gap left by courts reluctant to explicitly evoke the Equal Protection Clause's protected-class jurisprudence. The Supreme Court's desire to categorize historically oppressed groups to determine scrutiny levels has not satisfactorily resolved the status of groups that have been oppressed but don't fit into neat categories—the mentally disabled,<sup>5</sup> the LGTBO community,<sup>6</sup> the politically unpopular,<sup>7</sup> to name a few. The Court's protected-class jurisprudence has not comfortably evolved to reflect the realities of our society, in which the historical experiences of groups are more likely to be accepted on their own merits rather than validated by the discriminatory experiences of others. For example, LGTBO+ individuals have been persecuted, but the validity of their complaints should not depend on how their experiences compare to the experiences of groups to whom the Court does accord protection.

The court's protected class jurisprudence invites the use of the second-order doctrines that Professor Tsai champions in his book. Reasonableness does not require the Court to determine which groups are most oppressed and therefore worthy of the highest level of scrutiny, in essence a very unattractive method of comparing suffering. It is therefore acceptable to tell the City of Cleburne that it was unreasonable for the City to internalize the prejudices of its residents in refusing to give a permit to a home designed for the mentally disabled because the outcome would be the same if the mentally disabled was treated as a constitutionally

---

down the death penalty, and noting that “reducing merciless treatment across the board can rebound to the benefit of those who tend to feel the brunt of harsh policies.”

5. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

6. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *Romer v. Evans*, 517 U.S. 620 (1996).

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

protected group entitled to strict scrutiny under the Court's caselaw. Similarly, it is unreasonable for the government to deny food stamps to hippies because legislators disapproved of their lifestyle. The rule of reasonableness does not require the plaintiffs to prove ill will, or that the mentally disabled and hippies are similarly situated to the groups (like African-Americans or women) that get special solicitude from the Court. The plaintiffs only have to show that the government was not acting for sound reasons (p. 111).

Professor Tsai's book persuasively shows that second-order doctrines can work in place of equality arguments. In thinking about the use of second-order doctrines, however, it is important to be clear about when these doctrines are adequate replacements and when they are less-preferred alternatives. For example, the Supreme Court has weaponized the First Amendment in cases like *Citizens United v. F.E.C.* in order to promote an absolutism divorced from the uses that the Warren Court employed to protect discrete and insular minorities.<sup>8</sup> Under this view of the First Amendment, corporations and unions can spend in unlimited quantities, drowning out the voices of those who do not have equivalent resources. Relatedly, this interpretation of the First Amendment also protects a baker from having to make a cake for a gay couple for religious reasons, another implicit limit on the ability of second-order doctrines to do the work of equality when there are competing claims.<sup>9</sup> For the Warren Court, the First Amendment was a useful vehicle for eradicating inequality faced by African-Americans during the Civil Rights era. The doctrine protected the associational rights of groups like the NAACP from crippling state legislation that would have forced them to cease operations in the state. Much of the utility of second-order doctrines depends on the Court that is employing them. For the Warren Court, the First Amendment was a paradigmatic example of what practical equality can achieve; for the Roberts Court, the First Amendment is a vehicle for preventing equality from becoming oppression, but at the expense of the most vulnerable members of society.

There are similar limits to a rule of reasonableness as an equality substitute. On one hand, the Japanese internment was a

---

8. *Citizens United v. Federal Election Commission (F.E.C.)*, 558 U.S. 310 (2010).

9. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

clear example of government unreasonableness, because of its willingness to engage in racist behavior based on flimsy (and some might say nonexistent) evidence of disloyalty. While the rule of reasonableness might have been the vehicle that ultimately led to the Court to demand the release of a Japanese-American woman in *Ex Parte Endo*, its blanket endorsement of Japanese internment in *United States v. Korematsu* illustrated how second-best doctrines are just that—second best.<sup>10</sup> The Japanese internment was less an instance of government unreasonableness, and more a situation in which the racism should have been directly called out in a way that could have led to more political accountability. As *Endo* shows, second-best solutions might not be ideal when they force individual victims to bear the burden of challenging a program that the government should have to defend in the first instance. Instead of forcing the government to come forward with compelling evidence to justify its blanket internment program in *Korematsu*, the Court ordered the release of one individual based on a lack of evidence of disloyalty. The government might have lost the battle in *Endo*, but with *Korematsu*, they won the war.

Second-order doctrines can vindicate the interest of historically oppressed groups, but they can also contribute to their continued oppression. In some ways, the success of these doctrines is determined in no small part by the Court's willingness to deploy them in a way that achieves the equality ideal, bringing us back to an area of contestation Professor Tsai hoped that the use of these doctrines would avoid. As the next section shows, there are also costs to second-order doctrines that have broader cultural consequences, and this should factor into any strategic decisions to deploy such doctrines as meaningful equality substitutes.

## PART II: THE COST OF SECOND-BEST STRATEGIES

*Ex Parte Endo* and *Korematsu* squarely present the question of when equality advocates should force courts to confront inequality head on, particularly when evasion can further the oppression of discrete and insular minority groups. The voting rights context is one area in which our reluctance to call out

---

10. *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944).

discrimination by name has had far reaching cultural consequences, and second-order doctrines have proved detrimental. For example, Section 2 of the Voting Rights Act allows plaintiffs to prevail if they can show that any device used for voting has the effect of abridging the right to vote on the basis of race, neatly sidestepping any intent requirement. In the decades since the Act was amended to allow plaintiffs to prevail by showing effect alone, it has become one of the most potent tools in the arsenal of civil rights advocates. Similarly, Sections 4(b) and 5 of the Act required that certain covered jurisdictions preclear all changes to their voting laws with the federal government before those changes could go into effect. The Department of Justice would block the implementation of any law that it found to be discriminatory in intent or effect. Again, reliance on discriminatory effect made it much easier to block laws than if the Department had to establish the existence of discriminatory intent alone.

While litigation under Section 2 and preclearance under Sections 4(b) and 5 were not without their challenges,<sup>11</sup> the effects-only regime has had negative impacts, which voting rights advocates did not have to directly confront until the *Shelby County v. Holder* case.<sup>12</sup> In *Shelby County*, the Court invalidated Section 4(b) of the Voting Rights Act, on the grounds that the coverage formula was based on racially discriminatory practices, such as literacy tests and poll taxes, which did not reflect the current racial climate of the country.<sup>13</sup> The Court touted the progress in African-American voter registration and turnout that has been achieved in the years since the Voting Rights Act became law, which illustrated, as one scholar eloquently put it, that “Bull Connor is dead.”<sup>14</sup>

The Supreme Court created the post-racial narrative in *Shelby County*, because the reluctance in recent years to call out intentional discrimination, facilitated by the fact that the law required no showing of intent, gave them cover to claim that

---

11. See, e.g., *Bartlett v. Strickland*, 556 U.S. 1 (2009) (stating that Section 2 did not protect districts that were less than fifty percent majority-minority); *Reno v. Bossier Parish*, 528 U.S. 320 (2000) (holding that the government had to preclear a redistricting plan enacted with discriminatory, but nonretrogressive, purpose).

12. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

13. *Id.* at 555.

14. Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 179 (2005).

racism no longer existed. *NAMUDNO v. Holder* presented this dynamic in stark fashion. In *NAMUDNO*, the Court intimated at length that Section 5 of the Voting Rights Act of 1965 was unconstitutional, but application of the constitutional avoidance canon would give Congress an opportunity to fix the statute. Here, the second-order doctrine was the constitutional avoidance canon, and equality advocates were more than happy to fall in line behind this use of the doctrine, so long as the preclearance regime survived to live another day. Yet, when the Court invalidated the coverage formula of Section 4(b) four years later, in *Shelby v. Holder*, the Court made it difficult to envision that any type of remedy would have been appropriate, especially since much of its opinion was based on a post-racialism which suggested that the Act was outdated because of its federalism costs.<sup>15</sup> Congress, even if it had been functional enough to amend Sections 4(b) and 5 during the period between *NAMUDNO* and *Shelby*, was likely in a lose-lose situation, given the chasm between the Court's deference to Congress in 2009<sup>16</sup> and the Court's 2013 intervention to save "Our Federalism" from a threat that no longer existed.<sup>17</sup>

---

15. *Shelby Cty.*, 570 U.S. at 540, 547 (arguing that the preclearance regime, as then constituted, was no longer warranted because "blatantly discriminatory evasions of federal decrees are rare," "minority candidates hold office at unprecedented levels," and the "tests and devices that blocked access to the ballot have been forbidden nationwide for over 40 years"); *but see id.* at 565 (Ginsburg, J., dissenting) ("The House and Senate Judiciary Committees held 21 hearings, heard from scores of witnesses, and received a number of investigative reports and other written documentation of continuing discrimination in covered jurisdictions. In all, the legislative record Congress compiled filled more than 15,000 pages. The compilation presents countless 'examples of flagrant racial discrimination' since the last reauthorization; Congress also brought to light systematic evidence that 'intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed.'").

16. *Compare* *Northwest Austin Municipal District Number One (NAMUDNO) v. Holder*, 557 U.S. 193, 205 (2009), *with* *Shelby Cty.*, 570 U.S. at 556. In *Shelby County*, the Court did not resolve the question of what standard of review applies to Congress's exercises of authority under the Fifteenth Amendment, making it difficult for Congress to legislate in this area moving forward. *See* *Shelby Cty.*, 570 U.S. at 542 n.1 (stating that "*Northwest Austin* guides our review under both Amendments in this case"); *but see* *NAMUDNO*, 557 U.S. at 204 ("The parties do not agree on the standard to apply in deciding whether, in light of the foregoing concerns, Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements . . . . That question has been extensively briefed in this case, but we need not resolve it. The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.").

17. *See* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 393 (2015) ("The *Shelby County* decision suggests that the Court is gravitating away from a broad interpretation of Congress's enforcement authority that would allow it to regulate otherwise constitutional conduct in order to

In 2009, it was not advantageous to call out the Court for its failure to speak in terms of equality, for its refusal to recognize that discrimination not only existed but required continuing federal oversight; instead, equality advocates took the crumb that was handed to them and lost the war four years later.

And the post-*Shelby* world continues to struggle with using the language of equality in the voting rights context, relying on arguments centered in federalism and faux outrage so as to ignore that the past is not really past. In *Veasey v. Abbott*, for example, a panel of the Fifth Circuit Court of Appeals invalidated Texas's voter identification law as a violation of Section 2 of the Voting Rights Act, but the court relied on an effects analysis, in part, because it was uncomfortable with finding that the state engaged in intentional discrimination that violated the Fourteenth and Fifteenth Amendments.<sup>18</sup> In rejecting the district court's analysis of the constitutional claim, in which the lower court determined that the state had acted with discriminatory intent, the appeals court parsed the evidence in a very formalistic manner, relying on older instances of discrimination to validate the statutory claim that the law had a discriminatory effect,<sup>19</sup> while disregarding this evidence with respect to whether the state had violated the Constitution.<sup>20</sup>

Both the Fifth Circuit panel and the *en banc* Fifth Circuit that later reviewed the case also shied away from relying on an intentional discrimination framework, finding that, while there was enough evidence to support a finding of invidious purpose, the case should be remanded . . . to determine whether there should be a finding of invidious purpose.<sup>21</sup> Although the Fifth

---

deter constitutional violations.”); *see also* Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1392–93 (2015) (arguing that proposed fixes to the VRA then under discussion “will simply increase the risk that the current Court majority further dismantles—and hastens the demise of—the remaining provisions of the Act” because “the Court no longer believes that intentional racial discrimination by state actors remains the dominant problem of democratic politics.”).

18. *Cf. Veasey v. Abbott*, 796 F.3d 487, 501–02 (5th Cir. 2015) (discussing the difficulty of establishing discriminatory intent on the part of an entire legislative body).

19. *See id.* at 504–05, 509–11.

20. *See id.* at 500.

21. *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2015) (*en banc*) (“In sum, although some of the evidence on which the district court relied was infirm, there remains evidence to support a finding that the cloak of ballot integrity could be hiding a more invidious purpose . . . [S]ince there is more than one way to decide this case, and the right court to make those findings is the district court, we must remand . . .”).

Circuit, sitting *en banc*, agreed with the original panel that some of the intent evidence was infirm,<sup>22</sup> the *en banc* majority conceded that there was evidence of intent on the part of the Texas Legislature that fell squarely within the intentional discrimination paradigm outlined in the Supreme Court decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.* This evidence included departures from normal procedures; questionable statements and omissions from legislators who supported the bill; the tenuousness of the legislature's stated purpose for passing the bill; and contemporary examples of state-sponsored discrimination.<sup>23</sup>

The court was much more comfortable with assessing the Section 2 violation, with the statute functioning as a second-order doctrine in this context, much like the doctrines discussed in Professor Tsai's book. Section 2 may relieve plaintiffs of the obligation to prove discriminatory intent, but its use has also conditioned courts to question the very existence of discriminatory intent, even in the face of substantial evidence of intent.

In fact, the suggestion that the State of Texas might have acted with discriminatory intent enraged the dissenters, who accused the majority of engaging in "racial name calling," merely by remanding for a determination of whether the state acted with invidious purpose. Additionally, the dissenters suggested that the majority's application of Section 2 rendered that statute constitutionally suspect, because "a wide swath of racially neutral election measures will be subject to challenge, a previously unthinkable result under the Fourteenth Amendment and the Constitution's federalist design."<sup>24</sup>

While no one has to be labeled a racist in order for discriminatory purpose to be present,<sup>25</sup> there are more significant

---

22. *Id.* at 230–31, 241.

23. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 698–702 (S.D. Tex. 2014), *aff'd in part, vacated in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *reh'g granted*, 815 F.3d 958 (5th Cir. 2016) (mem.), *aff'd in part, vacated in part, rev'd in part*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–68 (1977).

24. *Veasy*, 830 F.3d at 317 (opinion of Clement).

25. *Id.* at 335 (opinion of Costa). As Judge Costa observed:

Reluctance to hold that a legislature passed a law with a discriminatory purpose is understandable. Yet . . . [i]t is also important to note that affirming the finding of discriminatory purpose would not be the inflammatory "racial name-calling" that Judge Jones's dissent suggests. Such a finding, although one of grave

concerns that inure from avoiding an intentional discrimination finding than maintaining politeness. Notably, the remedies available to plaintiffs can be significantly hampered by a refusal to call out discrimination by name. Had the initial Fifth Circuit panel found that Texas engaged in intentional discrimination,<sup>26</sup> the court could have bailed the jurisdiction back into preclearance under Section 3 of the Voting Rights Act.<sup>27</sup>

Eventually, the case worked its way back down and then up to the Fifth Circuit again, before a new panel that would reject arguments that the voter identification law violated either Section 2 of the Voting Rights Act or the Constitution.<sup>28</sup> Thus, refusing to confront the question of intentional discrimination ultimately had a catastrophic effect. Invalidation of the law and forcing Texas back into preclearance under Section 3 of the VRA was the more appropriate—and just—remedy given the intent evidence before the court. The decision of the original panel and the *en banc* court to punt on the question of discriminatory intent led, first, to a “softening” of the Texas voter identification law, in which an affidavit option was added to the list of acceptable identification and, later, a complete rejection of any statutory and constitutional claims by a more hostile panel.<sup>29</sup>

The *Veasey* case is a manifestation of the failure to explicitly call out breaches of equality and its unforeseen consequences.

---

importance, is not tantamount to a finding that the law had a “racist motivation.” As Judge Kozinski explained in a decision upholding a district court determination that a discriminatory purpose motivated a Los Angeles county reapportionment plan, nothing in an opinion finding discriminatory purpose needs to even “suggest[ ]” that lawmakers “harbored any ethnic or racial animus.” *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 778 (9th Cir. 1990) (Kozinski, J., concurring). The discriminatory purpose can instead be the product of “elected officials engag[ing] in the single-minded pursuit of incumbency.” That most basic of human instincts—self-preservation—can thus provide an explanation for enacting a law at least in part because it will have a disparate impact on protected groups that favor the out-of-power party. Indeed, the highly polarized nature of voting in Texas along racial lines (according to exit polls from the last gubernatorial election, 72% of whites, 44% percent of Latinos, and 7% of African-Americans voted for the Republican winner) makes depressing minority turnout a strong proxy for suppressing Democratic turnout.

26. The court remanded because there was circumstantial evidence of discriminatory intent. *See Veasey v. Abbott*, 796 F.3d 487, 493 (2015), *reh’g granted*, 815 F.3d 958 (5th Cir. 2016) (mem.), *aff’d in part, vacated in part, rev’d in part*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

27. Section 3 of the VRA allows a judge, upon a finding of discriminatory intent, to bail a jurisdiction back into the preclearance regime. 52 U.S.C. § 10302(c).

28. *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018).

29. *See Veasey*, 796 F.3d, note 22, at 519–20.

The culture of not calling out discrimination by name has empowered courts to treat any call for equality as a request for an extraordinary remedy, an unfortunate development which was front and center in the recent case of *Abbott v. Perez*. At issue in *Abbott* was whether the Texas state legislature acted with discriminatory intent when it enacted redistricting plans that allegedly diluted the votes of minorities. The legislature—ironically the same legislature that enacted the voter identification law at issue in *Veasey v. Abbott*—originally adopted redistricting plans in 2011 that never went into effect, but were found by a three judge panel to have been adopted with racially discriminatory intent.<sup>30</sup> In 2013, Texas repealed the 2011 plans and replaced interim, court-drawn plans with new plans that were also challenged as discriminatory in intent and effect on constitutional and statutory grounds.<sup>31</sup> The lower court invalidated the 2013 plans, holding that the state legislature had failed to purge the discriminatory taint of the original 2011 plans when it adopted the 2013 version. The Supreme Court, in finding that the legislature’s intent in 2011 was irrelevant to the 2013 plans, held that the lower court erroneously disregarded the presumption that the legislature acted in good faith, a presumption that is “not changed by a finding of past discrimination.”<sup>32</sup> Instead, a court “‘must be sensitive to the complex interplay of forces that enter a legislature’s redistricting calculus.’ And the ‘good faith of [the] state legislature must be presumed.’”<sup>33</sup>

*Abbott v. Perez* stands for the uncomfortable proposition that, despite evidence that two lower courts in two different circuits in two different cases found to be indicative of discriminatory intent, courts should assume that the state legislature acted in good faith even in the face of claims of discriminatory intent. In this way, *Abbott* is consistent with the post-racialism of *Shelby County*, which viewed liability under a discriminatory effects framework, which does not require any evidence of intent, as tantamount to calling otherwise good people racists. The discriminatory effects approach of Section 2 of the VRA had long sustained civil rights advocates challenging state voting laws, but these cases signal the true danger that

---

30. *Abbott v. Perez*, 138 S. Ct. 2305, 2316 (2018).

31. *Id.* at 2317.

32. *Id.* at 2324.

33. *Id.*

statute faces in the coming years. When we fail to speak in the language of equality—directly, clearly, and without compromise—we empower its opponents to craft the narrative, no matter how erroneous and harmful, about what equality should look like, and we endanger the victories achieved through second-order doctrines.

CONCLUSION: BE PRACTICAL AND CALL OUT  
DISCRIMINATION BY NAME

*Practical Equality* illustrates the obvious benefits of second-order doctrines, and persuasively shows the value in achieving equality through other means. Professor Tsai recognizes that there is a time and place for the public condemnation that comes with identifying injustice, and he has given equality advocates much to think about with respect to the strategies that they pursue to achieve a more egalitarian society. But, as the Voting Rights Act illustrates, there has been a cost to the refusal to call out discrimination by name (p. 18). Voting rights is one area in which an intentional discrimination finding could have achieved more for equality than second-order doctrines that have been, until recently, useful for constraining state action. Sometimes the stigma and backlash are a small price to pay for demanding explicit adherence to basic equality norms, even if, to use Professor Tsai's words, "our tone is necessarily judgmental" (p. 18). Second-order doctrines must be a part of any litigation strategy seeking to enforce equality, but let us not silence our demands for equality because our silence could hasten, rather than prevent, the very future that we are trying to avoid.