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Robert L. Tsai

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THE HIDDEN COSTS OF DISSENT

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

*Robert L. Tsai*¹

It's not every day an author is fortunate enough to have such accomplished scholars and committed egalitarians engage so thoughtfully with his ideas, so I wish to begin by thanking Professors Franita Tolson and Nelson Tebbe for engaging with the arguments in *Practical Equality*. Each took the time to separately review the book, but for reasons of efficiency I'll combine my response.²

Both Tolson and Tebbe believe, as I do, in a more robust theory of equality than the thin gruel that has emerged from the Supreme Court's jurisprudence. Indeed, they are way ahead of me in articulating compelling normative visions of a just and equal society.³ Yet they also see, as I do, that thicker accounts of equality—and most rights generally—won't find much traction before the High Court any time soon. Thus, we share the sense that a supplemental theory might be necessary to accompany our preferred ideal theory of equality.

1. Clifford Scott Green Visiting Professor of Constitutional Law, Temple University, Beasley School of Law (Fall 2019); Professor of Law, American University, Washington College of Law. My deep appreciation to Brian Bix and *Constitutional Commentary* for organizing and publishing this mini-symposium.

2. The book emerged some different threads of my work, one of which was a generative collaboration with Nelson Tebbe: *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

3. See NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE (2017); FRANITA TOLSON, IN CONGRESS WE TRUST?: THE EVOLUTION OF FEDERAL VOTING RIGHTS ENFORCEMENT FROM THE FOUNDING TO THE PRESENT (forthcoming 2019); Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159 (2015); Nelson Tebbe, *Nonbelievers*, 97 VA. L. REV. 1111 (2011).

Practical Equality strives to do just that, by coming up with an approach that's compatible with most theories of equality, while helping decisionmakers to sidestep troublesome pitfalls that more often than not lead to indecision and the reinforcement of unjust conditions. In that sense, the book offers not a comprehensive account of equality, i.e., what an egalitarian society should look like in the best of worlds, but instead the description of an egalitarian ethic and a set of work-arounds, built on past experiences, that can be used in the deeply flawed circumstances that we often find ourselves.

I'm grateful both reviewers see "significant power"⁴ in the approach I have outlined, which holds that embattled egalitarians can, and sometimes should, look for ways to do the work of equality by other means when they run into major roadblocks. These second-order concepts—many of which tie "equality to broader notions of dignity and fairness"⁵—can, as Tolson says, "preserve gains" as well as "find common ground where none existed before . . . all in the name of justice."⁶ Doing the work of practical egalitarianism isn't about reconciliation or enforcing norms of civility; rather, it's about finding people where they are ideologically and forging a series of compromises both big and small, in as many different ways as possible, to advance the goals of equality.

Because Tolson and Tebbe start out as steadfast egalitarians, most of their concerns about my approach have to do with settling for too little. That is to say, they worry that when people move to pursue an alternative remedy, they might be either leaving winning equality arguments on the table or foreclosing the possibility of making broader equality arguments in the future. I want to spend some time trying to allay those concerns.

4. Nelson Tebbe, *Should the Left Dissent?*, 34 CONST. COMMENT. 463, 465 (2019).

5. Franita Tolson, *Practical Equality and the Limits of Second Best Strategies for Justice*, 34 CONST. COMMENT. 477, 480 (2019) ("Tsai's book persuasively shows that second-order doctrines can work in place of equality arguments.").

6. There are different ways to talk about the overlap between concepts like equality and fairness. Some philosophers, such as Jeremy Waldron, refer to the "redundancy thesis." JEREMY WALDRON, *ONE ANOTHER'S EQUALS* 72–83 (2017). Others talk about different reasons one might object to a form of inequality, and there can be a synergy between those different but related reasons. T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* (2018). See generally Robert L. Tsai, *How We Talk About Equality*, L.A. REV. OF BOOKS, Aug. 22, 2019 (reviewing Waldron's *One Another's Equals*, Scanlon's *Why Does Inequality Matter?*, and Keri Leigh Merritt's *Masterless Men*).

There's no doubt the American tradition of dissent is compelling. But there are also hidden costs associated with dissenting if there is a real chance of reaching an accord that can reduce the unequal burdens faced by someone or some group. Making tradeoffs between possible solutions is always difficult, for they entail choosing which kinds of arguments to invest in and which ones to bypass. More resources put into one kind of argument means fewer resources for another kind of argument. But it's not just the availability of arguments in the ecosystem we should care about; we should also care about avoiding terrible, demoralizing losses, and reducing inequities in ways that can build momentum for future progress.

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Tolson acknowledges the importance of second-order preferences and strategies when it comes to doing the work of equality,⁷ but thinks that there remain circumstances in which "equality must be overt, express, and uncompromising." She says equality has to have the capacity to be "both practical and radical."⁸ I heartily agree.

So, what are the circumstances in which demands for equality must remain explicit and exacting? I think the most obvious situations are those where the most critical social goods are at stake: life, liberty, education, as well as fundamental rights like free speech, marriage, and so forth. Furthermore, the nature and scope of the restraint matters. Where a group has been categorically or mostly excluded from access to an important social good, the rhetoric of equality is not just appropriate, it's the most effective way to break down a long-standing barrier. It would be foolish to lay down one's big guns.

But there are many other situations where categorical exclusions aren't at issue, or the social good at issue is deeply contested (say, a right to migrate between countries), or the

7. For instance, she finds that "[w]ider reliance on notions of fair play could have special resonance in the death penalty context, where equality arguments have explicitly failed." Tolson, *supra* note 5, at 478. She also agrees that the tiers-of-scrutiny approach to handling equality claims, first developed in the 1930s, is "a very unattractive method of comparing suffering." *Id.* at 479. As I've argued, that cumbersome and outdated means of talking about equality has itself become an impediment to justice. When the project of equality is reduced to comparing battle scars, everyone loses (pp. 101–105).

8. Tolson, *supra* note 5, at 477.

institutional setting significantly complicates a person's claim to an otherwise valuable social good (say, the claimant is in prison or another country). In those scenarios, it may be more justifiable to compromise, at least situationally, to relieve unequal suffering. Doing so doesn't necessarily mean giving up on egalitarian objectives; it could just mean finding another way of solving a particular problem and living to fight another day.

Tolson is absolutely correct that we need to have a keen sense of the limits of specific second-order alternatives to equality, as well as its benefits. Different solutions carry with them different forms of relief. Some of the justifications overlap overtly with those associated with equality (e.g., due process), while other solutions advance the goals of egalitarianism in more indirect ways (e.g., by requiring related methods).

It's also true, as she points out, that striking down wartime policies such as race-based confinement, based on reasonableness grounds, would not be exactly the same as calling it out as a racist policy. But sometimes a stronger, condemnatory solution just doesn't seem possible.

By the time the Japanese-American internment cases were being considered, the Justices had already approved an explicitly race-based curfew by a unanimous vote. Chief Justice Harlan Fiske Stone, who was sensitive to the concerns of minority oppression in other contexts, nevertheless wrote the Court's opinion upholding the racist curfew; Justices Douglas, Murphy, and Rutledge had also forsaken people of Japanese ancestry.⁹ Facing long odds, then, a decision that struck down internment in *Korematsu* as unreasonable, which I propose in my book, would be a different answer that threaded the needle of interests in a supremely tough case. Egalitarians should welcome such an alternative outcome if that had been possible, even if it meant forgoing the equality rationale. I think such a narrower solution would also have done some good going forward, because the rule of reason is closely linked to the goals of equality, in that we need to be able to ferret out racial stereotypes that lead to irrational fearfulness.¹⁰ This outcome would have been far better than what

9. See *Hirabayashi v. United States*, 320 U.S. 81 (1943). These three had qualms, but were convinced by the Chief to stay on board; they offered their thoughts weakly instead, as concurring opinions.

10. I describe *Korematsu* as a "tragic precedent," one that should have been avoided by resort to a narrower alternative. The fact that the Justices decided in *Ex Parte Endo*,

we actually got in *Korematsu*, even though it would not entail calling out FDR's administration for expressing racial animosity.

Tolson identifies voting rights as another situation where she thinks compromise has actually turned out to be counter-productive. She contends that "our reluctance to call out discrimination by name has had far reaching cultural consequences and second-order doctrines have proved detrimental."¹¹ Pointing out Section 2 of the Voting Rights Act, which allows violations to be shown through disparate impact alone rather than intent, she argues that this easier legal standard essentially lulled many people—including judges—into thinking America had entered some kind of post-racial society. All of that set the Supreme Court up to undermine Section 5's preclearance mechanism, Tolson suggests, because we had fewer explicit findings of racial discrimination.

But did overreliance on this easier mechanism really lead to the demise of Section 5 years later? For decades, violations were found by DOJ and allies of equality. Troubling laws were prevented from being implemented mostly through executive initiative, as well as investigation and activism by civil rights advocates. Those were tangible wins for equality, even if they didn't come after complete rounds of litigation and robust judicial findings of intentional bias. Each time, friends of equality surely celebrated the legal victory, published what had been accomplished to deter similar wrongdoing, and built upon those actions to stop other equality-threatening measures.

It strikes me that the Supreme Court's move to gut the Voting Rights Act is better explained by the changing composition of that body or the cultural climate, rather than by any inherent flaw in a more lenient legal standard or the Justices' choice to duck this question briefly using the constitutional avoidance rule. That institution's creeping hostility seems general to voting rights, not specific to any particular statute (for that matter, there had been efforts to cut back on other civil rights laws

323 U.S. 283 (1944), vindicating a concededly loyal citizen's right to seek habeas relief from within an internment camp, suggests that most of the Justices understood the stakes raised by indefinite detention were different from a curfew. That, plus the fact that Justice Douglas originally wrote a draft dissent in *Korematsu*, but was convinced by the majority not to publish it, suggested there might have been a moment during deliberation where a narrower solution could have won the day.

11. Tolson, *supra* note 5, at 482.

during the same time frame). If it was hard enough to get executive branch lawyers or judges to deal with discriminatory voting rights measures over the years using the more forgiving threshold, it stands to reason there would have been even harder to win if they insisted upon using only the higher standard. It would probably have led to more losses in court. But let's say it also ended up with a few more robust findings of racial bias, what then? It's possible the backlash would have happened sooner, with conservative justices emboldened to strike down Section 5, or otherwise throw more wrenches into the voting rights machinery even earlier than they did.¹²

If there's a slightly counterintuitive feature to this criticism, it's the assumption that if courts had been forced to find more racial discrimination in voting, they would have actually done so rather than wasted those opportunities; and that having done so, they would now be more willing to find racial inequality today. I think there might have been some increase in raw doctrinal resources if this had played out the way Tolson posits. But I'm not convinced that even if more voting rights lawsuits had resulted in findings of explicit discrimination over the years, that would have altered the conservative trajectory with regard to voting rights all that much.¹³

12. Tolson vividly shows how the fight over voting rights in the Fifth Circuit has even descended into squabbling among judges, with one side accusing the other of "racial name calling." Those opposed to voting rights also worried that "a wide swath of racially neutral election measure will be subject to challenge." *Veasey v. Abbott*, 830 F.3d 216, 317 (5th Cir. 2016) (en banc) (opinion of Clement, J.). This episode illustrates two of the recurring obstacles to equality that I identify: worries about the social consequences of labeling someone a bigot and concerns about the disruptive effects of vindicating the principle.

13. Tolson discusses the remarkable twists and turns in the *Veasey v. Abbott* litigation in the Fifth Circuit, which involved one group of judges striking down a voter ID law based solely on the effects-only approach, only to have later groups of judges demand a search for invidious intent for the reason, on the ground that the effects-only application by the lower court raised constitutional concerns. I think this affair reveals the broader ideological battle between a color-blind vision with restricted methods that some conservative justices prefer, and a more aggressive equality-seeking vision that is more permissive as to methods for doing justice. This key moment of apparent ideological shift can certainly make it difficult to toggle between first-order and second-order solutions as a plaintiff or a judge. But I think it also illustrates the overriding need to be flexible among methods. Where Tolson sees a disaster partially attributable to the effects-only approach, I see a lower court and initial panel doing the best it can under the circumstances, given the dynamics in play. The trial judge's decision to opt immediately for the effects-only approach does raise a predictive question that Tebbe also raises, and I treat that thoughtful concern there since it's from the same vantage point as a district judge in the travel ban litigation. *See infra* text accompanying notes 25-27.

There are plenty of areas where the federal judiciary has been highly engaged for a time, and then decided to leave the field of action, never to return (integration immediately comes to mind, though sometimes they leave and reengage once again, as with the death penalty), and the fact that they've found discrimination in the past is no longer enough to keep them involved. Under the Fourteenth and Fifteenth Amendments, the generally stricter intent-based approach has been available and has even been used from time to time in the voting rights context.¹⁴ The wax and wane of judicial attentiveness is caused more by external factors like national elections and broader ideological shifts than the internal features of past resolutions.

Let's also not forget: Congress reauthorized the VRA in 2006. The vote in the House was overwhelming, while the vote in the Senate was unanimous. Even this legislative affirmation of the VRA's continuing need, and President George W. Bush's promise to "vigorously defend the provisions of this law," didn't give the Roberts Court much pause when the *Shelby County* dispute came along. The dream of a post-racial order, and some jurists' fervent hope of imposing it upon the law, despite continued evidence of efforts to undermine voting rights, is a serious problem. But is it really caused by the fact that advocates preferred the unequal effects test?

Don't get me wrong: post-racial dreaming has often been an obstacle to equality. It's just not limited to our time. Nor do I think it is caused by the multiplicity of liberation tactics employed by friends of justice. Instead, this longing for a society purged of inequality is probably shaped by a strong preference for liberal neutrality, a cultural difficulty in grappling with intergenerational wrongs, and a mostly resurgent conservative politics since the 1960s.

In a different vein, both Tolson and Tebbe are concerned that in a situation involving competing claims between equality and free speech, such as in the case of limits on corporate spending

14. See, e.g., *Rice v. Cayetano*, 528 U.S. 495 (2000) (invoking Fifteenth Amendment to invalidate provision of Hawaii Constitution that limited right to vote for agency's trustees to native Hawaiians); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down residency rule for voting under Fourteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that whites-only primary denied equal protection of the laws); *Guinn v. United States*, 238 U.S. 347 (1915) (striking down so-called grandfather clause exemptions to literacy clauses because they were designed to interfere with voting rights of black citizens).

during political campaigns or in the case of a baker who refuses to offer his services to a gay couple's wedding, practical egalitarianism gives us no clear path forward. It's true that the approach won't make things simpler for us, though it's not designed to do that. Instead, it's an approach that can help us think through a broader array of egalitarian interests and possible outcomes.

We'll still need normative signposts, because where one decides it is acceptable to draw the line will depend in part on the state of legal doctrine and one's sense of who is getting the short end of the stick under a legal settlement. But the approach may be appealing to those who prefer a strong egalitarian solution, insofar as it can identify less obvious back-up solutions helpful for managing key interests under less than ideal circumstances. That's true for those who are strong proponents of LGBTQ rights, as well as those who believe that equality is also at stake when someone objects to laws that unduly burden the exercise of religion (many of these folks want an even broader set of protections for their community, even though it might deny some consumers equal respect). I actually think that clear answers aren't wise when there is an inescapable clash of constitutional rights; theories that offer up simple solutions like so much candy do us a disservice.

Most people weren't thrilled with Justice Kennedy's animus-based disposition of *Masterpiece Cakeshop*. The reason is obvious: the opinion drew no clear lines in situations involving a clash of rights. It didn't create an entirely new settlement preferred by traditionalists, nor did it reaffirm a bright pro-equality line preferred by the civil rights community. But it did temporarily prevent an overly broad exemption from being created—something that proponents of LGBT rights feared would undermine the efficacy of public accommodations laws. The principle that a state agency shouldn't discriminate on the basis of religion in carrying out its work (especially during investigations and hearings) is also a welcome principle, and could have wider application in ways that help religious minorities as well as those who belong to the majority faith. But we'll certainly need more tools for managing situations involving a clash of rights.

What the resolution in the cake shop controversy suggested was that putting off a constitutional question or offering a temporary peacekeeping measure (perhaps Kennedy's opinion

did both) can lead to a period where the law itself seems less certain. That's not ideal, but it can be better than alternatives that extinguish notions of equality or dissent.

As for *Citizens United*, I share Tolson's concern that treating corporations like human beings for free speech purposes could have disastrous downstream effects on political equality. It's awkward, and perhaps wrong, to accord for-profit entities the same kind of dignity and respect reserved for individuals. At the same time, we've made this move already, extending such status to social groups engaged in political advocacy. I suppose one might say that conservatives deployed free speech doctrine as a second-best option to protect corporations when the notion of equality as it has been developed wouldn't be ideal. For those of us who object to the Court's wholesale borrowing of equality ideas indirectly to benefit corporations, it's incumbent upon us to show what questions are being unwisely submerged and why, even after an initial move of holding that corporate speech is protected, there are still differences that could justify differential treatment of corporations, given their immense power to do good and ill in a democratic society. After all, the right to free speech doesn't mean the right to say anything you want wherever you want.

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Tebbe raises a separate, provocative point about how one's tactical decisions could affect the social landscape for ideas. He worries that "shirking from dissent can have deleterious effects on the acceptability of equality arguments."¹⁵ In particular, he says that judicial silence, or even the siphoning of votes from a robust equality position, "can isolate egalitarian constitutional interpretations, casting them as extreme or radical."¹⁶

This is an intriguing possibility that he poses—and one that's worth further empirical investigation. But I have my doubts about

15. Tebbe, *supra* note 4, at 467.

16. Tebbe also argues that "a practice of persistent dissent could anchor the window, or force it to expand rather than simply shift." *Id.* at 468. Again, maybe. I'm actually sympathetic to this argument for rhetorical engagement. But I'm also aware of counter-examples, such as lonely dissents by Thurgood Marshall, Harry Blackmun, and William Brennan in death penalty cases. The content of their arguments continue to be worth engaging, but I'm not convinced they did much to make anti-death-penalty arguments any more plausible than they were at the time. Many of their dissents came during a period of general conservative resurgence and a resumption of the death penalty's use.

the hypothesis. For one thing, it runs counter to what I take to be the received wisdom, which is that the value and impact of a dissent is based largely on its moral clarity and its accuracy in looking into the future, rather than how many people embrace it at the time it is published. What makes Harlan's dissent in *Plessy* so potent, despite its flaws, is its insistence that equality is at stake in the case, when the rest of his colleagues see racial segregation on rail cars as small potatoes. I've not seen anyone contend that Harlan's position lacks appeal simply because no one else joined him. If anything, the fact that he stands alone against the tide of popular opinion and the collective judgment of his own colleagues contributes to its longevity.

Likewise, the beauty of Robert Jackson's dissent in *Korematsu* can be attributed mostly to his insistence that citizenship matters, that "guilt is personal and not inheritable," and his metaphorical likening of the majority's decision to "a loaded weapon."¹⁷ By the same token, Justice Frank Murphy's own dissent stands apart for marshalling all the evidence ignored by his colleagues in the majority during its "legalization of racism."¹⁸ As far as I can tell, the persuasiveness of these expositions on the constitutional wrongfulness of interning Japanese Americans during World War II isn't affected by their solo authorship.

Another reason to be skeptical of the judicial silence thesis is that it probably gives judges more power than they actually have to shape debate. When a judge articulates a constitutional view, that position can be helpful in public discourse because others can crib from it and say, "see, a very important person agrees with me—you should, too."¹⁹ There's something special about the rhetoric of egalitarianism—what I call its moral dimension—so when people in power speak in this particular way about a problem, their choice of words signals a unique kind of seriousness and judgment. But choosing not to say something about a given constitutional provision or issue doesn't necessarily squelch conversation.

17. *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting).

18. *Id.* at 242 (Murphy, J., dissenting).

19. Elsewhere I've advanced the view that such rhetorical participation is a legitimate justification for judicial review. ROBERT L. TSAI, *ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE* (2008).

It's actually when judges *do* say something—e.g., when they create new doctrinal obstacles to justice or remain too wedded to a view—that terrible things can happen. Here's something else: It's possible that a losing faction on the Court insisting on writing a strong, accusatory dissent could actually shut down any possibility for movement from initial positions as drafts are being circulated in a controversial case. It might even drive those in the majority to take a more strident tone or worse, to more broadly remake doctrine in ways that are either inegalitarian or seek to decide matters that are best left for future cases.²⁰

There's a lot that goes into why certain kinds of arguments are culturally plausible at any particular historical moment, but how many people agree with an orator at the moment of utterance probably has little impact. No one later feels bound by what's in a dissent, and I suspect that dissents that misjudge the stakes or the moral perspective over time simply disappear under the weight of so many other texts. Unless, of course, someone with a platform later chooses to rescue a dissent from the dustbin of history.

Moreover, the way Tebbe poses it—"shirking from dissent"—characterizes the articulation of egalitarian norms as *obligatory*, when I wouldn't put it quite that strongly.²¹ Instead, the egalitarian obligation that I focus upon is the duty to ameliorate tangible harms: the unequal suffering experienced by someone or some group being singled out. I don't think judicial silence will necessarily demoralize friends of equality, particularly if the people in charge give them something constructive to build upon.

There are many ways to talk about this unequally distributed harm that should be our focus. Jackson himself in *Korematsu* called it exercising power in a manner that's "so necessarily heedless of the individual."²² In my book, I prefer the formulation offered by John Bingham, who drafted the Fourteenth Amendment and talks about the imperative to lift "unequal burdens" (quoted at p. 42). Whichever formulation one prefers, it's that humanistic orientation that should inform the strategic

20. I have in mind *McCleskey v. Kemp*, a 5-4 case where the majority broadly tries to insulate the death penalty from structural equality challenges, but also cases like *Bush v. Gore*, where the winners stopped a recount that decided a presidential election.

21. I would not wish to reject this claim out of hand, but I think it needs to be defended.

22. *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

calculations made by a committed egalitarian. By contrast, the casual indifference that we are all battling is the attitude exemplified by Black’s majority opinion in *Korematsu*, where he shrugs that there are always “hardships,” especially in war (indeed, he calls war “an aggregation of hardships”²³), and some people might have to suffer a heavier burden. It’s this kind of attitude that tolerates all manner of inequality.

Now it’s possible that “where the outcome of a particular dispute is certain to be inegalitarian,”²⁴ as Tebbe points out, there’s nothing left to gain in terms of doing something materially significant for an injured party. But at that point the judge or public official on a multi-member body is trying to put a happy face on a loss. She can opine freely about clarifying the long-term egalitarian stakes of an issue, so long as doing so won’t impair her ability to make progress in the future. It might make perfect sense to dissent boldly—even radically—in that situation. Let’s call that what it is: acknowledging defeat while going down swinging. And in going down that way, a person might be remembered for putting up a fight and others could be inspired to leap into the fray next time.

But practical egalitarianism has bite as the window of opportunity for deliberation is closing. While there’s still a realistic chance for some of those burdens to be lifted in the matter at hand during deliberation, the goal of relieving suffering should be paramount, prioritized over a desire to needle one’s colleagues, burnish one’s reputation for philosophical consistency and erudition, or a desire to shape debate in the uncertain future. In such instances, I do think it’s worth sometimes giving up that ringing dissent—the possibility of unique rhetorical gain—in exchange for achieving an egalitarian outcome. There may be another opportunity to issue a forceful statement down the road.

So, to the judge who has lost a vote I would advise: Worry less about diluting a colleague’s dissent and more about whether it’s still possible to pry a vote away and change the controlling rationale entirely, or else find a way to weaken an inegalitarian precedent coming down the pike.

To press his point, Tebbe asks us to imagine if, instead of dissenting in the travel ban case, Breyer and Kagan had laid out

23. *Id.* at 219.

24. Tebbe, *supra* note 4, at 467.

their concerns in terms of some other rationale, such as those based on fairness. If that had happened, he said that “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.”²⁵

But I fear this concern is overblown. Let’s not forget that the most critical player from the standpoint of institutional power was always Kennedy. He provided the fifth vote in the case to uphold the third version of the ban, and it’s his opinion that carries the most weight going forward as judges apply the precedent. In his somewhat curious concurring opinion, he stresses that religious equality is a principle that governs even in this national security context, something four other conservative justices won’t concede. It’s Kennedy who didn’t go for the animus rationale, believing that the president’s order had changed sufficiently and that the rest of the circumstantial evidence wasn’t strong enough. But he seemingly left open the possibility that additional evidence of the ban-and-waiver system could emerge, and that discriminatory intent and effect could still be established in its enforcement.²⁶

Apart from Kennedy’s concurring opinion, everyone else is trying to persuade future courts and opinion makers, but from the identical disadvantageous perspective of being the losers in the dispute. What they say or don’t say can be helpful to others, and each has merits on its own terms, but the differences between the dissents are marginal at best and don’t dictate who in the future might actually use them.

Imagine a different scenario: had Kennedy been receptive to an alternative argument rather than rejecting the religious equality claim outright, that’s the moment practical equality has

25. Tebbe, *supra* note 4, at 469. On June 26, 2017, the Supreme Court sent a strong signal about how most of the justices were seeing the case. In granting certiorari to review the travel ban cases, it narrowed the injunctions to prevent enforcement of the ban only against those with “bona fide relationship with a person or entity in the United States.” *Trump v. International Refugee Assistance Project et. al*, Nos. 16–1436 (16A1190) and 16–1540 (16A1191) (June 26, 2017).

26. I think the best of way of thinking about Kennedy’s concurring opinion is that he rejected a facial equality-based challenge to the travel ban on the record before him, but that he left open the possibility that an as-applied challenge could succeed. Justice Breyer’s dissent then makes most sense as a road map for pursuing an as-applied attack. In fact, those cases are ongoing. See generally Robert L. Tsai, *Trump’s Travel Ban Faces Fresh Legal Jeopardy*, POLITICO (Mar. 27, 2019), <https://www.politico.com/magazine/story/2019/03/27/trump-travel-ban-lawsuit-supreme-court-unconstitutional-226103>.

bite. In that moment, prioritizing harm reduction justifies characterizing one's actions in some other way, so long as it's principled and so long as doing so doesn't create serious new impediments to egalitarian goals. If consensus had coalesced around some other rationale, we also would not have had to deal with a terrible precedent in which a seemingly watered-down version of equality applies, if at all, whenever the President acts to hurt non-citizens. All of that's worth forgoing a dissent. For instance, had Kennedy been willing to join a more limited decision that relied on the immigration statute to deny, on the facts, the president's ability to restrict entry, that would have been a fine instance of doing equality by other means. Alas, that was not in the cards.

The tougher question might be how lower courts should behave when they are faced with disagreement from colleagues or anticipate a hostile court higher in the pecking order. This is because there is a larger predictive element to their pragmatic calculations. Further twists and turns will happen because further proceedings in controversial cases are unavoidable. Plus, everyone knows that trial judges hate to be reversed. How can this instinct of self-preservation be made to serve the interests of justice rather than thwart it? Should a judge go for broad equality rationales before them to stake out the strongest moral view possible or narrower ones that might be sustained on appeal? If a lower court guesses right, she can do some good for equality; if she opts for less when something more could have been achieved, that's a missed opportunity.

In *Practical Equality*, I held up the Ninth Circuit's original travel ban decision as worthy of praise. There, at least one judge on the panel expressed strong reservations about the animus claim during oral argument.²⁷ I defended the panel's decision to ignore the religious equality claim so its members could reach a unanimous decision on due process grounds, even though this rationale offered relief to a narrower group of injured parties than a broad equality-based rationale might have. This decision

27. One of the Ninth Circuit judges wondered aloud at oral argument whether animus was fairly inferred from the ban itself, which didn't apply to Muslims worldwide, and from Trump's campaign speeches given in a boisterous political context. At this early point in the litigation, this revealed limits to the *Romer* analogy, where animus against gay people was inferred from unmistakable reference to homosexuality as well as the breadth of a ballot measure's effects (pp. 73-80). See also Kate Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017).

chipped away at the ban, giving relief to permanent residents and those affected by the so-called “Christian preference.” These were wins for equality that could be built upon.

Tebbe asks: is this decision measurably better than the Fourth Circuit’s decision, which struck down the ban on animus grounds? I won’t try to answer that question conclusively, but instead recognize that each might have been a defensible way of discharging one’s duty to do the work of equality, within the specific context one must act. That calculation can vary slightly from institution to institution, or in this case, from panel to panel.

The very first decision against travel ban 1.0, based on fairness grounds, came down on February 9, 2017, and led the administration to withdraw its appeal and revise its policy within a month. Those were the immediate effects of the original fairness-based ruling that has often been overlooked in the aftermath of the huge loss for equality in the Supreme Court, one that deserves to be celebrated. A different approach, exemplified in district court rulings on travel ban 2.0 and the Fourth Circuit’s decision in May 2017, sounded in religious discrimination. The animus solution, championed by Tebbe and many others, was also practical in its own way, as it hoped to appeal to Justice Kennedy, who in non-national security contexts had found that rationale convincing.

My concern isn’t with choosing between the two in a definitive sense. Both are valuable—and both shaped the public debate. I think it’s fair to say that the Ninth Circuit’s unanimous first decision based on due process was a major factor in forcing the administration to rethink its approach, while the overall drumbeat of court losses on multiple grounds—including the animus one—led to further revisions of the policy.

I happen to think that the animus approach has its pitfalls, and that while it often seems like a narrow ground, at times it can actually seem *more* threatening to those worried about the effects of decisions. But the main point here is that practical equality isn’t an either/or project. Indeed, I explicitly reject such a mentality. Instead, we must condition ourselves to always be strategizing along multiple dimensions at once: both in terms of the ideal and what might be acceptable as a fallback. Sometimes, a different kind of argument must serve as a substitute for equality because so many of the necessary social conditions aren’t right. The Jim Crow South in the 1930s is my leading example, when the

Supreme Court's own equality jurisprudence in the criminal justice context was paltry relative to the people's needs and the culture of unequal justice remained potent. On other occasions—and I think the travel ban situation falls into this second group—there really are several answers that can be good on egalitarian grounds and are culturally plausible. The question then becomes: What will get a key player to bite?

A final thought on sorting through various kinds of harms in equality disputes. Both Tebbe and Tolson separately point out that tradeoffs among choices are hard to calculate.²⁸ This is true. I wish I had a magical formula for prioritizing among the harms that confront us. I certainly don't propose a strict utility-maximizing approach—even if it were a more humanitarian version than one often sees in the literature. But I also think that making such tough choices is unavoidable when it comes to doing the hard, unglamorous spadework of equality. The most serious, everyday resistance to justice comes simply from the frustrating sense that inequality is too big a problem to solve. We can't be distracted by those who insist that wherever we draw a line, someone will be left on the wrong side of it.

For now, what I can say is the following. First, let's consider a recent example of defensible line-drawing that had pro-equality consequences. In attacking felon disenfranchisement in Florida, reformers had to decide whether to stake out a strong egalitarian position that no one should ever lose the right to vote, or to exclude certain categories of offenders likely to put the ballot measure at risk of failing. They ultimately did the latter by excluding people guilty of murder or felony sexual offense, and that decision paid off when citizens approved a historic measure that amended the state's constitution and restored the vote to some 1.4 million people. Purists could still build on the remarkable victory by trying to get rid of disenfranchisement altogether, but this change alone addressed major imbalances in terms of race, poverty, education, and perceived party affiliation wreaked by the state's practices.²⁹

28. Tebbe writes: "Referring again to the example of the travel ban, Tsai argues that travelers and especially refugees should not suffer uncertainty or indefinite postponement." Tebbe, *supra* note 4, at 472.

29. Before the ballot measure was approved, the racial disparities were stark: 1 out of every 5 black Florida citizens could not vote due to its harsh disenfranchisement practice (pp. 206-213). At the end of June 2019, however, the governor signed a bill that would still require a person convicted of a felony to pay outstanding court-ordered financial penalties

Second, it might help if we have a more systematic way of sifting through bigger and smaller forms of inequality. To that end, I am working on projects that I hope can aid us in thinking more concretely about the various forms that inequality has historically assumed.³⁰ This will hopefully improve the way we talk about types of inequality that are interrelated, but also show why different kinds of remedies are necessary.

Third, while the responsibility for doing the work of equality that I describe transcends social roles, in practice what each person can be expected to do is also necessarily constrained by such roles to some degree. Judges, for example, are constrained in ways that politicians and activists aren't. Tebbe says, "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 rulings—are now permanently deprived of relief."³¹ Well, shouldn't we lay most of the blame for these inequities at the feet of the Administration, rather than the judges who are trying to reduce the harms visited upon vulnerable populations by that policy? Whereas public officials and citizens acting through mechanisms of direct democracy can seize the initiative to deal with inequality in sweeping fashion, all judges can do is address the claims that come before them. It's defensible to prioritize the unequal burdens faced by permanent residents and others with ties to the United States, if that's what is practicable, and if doing so doesn't create significant obstacles to justice for other groups. I could be wrong, but I don't see anything in the panel's decision that prevents dealing with the plight of others harmed by the ban down the road.

In the end, this is all we can ask for: reducing callous treatment by the state and lifting unjustified burdens, while leaving open opportunities for future debate. Whether public officials have met their obligations, I hope we can all agree, is a vastly different question.

before restoration of his right to vote. See Mark Skoneki, *Amendment 4: DeSantis Signs Bill Requiring Ex-felons to Pay Fines Before Voting Rights are Restored*, ORLANDO SENTINEL (June 28, 2019), <https://www.orlandosentinel.com/politics/os-ne-amendment-4-law-signed-20190628-k644veeddjdsbcftyi2wna3n4-story.html>. Lawsuits have been filed to try to enjoin this new law.

30. See, e.g., Robert L. Tsai, *Racial Purges*, 118 MICH. L. REV. __ (forthcoming 2019).

31. Tebbe, *supra* note 4, at 472.