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Aziz Z. Huq

University of Chicago Law School

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EQUALITY'S UNDERSTUDIES

Aziz Z. Huq*

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

INTRODUCTION

Our Republic these days is riven by divides about what equality demands of us as private and public actors. Consider just a few recent examples:

- Harvard University is challenged in federal court for preferring African Americans over other racial minorities, especially Asian Americans, in their admissions pool.¹ Harvard's flagship law review, meanwhile, faces its own suit over its preferment of minority candidates.²
- Virginia's Governor Ralph Northam and its Attorney General Mark Herring are swept up into political controversy by news that both dressed in "blackface" during their medical school or college days, respectively.³ The historical significance of "blackface" is pivotal to these debates; the fact that Northam and Herring are white forms a necessary predicate to the controversy.
- President Donald Trump issues an executive order restricting entry to the United States by nationals of several Muslim-majority countries.⁴ The order is challenged several times in federal court

* Frank and Bernice J. Greenberg Professor of Law and Mark C. Mamolen Teaching Scholar, University of Chicago Law School. The Frank J. Cicero, Jr., Fund supported this writing. My thanks to Andrew Lanham, Sarah McDonald, and Haley Dutch for their terrific and insightful editing work. All errors are mine.

1. Hua Hsu, *The Rise and Fall of Affirmative Action*, NEW YORKER (Oct. 8, 2018), <https://www.newyorker.com/magazine/2018/10/15/the-rise-and-fall-of-affirmative-action> [<https://perma.cc/LWG3-B357>]; see also *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, No. 14-cv-14176-ADB, 2019 WL 4786210 (D. Mass. Sept. 30, 2019).

2. Bob Van Voris, *Harvard Law Review Suit Opens New Front in Admissions-Bias Fight*, BLOOMBERG (Oct. 8, 2018, 12:11 PM), <https://www.bloomberg.com/news/articles/2018-10-08/harvard-law-review-suit-opens-new-front-in-admissions-bias-fight> (on file with the *Michigan Law Review*).

3. Jonathan Martin & Alan Blinder, *Second Virginia Democrat Says He Wore Blackface, Throwing Party into Turmoil*, N.Y. TIMES (Feb. 6, 2019), <https://www.nytimes.com/2019/02/06/us/politics/virginia-blackface-mark-herring.html> [<https://perma.cc/VHR2-QUCZ>].

4. *Trump v. Hawaii*, 138 S. Ct. 2392, 2442 (2018) (Sotomayor, J., dissenting).

as a discriminatory policy at odds with the equal protection component of the Fifth Amendment.⁵ Immigration-related deference doctrines, however, preclude close scrutiny of the intentions animating the order.⁶ In part because it employs a nationality-based criterion rather than a faith-based criterion on its face, a revised order is ultimately upheld.⁷

- A proposal by Massachusetts Senator and presidential hopeful Elizabeth Warren to impose a “wealth tax” is immediately condemned as a reflection of mere “resentment” and “envy” by the less well-off.⁸ Warren’s putatively egalitarian proposal is also attacked on the ground that it will fail to address its stated target—economic inequality.⁹

Each of these national controversies turns on a claim for equality or an allegation that a person or institution has failed to honor the command of equality. Although they have been selected from a narrow band of time, they nonetheless evince the heterogeneity of equality-based arguments presently tendered in the public sphere. Often, albeit not inevitably, equality arguments in public debate are entangled with legal or constitutional arguments. But no one partisan formation holds a monopoly on equality talk. Just like identity politics more generally,¹⁰ equality claims are articulated on all sides of the ideological spectrum of American politics. An objection from “equality” can therefore channel a varied and incongruous array of challenges to legal, personal, and institutional arrangements. And it can be leveled by a motley crowd of conservatives, libertarians, liberals, and progressives. We are thus bound together by a conceptual vocabulary even as we are divided in its applications.

The idea that equality is a deeply plural concept is not new.¹¹ The related idea that equality standing alone is indeterminate,¹² however, and hence

5. See, e.g., *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017).

6. *Trump v. Hawaii*, 138 S. Ct. at 2418–19 (majority opinion); *Washington v. Trump*, 847 F.3d at 1167 (addressing plaintiffs’ claim that the order violates the equal protection guarantee).

7. *Trump v. Hawaii*, 138 S. Ct. at 2421 (upholding the executive order). For a detailed account of the litigation, see Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47 (2019).

8. Tyler Cowen, *Resentment of the Wealthy Is Not a Policy*, BLOOMBERG OPINION (Feb. 1, 2019, 6:00 AM), <https://www.bloomberg.com/opinion/articles/2019-02-01/warren-wealth-tax-resentment-is-not-a-policy> (on file with the *Michigan Law Review*).

9. Daniel Hemel, *Elizabeth Warren’s Wealth Tax on the Super-Rich Is the Wrong Solution to the Right Problem*, TIME (Jan. 30, 2019), <http://time.com/5516903/elizabeth-warren-wealth-tax-income-assets/> [<https://perma.cc/ZD7N-VKKNV>].

10. Cf. ASAD HAIDER, *MISTAKEN IDENTITY: RACE AND CLASS IN THE AGE OF TRUMP* 44 (2018) (noting that the “primordial” form of race is the “white race”).

11. See, e.g., DOUGLAS RAE ET AL., *EQUALITIES* 132 (1981) (“Equality splits itself into many distinct notions, each an element in its grammar.”); *infra* text accompanying notes 18–34. In separate work, I have argued that the narrower term “discriminatory intent” is also characterized by irresolvable pluralism. See Aziz Z. Huq, *What Is Discriminatory Intent?*, 103

must be specified and clarified rather than simply being taken as a given, has been gaining ground in recent years. This is in part the result of several scrupulous studies by political theorists and legal scholars looking at equality and the related concept of discrimination from a range of different angles.¹³ By contrast, the idea that equality is dispensable for moral and ethical critique and for public policy reform is not a familiar proposition. It is rather a novel and challenging idea. Yet that is the core claim of Robert L. Tsai's *Practical Equality: Forging Justice in a Divided Nation*.¹⁴ Tsai's central proposal to discard equality as an otiose criterion for legal and political strategy is at once surprising and also provocative in itself. That it should come from a respected and accomplished progressive scholar makes the book even more noteworthy, and even more worthy of close consideration.

My aim in this Review is to examine closely Tsai's idea that equality is a dispensable term in contemporary legal, ethical, and political debate. Such a claim clearly cannot rest on an observation of equality's rhetorical disutility or its irrelevance to observed debates. Plainly, many commentators of different ideological camps believe it to be an indispensable concept. Rather, Tsai's claim must hinge on the prediction that some set of normative goals is better achieved by abandoning equality talk in favor of substitutes. This indeed is his approach. As I read the book, he aims in effect to short-circuit difficult theoretical inquiries by asking directly how equality values are best advanced on the ground. Specifically, instead of embarking on the controversial and conceptually arduous task of specifying the material conditions or moral coordinates of equality, Tsai proposes that we abandon that "quest" (p. 230). In its place, he suggests, we should work for "a form of pragmatism to protect our progress on equality and to find other ways of doing justice when we have trouble agreeing to do it explicitly" (p. 37). To lend substance to this

CORNELL L. REV. 1211, 1240–65 (2018) (identifying five different species of discriminatory intent in Supreme Court jurisprudence).

12. The canonical formulation by Peter Westen asserts that "equality is entirely '[c]ircular.' It tells us to treat like people alike; but when we ask who 'like people' are, we are told they are 'people who should be treated alike.' Equality is an empty vessel with no substantive moral content of its own." Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (alteration in original) (footnote omitted). Westen's position was immediately contested. See, e.g., Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1168 (1983) (distinguishing formal and substantive conceptions of equality, and suggesting that only the former fall within Westen's argument, and then only imperfectly).

13. Among the leading recent works are ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010); BENJAMIN EIDELSON, *DISCRIMINATION AND DISRESPECT* (2015); DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* (2008); TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* (2015); and T.M. SCANLON, *WHY DOES INEQUALITY MATTER?* (2018). All of these works are deeply insightful, and reward sustained study. Note also that these works concern both the concepts of "equality" and "discrimination," which seem related, but need not be identical. Discrimination, for example, might be a failure of equality (e.g., racial animus). Alternatively, they may be functionally conjoined such that the practice of equality requires acts of discrimination (e.g., the accommodation of those with disabilities, and only them, in academic testing contexts).

14. Robert Tsai is a Professor of Law, American University Washington College of Law.

broad proposal, Tsai develops in granular detail four alternatives for equality: due process, minimal rationality, anticruelty, and free speech (p. 7). I will call these equality's proposed *understudies*. They can be understood as legal or ethical claims, or even less ambitiously as political slogans. In either capacity, they are to be yoked to the pikes of lawyers and party leaders in lieu of equality talk as they charge into battle. In Tsai's view, the best way to sustain and even advance equality is to abandon direct talk or action oriented toward it and instead to take on the garb, however ill-suited, of its four understudies. Equality talk itself, he intimates, can be disregarded as functionally unfit to the task at hand.

Even if one does not embrace his view—and for reasons I hope to make plain, I don't—Tsai's bracing polemic for equality's redundancy casts fresh light on familiar terrain. Fifty-odd years ago, arguments against the desegregation of schools hinged on the perceived risk of “mingling” of the races and the attendant downfall of the “Southern white race.”¹⁵ Today, the same arguments about racial purity—and, by implication, racial hierarchy—are proffered in defense of the harsh and selective enforcement of immigration law against migrants on the southern (but not northern) border.¹⁶ Now, as then, with the political headwinds seemingly pressing against emancipatory change, there are many progressives and liberals who would seek shelter in any port. Tsai's offer of alternative instruments to achieve equality will seem timely and needful to such readers. Although Tsai does not draw upon it, the history of political thought also provides ballast for his argument. It was not until the eighteenth century that claims about equal entitlements based on a common humanity became a lodestar for political action and arguments.¹⁷ If equality is indeed an innovation in political thought, there may be no reason to maintain it as a central term. *Practical Equality* therefore serves as an opportunity for discerning precisely what work the term “equality” does that its understudies cannot in the pursuit of broadly left-liberal projects related to the establishment of a just polity. While I resist the idea that equality can be abandoned as a central term of legal or political debate, and while I query its fungibility with other moral ideals, I nonetheless walk away from Tsai's work with many valuable insights. Even if it does not persuade all of its readers, *Practical Equality* still provides a valuable opportunity to consider how equality can most effectively be deployed.

15. Anders Walker, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 401 (1997).

16. See Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 198 (2019) (“The President's statements and policies suggest that he views U.S. national identity in racial terms and seeks to preserve the nation's predominantly white identity.”). For Tsai's views on contemporary white nationalism, see pp. 219–28.

17. Certainly, the idea that all are entitled to equal shares of some good, be it opportunity, wealth, or resources, is a relatively recent one. SAMUEL FLEISCHACKER, *A SHORT HISTORY OF DISTRIBUTIVE JUSTICE* 2 (2004) (challenging the idea that disputes about the meaning of distributive justice go back to the classical period, and instead positing an Enlightenment origin).

This Review proceeds as follows. Part I summarizes Tsai's core claim and situates it in the context of ongoing political and legal developments. Part II then critiques Tsai's claim by evaluating his use of equality and the adequacy of his proposed understudies. I suggest that none of these understudies can do the salutary work Tsai hopes. In particular, I argue that the failures of human sympathy that consistently undermine the progressive equality project (a project to which Tsai plainly subscribes—as do I) will equally puncture the proposed understudies. A final, brief Part III reconsiders how equality might be analyzed and deployed as a regulative ideal in modern American politics and law.

I. EQUALITY AND ITS ALTERNATIVES

An inquiry into the “practical” use of equality needs a threshold definition of equality. Tsai defines equality to mean that “individuals in similar circumstances ought to be treated the same” (p. 8). This definition is revealing in one way. But it is opaque along other margins.

It is revealing in the sense of showing that Tsai takes *individuals* to be the objects of equality. This excludes the thought that groups might be the proper object of solicitude, otherwise known as “bloc-regarding equality.”¹⁸ It also rules out the possibility that the appropriate object of egalitarian concern is the basic structure of society, famously defined in the Rawlsian tradition as “the major political, economic, and social institutions that make fruitful social cooperation possible and that apportion the benefits and burdens of such cooperation.”¹⁹ Some scholars mining the Rawlsian version of liberalism have refined John Rawls's principles of justice into a demand that sounds in the register of equality. For instance, the philosopher Tommie Shelby has powerfully argued in a Rawlsian register for the deep wrongfulness of “ghettos”—that is, pockets of concentrated economic, social, and legal disadvantage that systematically undermine the lifecycle opportunities of particular subsets of the population.²⁰

Tsai's quintessentially liberal and individualist focus also rules out certain policies and ambitions from an egalitarian agenda a priori. For example, Senator Warren's aspiration to create a more level economic playing field or Harvard's (alleged) ambition to create an educational environment in which several racial groups have a meaningful presence in the form of a “critical mass”²¹ of students do not plainly count as egalitarian.²² Claims in the Marx-

18. RAE ET AL., *supra* note 11, at 36–38, 43 (“A claim of equality for two or more subject classes, equality being required between these classes (blocs) and not within them.”). A variant is segmental equality, by which all those within a certain class must be treated equally, even if different classes are treated differently. *Id.* at 43.

19. TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM* 20 (2016).

20. *Id.* at 47.

21. *Cf.* *Grutter v. Bollinger*, 539 U.S. 306, 334–36 (2003).

22. *See supra* text accompanying notes 1–2, 8–9. I say “allegedly” because I have no sense of what the good folk at Harvard really believe.

ian tradition against the basic economic arrangements of industrial, financial, or other mutations of capitalism all seem to fall outside Tsai's definition, too.²³ With some effort, to be sure, one might fit an argument for an entitlement to basic income into his understanding of equality. But the arguments for basic income generally configure it as an instrument of larger, more systemic social reform.²⁴ Without meaning to sound judgmental here, I want to stress the point that Tsai has defined "equality" in a way that rules out of court a whole host of understandings that have historically fallen under that rubric.²⁵ This means that he does not address—indeed, does not have to address—the circumstance in which a group- or structure-focused argument about equality comes into conflict with an individual-based equality claim. Affirmative action, of course, can be characterized in this fashion, as can Senator Warren's wealth tax. But the equality-centered nature of these conflicts about affirmative action and redistributive taxation are elided by Tsai's definition of equality.²⁶ Clarity is bought at the cost of losing sight of certain moral questions traditionally associated with the project of equality.

Even while embracing a liberal, individualistic framework, moreover, Tsai's definition gives us a very open-textured conception of equality, one that is marred by numerous ambiguities. First, he deliberately offers no definition of what it means to be "in similar circumstances" and no definition of what it means to be treated "the same." A simple example of why this matters relates to pregnancy: Is the trait of "pregnancy" a relevant distinction between persons in respect to which claims of equality can arise in the first

23. On the centrality of equality to the Marxian tradition, see G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* 6 (1995) ("Classical Marxists believed that economic equality was both historically inevitable and morally right.").

24. See generally Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the Twenty-First Century*, 32 *POL. & SOC'Y* 7 (2004) (introducing this concept).

25. In some tension with this individual focus, Tsai occasionally makes assertions that invite an inquiry into social structure. For instance, he writes that egalitarianism calls for arguments that "presuppose a community based on mutual respect and to explain how a course of action will allow individuals to live a morally rewarding life." P. 14. Later, he worries about the "state's expanded capability to stratify individuals along all kinds of dimensions." P. 230. Setting aside the question whether it is wise to "presuppose" a decent social structure when arguing in favor of a reform to that very end, I think that many of the arguments of this form that might have force under present conditions would focus upon social structure and inter-group relations, and not on individual entitlements.

26. He is also excused from dealing with problems that arise within group-based claims of equality. For instance, it can be the case that two groups are equal in the sense that the median member of the group is treated the same (e.g., the average wage of a man and a woman in a given industry are at parity), but that median members of each stratum of the group are treated differently from the median members of the parallel stratum (e.g., the average wages of male and female CEOs and janitors both diverge from their gender comparator group). For a formal definition, see E.H. Simpson, *The Interpretation of Interaction in Contingency Tables*, 13 *J. ROYAL STAT. SOC'Y, SERIES B (METHODODOLOGICAL)* 238 (1951).

instance? Or should it be subsumed within the categories of sex or gender?²⁷ To the extent that questions of pregnancy impinge upon a domain of human activity—say, control over reproductive capabilities, sexual relations, or labor-force participation—is it even a domain in which claims of equality have normative bite? Or is it a sphere of human activity in which the idea of equality has no role to play? (Consider in this regard the role that race should play in one's choice of sexual partners; then repeat the exercise with gender.²⁸) If equality indeed is a relevant criterion of evaluation, who then is "in similar circumstances" to a pregnant employee or applicant? A nonpregnant employee without any other relevant conditions? Or a nonpregnant employee with, say, a medical condition that imposes physical constraints and a risk of absence, analogous to pregnancy? I don't mean to suggest here a specific answer here to these questions. Rather, I want to underscore the point that even so basic a question as whether an employer can have a "no pregnancy" rule consistent with equality raises a host of questions about how a general and abstract principle of equality is to be linked to specific parameters of human and social experience.

More generally, what counts as pertinent to equality under particular factual circumstances must be identified and justified, and this requires some sort of theory. As Douglas Rae explained in a seminal treatment of the subject, equality talk always and necessarily rests upon "an account of the ways in which . . . judgments [of equality] form coherent patterns of similarity and difference, consistency and contradiction."²⁹ Rae describes this as a *grammar of equality*, insofar as it mediates the "basic structural problems lying between abstract and practical equalities."³⁰ Implicit in his argument is the complementary concern that equality talk without a specification of a mediating grammar, and a justification of that specification, has a hollow normative core. That is, in ascertaining what equality demands in a specific case, almost all the normative and theoretical work is done in the putatively empirical determinations about what units of comparison to use, what traits to compare, and the like.

It's not the case that there's no way of answering these questions. The philosopher T.M. Scanlon recently identified six different reasons that ine-

27. For the Supreme Court's view, see *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("Normal pregnancy is an objectively identifiable physical condition with unique characteristics.").

28. One's choice of sexual or romantic partner is often considered a domain free of the demands of equality and nondiscrimination. See Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009). But those choices do have quite predictable political consequences that are, in a sense, salient to equality norms. For a brilliant and heterodox discussion of these issues, see Amia Srinivasan, *Does Anyone Have the Right to Sex?*, LONDON REV. BOOKS (Mar. 22, 2018), <https://www.lrb.co.uk/v40/n06/amia-srinivasan/does-anyone-have-the-right-to-sex> (on file with the *Michigan Law Review*).

29. RAE ET AL., *supra* note 11, at 15 (emphasis omitted).

30. *Id.*

quality might be deemed objectionable, ranging from its engendering of “humiliating differences in status” to its origin in “economic institutions that are unfair.”³¹ Lurking behind Scanlon’s taxonomy is a long and tangled debate in political theory concerning the appropriate unit for evaluating equality. On one side of this debate are the so-called luck egalitarians, who take the fundamental aim of equality to be the compensation of people for undeserved bad luck.³² On the other side are those who argue for a relational understanding of equality, which seeks “the construction of a community of equals” and “integrates principles of distribution with the expressive demands of equal respect.”³³ (Remember that language; we’ll come back to it.) This is why the law professor Peter Westen, writing almost forty years ago, complained about the “derivative, secondary” nature of equality as a normative touchstone and urged that it be abandoned in favor of plainer rights talk.³⁴

I think Tsai is fairly read to personally understand all these uncertainties and unsettled questions. I see no reason to infer that he is simply assuming them away because they are inconvenient. Rather than ignoring them, he suggests that it is the very difficulty of settling this buzzing swarm of definitional, “grammatical” questions (to invoke Rae’s useful terminology) that provides a reason to avoid an excessive reliance on the term equality in the first place. Tsai thus acknowledges, in an unmistakably worried tone of voice, that equality is an “inescapably moral concept” (p. 23). He fears that a “broad theory of equality” may well have “no real meaning” for the populations that it putatively benefits (p. 43). Theory, on his account, yields “few satisfying or permanent resolutions” (p. 38). And “it’s just too easy to get caught up in the minutiae of social differences” and hence “paralyzed by inaction” (p. 103). (Note that this might be a problem of theory, or it might be an indictment of a certain genre of practical identity politics.) Worse, at least when it comes to racial equality, the psychological priming effect from the nonwhite faces of inequality’s victims may “create new psychological and political roadblocks to legal change” (p. 144). Based on these concerns, and out of a fear of “political resistance and blowback” against equality demands,³⁵ Tsai contends that we should abandon the “quest for gorgeously rendered concepts that can solve all of our problems at once” and instead “become grittier in our disposition, while broadening our tactics” (p. 230).

At the same time as Tsai makes this tactical retreat from equality as an explicit standard for lawyers or social movements, I do not read him as embracing Westen’s counsel and abandoning equality talk entirely. I do think Tsai is in favor of a direct and unmediated analysis of the underlying indi-

31. SCANLON, *supra* note 13, at 8–9.

32. See, e.g., G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989).

33. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289, 313 (1999).

34. Westen, *supra* note 12, at 542, 548.

35. See, e.g., p. 89 (detailing judicial efforts to abolish the death penalty).

vidual interests, and corresponding harms, that equality theory endeavors to systematize. Rather, he argues that a number of midlevel theory substitutes are needed for equality talk because of the barriers and frictions that equality talk is likely to induce (pp. 8–11). He invokes an American tradition of pragmatism, in which (very roughly speaking) knowing about the world is inseparable from acting within the world. He thus seeks to articulate “a form of pragmatism to protect our progress on equality and to find other ways of doing justice when we have trouble agreeing to do it explicitly” (pp. 37–40). This formulation echoes an antifoundationalist strand of pragmatist thinking that rejects “the tacit presupposition of much of modern philosophy that the rationality and legitimacy of knowledge require necessary foundations.”³⁶ But Tsai also borrows a pragmatist metaphor from William James to the effect that “[i]f pragmatism is like a corridor, then the law of equality provides the overarching structure” (p. 40). That is, Tsai’s is still a theory of equality, simply “by other means” (p. 37). Correspondingly, his pragmatism is fainthearted rather than full-throated. An open question necessarily remains about what nonempty idea of equality his argument depends upon, and how it is to be knitted into practical recommendations.

This incomplete turn from theory to “pragmatics” in turn drives the main line of argument articulated in the book. The core of Tsai’s project is to illuminate ways in which advocates of equality can frame and advance their goals without provoking zero-sum partisan face-offs. Across the four main chapters of the book, he identifies and fleshes out four different substitutes—roughly modeled on due process claims, demands for minimal rationality, a ban on cruel treatment, and an embrace of free speech rights—as alternatives to (or understudies for) equality. Given the range of examples employed in the book, I think Tsai is best read as proffering these understudies as not just specifically legal arguments, which can be tethered to different constitutional provisions in legal briefs, but instead as ethical orientations and rhetorical moves in debates over public policy. But there is no precision on this point. In respect to each of the four understudies, Tsai points to a historical instance in which equality values were advanced indirectly by insisting on the alternative value. Because the success of his overall argument depends on the success of these understudies, I briefly summarize each of them. I will return to evaluate some of their merits in the following Part.

First, Tsai’s chapter on “fair play” offers an idea roughly analogous to constitutional due process. He focuses on landmark criminal procedure cases such as *Brown v. Mississippi*³⁷ and *McCleskey v. Kemp*.³⁸ In these two cases, the Supreme Court respectively embraced and then shied away from procedural fairness-based rulings that tracked worries about racial animus

36. Richard J. Bernstein, *The Resurgence of Pragmatism*, 59 SOC. RES. 813, 813–15 (1992).

37. 297 U.S. 278 (1936).

38. 481 U.S. 279 (1987).

in the criminal justice system.³⁹ Tsai points out that the black defendant in *McCleskey* mentioned, but failed to advance, a due process claim in favor of an emphasis on equal protection (p. 87). Tsai argues that this “omitted” due process argument could have been a less destabilizing—and hence a more attractive—basis for relief than any equality ground (p. 89). He also suggests that due process arguments are generally preferable for the separate reason that evidentiary questions are more easily addressed (p. 65). Discriminatory motive is notoriously hard to prove, he notes, but the extrinsic facts about how a case was handled will often be more readily available (p. 79). And even when a discriminatory motive is in evidence, it will often be too costly for a court to assign that label and to act accordingly (pp. 71–80).

The second equality understudy that Tsai offers is a demand for minimal rationality. In general, Tsai contends, a reasonableness rule that searches out “[w]eak justifications produced by hasty deliberation, or offered with utter contempt to the empirical reality of a situation,” will prove a capable substitute for equality (p. 98). His leading example is the Supreme Court’s decision in *City of Cleburne v. Cleburne Living Center, Inc.*,⁴⁰ which overturned a municipality’s decision to exclude homes for people with intellectual disabilities as arbitrary and irrational, and hence a violation of the Equal Protection Clause.⁴¹ *Cleburne* is the rare robust exercise of rational basis review under that Clause.⁴² Although Tsai discusses the case’s history based on the justices’ own papers, he omits one feature of those deliberations that supports his account of the case as an instance of second-best reasoning: At the insistence of then-Justice Rehnquist, the Court first reached the question whether intellectual disability constitutes a suspect class and rejected this possibility.⁴³ But after this concession was made, Rehnquist was more open to finding for the *Cleburne* plaintiffs on rational basis grounds.⁴⁴ That is, the fatal deployment of rationality review flowed from precisely the kind of substitution-friendly compromise Tsai endorses—a compromise predicated upon the concern among some officials at the prospect of a destabilizing surfeit of valid challenges to state action.

Third, Tsai proposes an anticruelty rule. To illustrate, he invokes litigation concerning a late-nineteenth-century California ordinance requiring closely shaved hair for incarcerated men.⁴⁵ Neutral on its face, that law was “understood by every one” to target Chinese men with a queue and was in-

39. See pp. 54–55 (discussing *Brown*); pp. 81–83 (discussing *McCleskey*).

40. 473 U.S. 432 (1985).

41. Pp. 93–97; see also *Cleburne*, 473 U.S. at 450.

42. But it is not alone. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating a Colorado initiative that precluded municipal antidiscrimination legislation to protect gays and lesbians).

43. *Cleburne*, 473 U.S. at 442–46.

44. William D. Araiza, *Was Cleburne an Accident?*, 19 U. PA. J. CONST. L. 621, 647, 648 n.137 (2017). Tsai notes the second but not the first point. P. 97.

45. P. 138; see also *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6546).

validated on this ground as well as on the basis of its cruelty.⁴⁶ A more contemporary example Tsai offers is felon disenfranchisement, which has a racially disproportionate effect on the eligible voter pool (p. 145). He might have added the recently reinvigorated institution of solitary confinement,⁴⁷ which (at least on the basis of presently available evidence) appears to have a racially disparate distribution.⁴⁸ These examples make apparent that Tsai has a capacious understanding of cruelty that includes not just physical but also dignitary harms.

Finally, Tsai points to the possibility that free speech claims can be employed as alternatives to equality claims. The argument here, in my view, is best understood in slightly different terms from the earlier three examples (although Tsai does not quite offer this distinction): It is not that free speech is a direct substitute for equality. It is rather that free speech is a necessary complement to equality claims. In part this is because the social fight for equality requires advocacy and speech. Hence, Tsai's leading example of the fourth understudy is *NAACP v. Button*,⁴⁹ which rejected on First Amendment free speech grounds Virginia's effort to regulate the NAACP out of existence as a way to defeat desegregation.⁵⁰ The other examples that Tsai provides—for example, a federal law that criminalizes encouragement of unlawful immigration (p. 202)—have the same function: It is not that their enforcement alone has any ameliorative effect on equality-related practices. It is rather that they clear the channels of political communication, and so enable equality's advocates to speak forthrightly and be heard by political allies.

In sum, Tsai purports to offer a toolkit for egalitarians that eschews both the definitional quandaries and the terminology of equality talk as we have long known it. Three of the four understudies that he proposes would operate as rough, presumably imperfect, substitutes. Although Tsai does not say as much, his fourth alternative has a rather different function as an enabling complement to equality-based arguments. In either capacity, though, his analysis frames the following question: How successful will the understudies be at doing the labor that under ordinary conditions would be done by equality?

46. *Ho Ah Kow*, 12 F. Cas. at 255–57; see also pp. 137–40.

47. On the resurgence of solitary confinement in the 1990s, see KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016).

48. See Samuel Fuller, Comment, *Torture as a Management Practice: The Convention Against Torture and Non-Disciplinary Solitary Confinement*, 19 CHI. J. INT'L L. 102, 126 (2018) (“The data that does exist indicates that the American prison system as a whole has a disproportionate rate of solitary confinement among prisoners from racial minority groups, particularly among black prisoners.”).

49. 371 U.S. 415 (1963).

50. Pp. 185–87; see also *Button*, 371 U.S. at 444. On the context of massive resistance to school desegregation in Virginia, see Robert H. Birkby & Walter F. Murphy, *Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Courts*, 42 TEX. L. REV. 1018, 1021–24 (1964).

II. A WORLD WITHOUT EQUALITY?

At a moment of perceived retrenchment and rollback for those struggling on behalf of historically and presently marginalized social groups, the idea that the arsenal of equality can be deepened, and hence rendered more effective, has obvious and powerful appeal for liberals and progressives. And the force and allure of Tsai's argument may be even more significant insofar as it transcends the particulars of our present historical conjuncture. For it is difficult to think of a period in history in which those who have power willingly ceded it to the marginalized without either violence or the threat of violence intervening.⁵¹ As a result, it is difficult to think of a moment when claims for equality on behalf of a group that had been denied that entitlement were embraced without conflict. Equality and its pursuit always have a price. Conflict and the fragility of ensuing victories are constant handmaidens of equality struggles, not exceptional conditions. If this diagnosis holds, then Tsai's proposals do not apply only in extraordinary moments of backsliding of the kind that some think characterize the United States circa 2019. Rather, Tsai's proposals would obtain across the board. This potential generality to Tsai's claims on behalf of equality's understudies makes a careful analysis of their potency all the more pressing.

To evaluate Tsai's claims, I pursue two argumentative tacks in this Part. First, I consider whether there are general problems with the strategy of substituting some other value for equality. These general problems are unrelated to Tsai's specific election of understudies. Second, I examine more closely the adequacy of his proposed substitutes. On both scores, I flag reasons to be somewhat skeptical of the substitution strategy pursued in *Practical Equality* and of the possibility that one can pursue the normative goals Tsai embraces without some account of equality.

A. *The Problematic Absence of Equality*

To begin with, recall that Tsai does not follow Westen's lead in wholly abandoning equality as a regulative ideal.⁵² To the contrary, it continues to play an organizing or architectural role in Tsai's analysis.⁵³ At the same time, however, he does not provide a clear account of *which* notion of equality matters or explain *how* that abstract notion is to be connected to the specific proposals and tactical choices of and between equality's understudies. As a

51. See Aziz Z. Huq, *Democracy as Failure*, 60 NOMOS (forthcoming 2020) (documenting the intimate connection between violence and both democracy's birth and its subsequent expansion). Note that by incorporating the threat of violence into this formulation, it encompasses the influential claim that democracy originates with elites' concessions in the face of a credible threat of popular violence. See Daron Acemoglu & James A. Robinson, *Why Did the West Extend the Franchise? Democracy, Inequality, and Growth in Historical Perspective*, 115 Q.J. ECON. 1167 (2000).

52. See *supra* text accompanying note 36.

53. See, e.g., p. 40.

result, it is simply not clear how the ideal of equality can or does serve as an “overarching structure” (p. 40) when its essential quality and immediate implications are unspecified.

To see the problems created by the lacuna, consider cases in which different claims of equality conflict. When this happens, the absence of a clear specification of equality as an overall organizing principle creates a problematic ambiguity in the normative implications of Tsai's argument. For instance, affirmative action disputes such as the one that has roiled Harvard⁵⁴ might on one reading be characterized as conflicts between different claims to equality. Roughly speaking, on one side is a claim to equal opportunity simpliciter (at least along certain margins), and on the other side is a claim to equal opportunity accounting for historical patterns of economic and social stratification. I don't see how any of Tsai's substitutes help us think through this conflict. Indeed, the one brief mention of affirmative action in *Practical Equality* is elusive to the point of evasion.⁵⁵ But I am not sure how one can usefully think about affirmative action without acknowledging this conflict of equalities.⁵⁶

Or consider the problem of exclusionary or racist political leaders and associated movements of the sort that have forcefully manifested in both Europe and the United States in the past few years, including Marine Le Pen, Geert Wilders, and Norbert Hofer.⁵⁷ Tsai recognizes that such movements can be “a clear and present danger to liberalism” (p. 219). He warns, however, against “denying them liberties simply because of who they are” (p. 222). But why? In fact, there is a long tradition of doing just that in Europe. Drawing on the work of political scientist Karl Loewenstein on “militant democracy,” the Federal Constitutional Court of Germany banned the quasi-Nazi Socialist Reich Party in 1952 and the Communist Party of Germany in 1956.⁵⁸ At least twenty-one other democracies have experimented with various forms of party bans, with a range of results.⁵⁹ In order to explain why

54. See *supra* text accompanying notes 1–2.

55. See p. 22. In contrast, other important recent treatments of discrimination and inequality have confronted the place of affirmative action in a general scheme of equality law. See, e.g., KHAITAN, *supra* note 13, at 215–40.

56. That much commentary does not acknowledge the conflict is simply an indication of its bad faith.

57. See, e.g., Katie Forster, *Europe's New Fascism? The Far-Right Leaders Hoping to Take Power in 2017*, INDEPENDENT (Nov. 15, 2016, 6:28 PM), <https://www.independent.co.uk/news/world/europe/marine-le-pen-geert-wilders-norbert-hofer-rise-of-fascism-europe-far-right-leaders-donald-trump-a7417276.html> [<https://perma.cc/9CB8-XRB4>]. For a discussion of the general phenomenon from a legal and constitutional perspective, see Aziz Z. Huq, *The People Against the Constitution*, 116 MICH. L. REV. 1123 (2018) (reviewing JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016)).

58. Angela K. Bourne, *Democratization and the Illegalization of Political Parties in Europe*, 19 DEMOCRATIZATION 1065, 1067 tbl.1, 1073–74, 1080 (2012).

59. TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 170–71 (2018). Ginsburg and I express reservations about militant democracy, but on grounds that are distinct from Tsai's. We elaborate the tactical questions at stake in Aziz Z. Huq & Tom

such measures are ruled out from equality's toolkit, I think that one must do more than merely suggest that they make "the pursuit of equality collapse[] upon itself."⁶⁰ That did not happen in midcentury Germany. More is needed to demonstrate that other polities will likely take a more destructive path.

The concern raised by such ambiguity would be minor if conflicts between variant formulations of equality were infrequent. But Rae has demonstrated that such conflicts are pervasive. Indeed, a central implication of Rae's analysis is that for almost any given equality claim, the basic "grammar" of equality means that there is typically some alternative claim that is available in opposition to whatever equality argument one chooses to make. Underscoring this dynamic, Rae makes the paradoxical observation that the "one idea that is more powerful than order or efficiency or freedom in resisting equality" is "equality itself."⁶¹ So it is with Harvard's efforts to fold in minorities that have long been excluded; so it is with Elizabeth Warren's wealth tax proposal, which was parried in effect with the principle of equal opportunity.⁶² In the U.S. context, one especially important potential conflict arises between race- and class-based conceptions of inequality, with white working-class interests often juxtaposed in something like a zero-sum contest with those of minority communities.⁶³ That is, the current moment of populist resurgence is itself animated by a felt clash of equalities (even if it will not often be articulated in those terms on the battlefield of daily politics).

Given this large domain of uncertainty, I think it is fair to say that Tsai samples a number of egalitarian intuitions without explaining how they hang together, or even whether some coherent normative vision can be found underpinning their selection. To the extent that *Practical Equality* is read as a political manifesto, this is not a problem: one is entitled to cobble together whatever bundle of policies will appeal to one's median voter. But to the extent that it is a more scholarly contribution, the absence is an acute one. Without some account of what work equality's understudies are supposed to do, or a metric against which to evaluate them, it is simply unclear how Tsai's proposed alternatives can be assessed in the first place.

Uncertainty about where equality leads is compounded by a difficulty in Tsai's method for prescribing a route to get there. He occasionally refers to his strategy as one of pursuing the "second best" (p. 91). His terminology re-

Ginsburg, *Democracy Without Democrats*, CONST. STUD. (forthcoming 2020) (analyzing the role of timing in the tactics of democratic defense).

60. See p. 222.

61. RAE ET AL., *supra* note 11, at 150; *id.* at 138–40 (analyzing the "mutual exclusion" arising when "equalities rule each other out").

62. See Cowen, *supra* note 8.

63. See Alan Abramowitz & Jennifer McCoy, *United States: Racial Resentment, Negative Partisanship, and Polarization in Trump's America*, 681 ANNALS AM. ACAD. POL. & SOC. SCI. 137, 137–38 (2019) (arguing that a "reaction to the growing racial, ethnic, religious, and gender diversity of the American electorate produced a surprising win for Donald Trump"); Marc Hooghe & Ruth Dassonneville, *Explaining the Trump Vote: The Effect of Racist Resentment and Anti-Immigrant Sentiments*, 51 PS: POL. SCI. & POL. 528, 529–30 (2018) (similar findings).

calls a well-known theorem in welfare economics entitled the “theory of the second best.”⁶⁴ Although Tsai might mean the term in a colloquial sense, the technical theorem is illuminating too. In rough paraphrase, the theorem holds that if one of the assumptions that support a social welfare–optimizing policy fails, then one cannot simply make some small adjustment to account for that failure.⁶⁵ Rather, under second-best conditions, there will be deep uncertainty over how best to advance social welfare.

To be sure, Tsai is not a welfarist, and so the theorem as originally specified is not directly applicable to his argument. Nevertheless, a form of the second-best problem may be, *mutatis mutandis*, relevant to his analysis in the following way: Tsai infers from the existence of current obstacles to equality that it is better to tack toward equality's understudies as a means to more effectively ascend to reach a position of greater equality. Many of his examples point to the possibility of short-term gains from this approach. But it is far from clear that under the counterfactual conditions identified by Tsai, short-term gains would translate into sustainable, long-term decreases in inequality (even bracketing the vagueness of that term in Tsai's analysis). Here is the worry in a somewhat stylized form: The question is not simply whether an equality understudy will generate an increase in equality-relevant outcomes. It is also whether it will lock the system into that limited increase and thereby make larger gains in the future infeasible.

Consider, by way of analogy, the role of regional trade agreements in promoting global free trade. Regional treaties can promote trade between signatory nations, but may increase the difficulty of achieving a global trade settlement.⁶⁶ It may work, that is, as a “local maximum” that impedes further advances. Hence, advocates of greater global free trade must make a difficult predictive calculation: Given the observed political economy of the world, is a regional reform likely to yield a durable local maximum that precludes reforms with even bigger payoffs down the road?

Essentially the same predicament faces equality's understudies: It may be that an anticruelty rule or a pro-free speech rule has the effect of mitigating some immediate effects of inequality. But by that very step, one might reduce the urgency of more systemic equality-facing reforms, and thus retard the larger mission of equality.⁶⁷ Incrementalism is sometimes portrayed as an especially potent reform strategy, but I suspect that its vitality is very much a

64. R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956); see also Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–05 (2012) (discussing the theorem's application to law).

65. Lipsey & Lancaster, *supra* note 64.

66. For a survey of debates on whether regional trade treaties inhibit global free trade, see, for example, Caroline Freund & Emanuel Ornelas, *Regional Trade Agreements*, 2 ANN. REV. ECON. 139 (2010).

67. Note that this should not be a problem for those who represent the immediate victims of inequality, who ought to prioritize their clients' interests. For a fascinating discussion of how this works in practice, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

contextual matter.⁶⁸ To predict which pathway of legal or institutional reform ultimately yields the most egalitarian outcomes requires a difficult diagnosis of present and impending political conditions and outcomes. Tsai does not undertake this political analysis. But without that work, it is difficult to know whether the short-term gains that he prefers are warranted by the long-term trade losses adhering to egalitarian reform projects.⁶⁹

But let us bracket these concerns for a moment. Let us say that there is an adequate specification of equality, and also that we have in hand political prognostications sufficiently clear to make unavoidable intertemporal trade-offs. Even then, another obstacle remains. Tsai is not clear as to whether understudies will always be available for equality. And there is at least one domain of social organization in which their availability should not be taken for granted. One of Scanlon's accounts of equality takes the form of a principle of political fairness that "depends on the structure of the process through which individual[representatives] are chosen."⁷⁰ On Scanlon's account, this in turn requires "equal access to the *means* for attaining office and, more generally, influencing policy through the electoral process."⁷¹ But I doubt that any of Tsai's understudies can plausibly be involved as a substitute for this species of equality. Rationality, for example, has not proved an adequate means of preventing restrictions on the franchise, such as voter identification requirements, that are sometimes motivated by discriminatory intent.⁷² Nor has rationality review mitigated whatever burden is imposed by voter identification laws.⁷³ (Interestingly, and contrary to Tsai's thesis, some such laws have fallen under equality review simpliciter.⁷⁴) In the contemporary

68. For a nuanced treatment of incrementalism as a political strategy, see Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815 (2010).

69. Tsai expresses a concern that equality-focused litigation strategies risk the creation of "tragic" precedents. P. 12. But a decision upholding a discriminatory policy without passing clearly on an equality claim can be equally tragic. There is no reason a priori to think that the incentive effects of a bad decision on equality grounds will be different from those from a bad non-equality decision. The ultimate resolution of the travel ban case arguably has the latter character, since the Court largely evaded the quality question. See Huq, *supra* note 7. Yet its incentive effects in terms of future policy are likely the same as those generated by an equality-facing decision.

70. SCANLON, *supra* note 13, at 77.

71. *Id.* at 80. But see Charles R. Beitz, *Procedural Equality in Democratic Theory: A Preliminary Examination*, 25 NOMOS 69, 70–71 (1983) (doubting the moral standing of equal participation rights).

72. *E.g.*, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 219, 234 (4th Cir. 2016) (invalidating a voter identification law as predicated on a racial motive), *cert. denied*, 137 S. Ct. 1399 (2017).

73. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 185–204 (2008) (upholding the Indiana state voter identification law against a facial challenge under the Fourteenth Amendment's Equal Protection Clause).

74. See, e.g., *McCrory*, 831 F.3d at 219; *Veasey v. Abbott*, 830 F.3d 216, 243–65 (5th Cir. 2016) (striking down the Texas state voter identification law as racially discriminatory under section 2 of the Voting Rights Act).

American context, the frequent collinearity of race and partisan affiliation creates a further difficulty because it will often be either unclear, or even profoundly unknowable, whether a specific electoral measure was based on racial grounds, partisan grounds, or an inarticulate alloy of the two.⁷⁵ Mere “rationality” does not help us decide how to characterize the resulting complex reality.

On the other hand, the fourth of Tsai's understudies, free speech, can actually operate as an impediment to state efforts to facilitate equal access to “influencing policy”⁷⁶ through campaign finance reform legislation. Equality is “not a legitimate objective of laws regulating campaign finance” under the current jurisprudential dispensation.⁷⁷ Because the motivating goal of campaign finance reform since the Progressive Era has been the mitigation of political distortions that inevitably result from social inequalities,⁷⁸ free speech concerns can often work at loggerheads with equality.⁷⁹ It is difficult to see at present any sort of complementarity of the kind evinced in *NAACP v. Button*,⁸⁰ let alone the prospect that free speech law can operate as a full-blown substitute for an equality principle. Perhaps the best that can be hoped for, as my colleague Genevieve Lakier has contended, is the possibility of critique based on judges' failure to “take serious account of economic, political, and social context” in First Amendment law.⁸¹ The relation between such critique and the concrete prospect of reform, however, is sufficiently etiolated at this moment of rampant formalism and empirical negligence as to warrant a measure of pessimism.

I do not mean to exclude the possibility that there are other avenues of reform—in effect, other “understudies”—that might be mobilized to egalitarian ends in the electoral and political arenas. For example, Bertrall Ross has recently developed a compelling argument that focuses not on rights but on

75. Compare *Cooper v. Harris*, 137 S. Ct. 1455, 1479 (2017) (treating race as a proxy for party), with *id.* at 1496–97 (Alito, J., concurring in the judgment in part and dissenting in part) (positing a choice between race or party as a criterion of analysis).

76. SCANLON, *supra* note 13, at 80.

77. David A. Strauss, *The Equality Taboo*, 2015 U. CHI. LEGAL F. 509, 509.

78. The basic thought was expressed by Elihu Root in the speech that once elucidated the jurisprudence. See *United States v. UAW*, 352 U.S. 567, 571 (1957) (“The idea [behind campaign finance restrictions] is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds . . . to send members of the legislature . . . to vote for their protection and the advancement of their interests . . .” (second alteration in original) (quoting Elihu Root, *The Political Use of Money* (Sept. 3, 1894), in *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 141, 143 (Robert Bacon & James Brown Scott eds., 1916))).

79. Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 532 (2016) (“[The] Roberts Court . . . consistently strikes down nearly every kind of campaign finance regulation it has reviewed, from aggregate contribution limits, to restrictions on corporate electioneering, to public financing.”); *id.* at 547.

80. 371 U.S. 415 (1963); see *supra* note 50.

81. Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2156 (2018).

political empowerment as a response to inequality.⁸² But the larger thrust of this Section remains, even accounting for those further alternatives: there are domains of social and political activity in which Tsai's understudies are ineffective or even counterproductive. This exacerbates the other concerns I have flagged here—that Tsai's argument demands a more specified conception of equality than the one he supplies, and that it provides no means for resolving the pervasive conflicts between different forms of equality. Together, all three hesitations should prompt caution about the threshold wisdom of jettisoning the ideal of equality even before one reaches the substance of Tsai's specific understudies.

B. *The Adequacy of the Understudies*

Sometimes, a substitute performer is better than the real thing. I have, for example, heard it said that the Chicago performance of Lin-Manuel Miranda's *Hamilton* is better than the version on Broadway in New York. (This also strikes me as the sort of thing we midwesterners say to make ourselves less envious.) For Tsai, however, the opposite problem arises: it is not clear that his substitutes can do the work that he wants them to. This is so as a matter of both practice and theory. And the worry holds whether one looks across the four understudies or at each individually.

To begin with, it is relevant, but hardly decisive, to observe that there are instances in which non-equality arguments have been lodged against policies that are blatant engines of inequality and subordination—and have utterly failed. For example, one of the threshold challenges to the Japanese American internment initiated in 1942 was framed on nondelegation grounds; equal protection concepts took a backseat because of uncertainty as to whether the Fifth Amendment's Due Process Clause incorporated an anti-discrimination component.⁸³ In *Plessy v. Ferguson*, similarly, the Court tested the validity of Louisiana's requirement of separate "white" and "colored" railroad carriages by asking whether it was "reasonable, and . . . enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."⁸⁴ The *Plessy* Court rejected the argument from reasonableness (Tsai's second understudy) by stressing the epistemic

82. Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120, 1127 (2018) ("[A] more promising legal intervention would focus on incentivizing political campaigns to mobilize the poor. Once campaigns target the poor in their mobilization activities, representatives are likely to see the electorate in a less biased way, while experiencing more pressure to adopt the redistributive policies necessary to ameliorate economic inequality.").

83. *Hirabayashi v. United States*, 320 U.S. 81, 83 (1943) (identifying both nondelegation- and discrimination-based challenges). But note that antidiscrimination norms at this time had not been folded into federal constitutional law in any robust form. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 883 n.13 (1998).

84. 163 U.S. 537, 549–50 (1896).

difficulty of drawing a conclusion against the state.⁸⁵ Finally, in *Williams v. Mississippi*, the Court upheld a suite of facially race-neutral restrictions that the state had imposed on the franchise with the aim of excluding African Americans because of the absence of a perfect fit between the regulated class and race.⁸⁶ At a minimum, these examples demonstrate that Tsai's solution is no global panacea. In some of the most crucial moments of egalitarian struggle in U.S. history, equality's understudies are just as disarmed as the lead herself.

But this pattern of failures is also allied with a profound theoretical difficulty. A central problem, running across all of his alternative tactics, is that Tsai does not account for the possibility that the very forces that impede equality's progress would also (dare I say, perhaps, equally?) impede the path of its understudies. Much of equality law has an implicit or explicit redistributive coloration. The most immediately available solution to inequality, after all, would seem to be a reallocation of some sort of resource from the advantaged to the disadvantaged. Redistribution will be resisted predictably by those who are already advantaged by the status quo.⁸⁷ Anything else would be surprising.

If the reason for resistance to equality claims rests upon a desire to not see resources redistributed, it is unclear why an alternative means to the same end would succeed where equality has failed. Why would a dominant group, which is currently enjoying a disproportionate share of the status quo's harvest, not oppose equality's understudies with as much fervor as they resisted equality itself? Perhaps they will not realize the redistributive or corrective force of those understudies in as crisp and clear a fashion as they recognize the force of equality claims? I am skeptical that it is easy to sneak egalitarian redistribution past its opponents merely by draping it in a new label. During periods of constitutional transition, for example, when there are multiple legal issues up in the air and many means for redistributing resources, studies suggest that powerful elites still in practice maintain tight control over the extent of redistribution.⁸⁸ There is little reason to think that legal and constitutional conflict in the wake of a constitution's creation

85. *Plessy*, 163 U.S. at 550–51 (“[W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia . . .”).

86. 170 U.S. 213, 222 (1898) (“[T]he operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men . . .”). Williams had argued that Mississippi law required that jurors be qualified voters, yet the state's suffrage criteria unconstitutionally excluded blacks. *Id.* at 214.

87. RAE ET AL., *supra* note 11, at 148 (“[A]dvantaged groups do not act under an impulse for self destruction.” (emphasis omitted)).

88. Michael Albertus & Victor Menaldo, *Gaming Democracy: Elite Dominance During Transition and the Prospects for Redistribution*, 44 BRIT. J. POL. SCI. 575, 577 (2013).

would yield a different outcome.⁸⁹ Elites are indeed more likely to be able to identify covert efforts at redistribution because they would be dissimilar from other forms of ordinary legislation. Even if that were not the case, the enabling effect of a legal change's low salience on the prospect of redistribution would be dissipated by Tsai's book-length effort to draw attention to equality's alternatives. His interjection into public debates would therefore have something of a self-defeating character.

The problem of obdurate political resistance to redistribution does not improve if the reform does not transfer money or resources from one person or group to another. Even if the law engages in leveling up, say by vesting a subordinate group with costless legal rights such as citizenship or the franchise, this might have the effect of depriving the superordinate group of relative standing or status engendered by the very fact of hierarchy. As Richard McAdams has pointed out, race discrimination in the United States has historically been "a means of producing group status." It can serve that function, however, only if social hierarchies and "esteem-producing racial biases" are sustained.⁹⁰ McAdams's powerful account suggests that progressive reorganizations of status will meet fierce resistance even if there is no material good at stake. Even efforts to erase status-based stratification, therefore, will yield countermobilizations.

The concern I've expressed with the futility of substituting for equality is rather abstract. It can be rendered more concrete, though, using Tsai's own examples. Consider again *Plessy v. Ferguson*.⁹¹ According to Tsai, the "path not taken" in *Plessy* hinged on an argument from what is today called the dormant commerce clause—that is, the notion that a discriminatory state regulation of railcars fell outside the reserved powers of the states and instead fell within an exclusive federal domain pursuant to the Commerce Clause (pp. 45–47). But *Plessy*'s majority explicitly rejected that argument,⁹² just like it rejected the argument from reasonableness.⁹³ Worse, even on those occasions that the Court was asked to invalidate railroad legislation based on overt racial bias, it continued to find ways to duck the question as late as the 1940s.⁹⁴

89. Consider, for instance, post-Eastern bloc Hungary, which has experience a rapid democratic decline that courts have been unable to hinder. János Kornai, *Hungary's U-Turn: Retreating from Democracy*, 26 J. DEMOCRACY 34, 36 (2015).

90. Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1008, 1064 (1995).

91. 163 U.S. 537 (1896).

92. *Id.* at 548 ("In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana.").

93. See *supra* text accompanying note 85.

94. See R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941) (abstaining rather than ruling on an equal protection challenge to a Texas rule prohibiting African American porters).

Finally, it is worth drilling down on the specifics of Tsai's understudies to query whether they in fact can perform the same work on the ground as equality. I have already registered a concern that First Amendment free speech doctrine as currently configured is more hostile to than facilitative of equality concerns.⁹⁵ So I am unconvinced that present free speech doctrine will have any egalitarian effect—and a radical refashioning of the doctrine is presently implausible.⁹⁶ Building on elements of the analysis so far, I will therefore focus on Tsai's due process and anticruelty proposals to suggest that they will not suffice to play the role that Tsai hopes them to fulfill.

Take first the idea of due process.⁹⁷ At least under present doctrine, this principle has force only if the government acts in a way that is discretely targeted at a specific person, and not if it alters legal entitlements through a general law.⁹⁸ Accordingly, much state action that might impinge on (some understanding of) equality does not impinge on the domain covered by due process. Even where due process does apply, it is hardly clear that it can supply an alternative to equality concerns. Focusing on criminal justice, Tsai suggests that due process can do the work of preventing state officials from "using outrageous and unreliable methods" (pp. 72–73). But at least so far as criminal justice goes, among the most inegalitarian elements of current practice is the power to stop and search pedestrians without probable cause, a power that the Warren Court explicitly blessed. The ensuing "stop and frisk" tactic, when applied unevenly across different geographic areas with varying racial geographies, solidifies existing racial stratification and perhaps even exacerbates the extent of such inegalitarian layering.⁹⁹ Due process norms do little to impede the use of tactics that are legally and factually justified in the

95. See *supra* text accompanying notes 79–81.

96. For an argument that the Court treats disfavored speakers differently, and with less care, than favored speakers, see Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012).

97. At times, Tsai uses the idea of "procedural justice." P. 67. This term is now associated with Tom Tyler's theory of legal compliance. See TOM R. TYLER, *PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS* 37–41 (2007) (defining procedural justice). But procedural justice so defined is not necessarily a substitute for equality. The thrust of Tyler's theory is that manifestations of procedural justice increase the tendency of those who interact with state actions to comply subsequently with the law. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 49–58 (2002) (discussing the role of procedural justice in causing people to accept third-party decisions). But an increased willingness to obey the law is not the same as more equal or more just treatment. Much depends, rather, on the content of the substantive law.

98. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Londoner v. City of Denver*, 210 U.S. 373 (1908).

99. See Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2409–12 (2017) (arguing against the use of street stops, even if legal, on the basis of their racially stratifying effects); cf. pp. 64–65.

individual case, like stop and frisk, but that have the effect, when applied in the aggregate, of increasing the extent of pernicious forms of inequality.¹⁰⁰

Or consider Tsai's suggestion that *McCleskey v. Kemp*¹⁰¹ might have turned out differently had it been argued on due process grounds focusing on the standardless discretion exercised by district attorneys in Georgia bringing capital charges (pp. 87–88). If the Court had taken that path, however, the problems of racial bias and disproportionality in the application of the death penalty would have remained unaddressed. It would not have been a “second-best response to concerns of political backlash” as Tsai suggests (p. 91), but rather a precisely tailored fix that may have helped McCleskey and no other defendant. It is simply unknowable whether a more formal standardization of prosecutorial decisions to seek a capital sentence would have led to greater or lesser inequality. For all we know, under such counterfactual conditions, a rigid rule in lieu of a flexible standard could have eliminated whatever discretionary mercy then existed in this part of the Georgia criminal justice system.¹⁰² Worse, we cannot know whether a more robust due process doctrine would not have led to a similar political and jurisprudential backlash. There is reason to think it would indeed have had this effect. For even before *McCleskey* was decided, influential arguments were made against the federal judiciary's enforcement of constitutional norms related to fair criminal trials through the writ of postconviction habeas.¹⁰³

Finally, I am not convinced by Tsai's assertion that due process violations will be easier to prove than bad motive (p. 70). Often, it will be just as hard to show procedural irregularities in the opaque context of criminal justice as it is to demonstrate bad intent. In any adjudicative system characterized by informality, similar difficulties will arise. Even where process is more formalized (such as at the trial stage of criminal adjudication), there will often be loosely regulated decision points at which unequal treatment of similarly situated litigants might emerge without any ready means of scrutiny or regulation. In practice, litigants will often lack the resources or procedural means to show that similarly situated individuals were treated differently from them. Absent some comparative data, a claim of per se improper process may well founder.

Alternatively, consider anticruelty norms as a substitute for equality. As of April 2019, a majority of the Court had flipped from solicitude about the

100. For instance, algorithmic bail and sentencing tools can have racial stratification effects even if they are accurate (in the sense of having low rates of false positives and false negatives). Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043 (2019).

101. 481 U.S. 279 (1987).

102. That said, increased discretion in the federal criminal sentencing system has led to more rather than less racial inequality. See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1333 (2014).

103. The locus classicus of this concern was an influential, albeit highly flawed, article by Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963).

risk that innocent defendants may be executed to a positive hunger for a rapid delivery of the ultimate punishment.¹⁰⁴ This dynamic has already generated a sharp and public complaint from the usually mild-tempered Justice Breyer.¹⁰⁵ Whatever one makes of this hungry judicial embrace of death, it is hardly compatible with the potency of anticruelty as a value in lieu of equality. More generally, it is far from clear that we are equally empathetic to all manifestations of suffering without regard to the identity of the person claiming that experience. The American Medical Association, for example, cautions that physicians tend to believe that “Hispanic and African American patients experience less severe pain than whites, when in fact they report comparable pain.”¹⁰⁶ If physicians trained in the diagnosis of physical pain systematically misrecognize the pain of (nonwhite) others, it would be astonishing to find that judges, legislators, or members of the general public performed better. To the contrary, there is every reason to expect that a reliance on empathy, which is the basis of the anticruelty norm, will reproduce a stratified titration of care and remediation across superordinate and subordinate social groups.

To summarize, both an analysis of the possibility of substituting for equality in the abstract and a close scrutiny of the specific understudies proposed by Tsai reveal a host of difficulties. There is no reason to think that equality's understudies will have a path that is substantially less onerous than equality itself to a more equitable set of social arrangements. In their particulars, moreover, Tsai's understudies seem now to be either orthogonal to or at odds with equality concerns (e.g., free speech and due process) or underwhelming, simply inefficacious substitutes (e.g., due process and anticruelty). I am thus not convinced that equality talk can or should be abandoned anytime soon.

III. WHY EQUALITY (AGAIN)?

So we return once more to the obdurately complex and occasionally fugitive ideal of equality. The force of Tsai's threshold bill of particulars against the concept remains: Equality is an idea that seems to do as much as political rhetoric to preserve the status quo ante of educational and status privilege (the Harvard case), white national identity (the travel ban case), and economic inequality (the wealth tax) as it does to mitigate visceral social divi-

104. See *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019) (“If litigation is allowed to proceed, federal courts ‘can and should’ protect settled state judgments from ‘undue interference’ by invoking their ‘equitable powers’ to dismiss or curtail suits that are pursued in a ‘dilatatory’ fashion or based on ‘speculative’ theories.” (quoting *Hill v. McDonough*, 547 U.S. 573, 584–85 (2006))).

105. See Adam Liptak, *Over 3 A.M. Dissent, Supreme Court Says Alabama Execution May Proceed*, N.Y. TIMES (Apr. 12, 2019), <https://www.nytimes.com/2019/04/12/us/politics/supreme-court-alabama-execution-.html> [https://perma.cc/9DHD-AWE2].

106. Ronald Wyatt, *Pain and Ethnicity*, 15 A.M.A. J. ETHICS 449, 451 (2013).

sions and yawning gaps in life-cycle opportunities.¹⁰⁷ When Tsai complains that “we can’t solve any real problems at [a high] level of generality” (p. 38), he is effectively and precisely diagnosing a core problem in equality. Its internal pluralism is rendered inevitable by what Rae calls an implicit “grammar” that allows for many different equality claims to be made by altering the comparator groups, the traits being compared, and the baseline of entitlements in the world.¹⁰⁸ Yet equality parades across the public stage as if it were a self-evident truth.

Rather than turning away from equality, though, I think the more profitable pathway is the one suggested in Elizabeth Anderson’s essay *What Is the Point of Equality?*¹⁰⁹ Anderson’s compelling response is that to champion equality is to seek “to end oppression” through the “construction of a community of equals” that “integrates principles of distribution with the expressive demands of equal respect.”¹¹⁰ Or take instead Tarun Khaitan’s eloquent recent formulation of discrimination law’s aim as the promotion of human flourishing by “reduc[ing] . . . pervasive, abiding, and substantial relative disadvantage between certain types of groups.”¹¹¹ To be sure, these definitions require more specification of what counts as “oppression” or when it is legitimate for a certain social group to be subject to abiding “disadvantage.” But by asking *why* we have recourse to the ideal of equality—a question that did not occur to political thinkers for many centuries¹¹²—Anderson and Khaitan provide an orienting lodestar to sift disputes about affirmative action, the exclusion of national or religious groups from the polity, or the effort to reduce a nation’s Gini coefficient. They show the point, and not just the form, of equality. This orientation provides not just prescriptive guidance but also a foundation for critique. Most obviously, when the Court sententiously propounds syllogisms such as “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” it offers a vantage point from which to critique the vacuity, pomposity, and even hypocrisy of such an assertion when made in a context of persistent racial stratification and calls for white supremacy.¹¹³

Of course, this is not the only possible account of equality’s ambition.¹¹⁴ I invoke it here because I think its substance is persuasive, not because I think that merely invoking it is enough to persuade. The hard work of equality, though, is in the public and juridical exposition of these ambitions, and

107. See *supra* text accompanying notes 1–9.

108. RAE ET AL., *supra* note 11, at 15.

109. Anderson, *supra* note 33.

110. *Id.* at 288–89.

111. KHAITAN, *supra* note 13, at 18.

112. FLEISCHACKER, *supra* note 17, at 2.

113. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

114. Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (“The end of traditional equality jurisprudence, however, should not be conflated with the end of protection for subordinated groups.”).

in their defense against alternatives. It is only through such arguments, and through the proffering of contentions about which ambition is more faithful to our constitutional traditions and moral compasses, that the fight for equality really is pursued. Laying down arms is not an invitation to an understudy. It rather risks abandoning one important rhetorical and conceptual field to equality's opponents.

Yet even if I demur to his ultimate recommendation, Tsai has done an important service by clarifying the intimate connections between equality, at least understood in a certain way, and related normative concepts. By asking why equality matters, he invites a more searching inquiry into a social and legal norm that is recklessly invoked and rarely explicated with care or good faith. No such criticism can be made of Tsai's work. Rather, at a time of increasing anxiety about prejudice, tolerance, and the possibility of realizing a decent society (either for us, or for the next generation), this is an important and worthwhile enterprise, albeit one that should be understood as complementary to, and not a substitute for, the deeper and longer fight over equality.

