Equality is a Brokered Idea

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Equality is a Brokered Idea

Robert L. Tsai*

We have long been warned not to expect too much from people when it comes to defending the principle of equality. Take the U.S. Supreme Court. For every Strauder v. West Virginia, Brown v. Board of Education, or Obergefell v. Hodges that extended equal respect to those previously denied it, there is a disastrous ruling like Plessy v. Ferguson, McCleskey v. Kemp, or Trump v. Hawaii that provided cover for major inequities and demoralized friends of

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1 Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (invalidating state law that forbid black males from serving on juries because law “is practically a brand upon them affixed by the law, an assertion of their inferiority, and a stimulant to . . . race prejudice”).

2 Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that state’s segregation of schoolchildren according to race was “inherently unequal”).


5 McCleskey v. Kemp, 481 U.S. 279, 287, 297 (1987) (rejecting equal protection challenge to Georgia’s death penalty despite study that showed black defendants are significantly more likely to be sentenced to death than white defendants).

equality—sometimes lasting for generations. And if we think that even the rulings that are
praiseworthy have faults of their own, these outcomes can actually be mapped somewhere
between horrible and pretty good, with few if any truly outstanding defenses of equality.

There are several explanations why we’ve had such a hard time doing the work of
equality in vigorous fashion. Political scientists have shown us that courts generally, but the
Supreme Court in particular, behave in largely majoritarian fashion despite certain design
choices originally made by the Constitution’s framers to facilitate a degree of independence.⁸

When federal judges strike down laws, they have tended to be most confident vindicating
national norms (including constitutional rights) when state laws are involved.⁹ By contrast, the
desire to remain part of the national elite and to avoid an open clash with a coordinate branch is a
recurring theme of the federal judiciary’s history, so when the Court has invalidated a federal
law, it’s usually been when no real fear of backlash exists or when Justices have found it safe
enough to prune a national policy.¹⁰

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⁸ See generally Pamela Brandwein, Reconstructing Reconstruction: The Supreme Court and
the Production of Historical Truth (1999); Robert A. Dahl, The Supreme Court as a National
Policymaker, 6 J. Pub. L. 279 (1957); Epstein et al., The Supreme Court as a Strategic National

⁹ See, e.g., Frank B. Cross & Stefanie Lindquist, The Scientific Study of Judicial Activism, 91 MINN. L.
REV. 1752, 1774-82 (2007). More refined data suggests that liberal justices have generally been more
willing to strike down state laws than federal laws over the years, and that conservative justices have
shown a slightly greater willingness to strike down federal laws over state laws. Id.

¹⁰ See Dahl, supra note 8, at 287.
Critical theorists have a different explanation, but it’s also built upon this same basic majoritarian insight: they say that progress on equality, particularly when it comes to safeguarding the rights of African Americans, has been made only when white citizens have perceived some advantage to come from enlarging the notion of equality, producing what Derrick Bell famously called a “convergence of . . . interests.” 11 But whatever explanation one prefers, it seems clear that civic leaders must feel it sufficiently culturally safe, legally productive, and institutionally worthwhile before they will act to enforce the idea of equality.

I. Practical Egalitarianism

I have recently presented a refinement of these accounts. In my new book, Practical Equality, 12 I argue that what’s crucial is not so much conceptual differences that prevent institutions from doing the hard work of equality (although such disagreements certainly exist), but rather practical concerns decision makers have about the actual effects of equality—real or imagined. 13 Human beings are far more consequentialist in their decision making than they are

11 Derrick A. Bell, Jr., Brown v. Board and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 526 (1980). Bell’s original account made it largely a black-white dynamic. See also Sheryll D. Cashin, Shall We Overcome—Transcending Race, Class, and Ideology through Interest Convergence, 79 St. John’s L. Rev. 253, 274 (2005).

12 ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION (2019).

willing to admit. Accordingly, they have proven themselves willing to adjust their principles
when they don’t like where steadfast commitment to those principles might lead. Hesitation over
the consequences of equality has sometimes led to lousy excuses, gigantic exceptions, and
cynical ploys to duck hard questions. While we shouldn’t give in completely to outcome-based
thinking, neither should we deny that concerns about the effects of equality—what Justice
William Brennan once called “a fear of too much justice”\textsuperscript{14}—can dampen the idea’s potency.

Putting off a decision or accepting a watered-down theory of equality might be justifiable
when the risk of disaster outweighs the potential for incremental progress, of course, so I’m not
inalterably opposed to such strategies, but they do come with their own costs. My main point is
that there are more options than deferral or appeasement for managing the stress that comes from
equality claims.

Nor should we forget the importance of institutional context. At least in this life, there’s
no such thing as pure equality. Already a deeply fraught idea, the meaning of equality exists only
as a product of multiple compromises between people with different philosophical outlooks who

\textsuperscript{14} McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting). There, the Supreme Court in a
5-4 vote rejected a death-row inmate’s racial discrimination claim largely because of the perceived effects
on the criminal justice system as a whole. This prompted Brennan’s famous rejoinder. In my book, I
revisit the debate behind the scenes, emphasizing how this fear of system-wide effects from the principle
of equality took on a larger-than-life role in Justice Powell’s thinking. He took an active role lobbying his
colleagues against the defendant’s position.
inhabit institutions that possess the actual power to reduce human suffering. Inequities can only
be ameliorated by finding effective ways to unlock that power.

Thus, we ignore the recurring roadblocks to equality at our peril. By failing to account for
the many reasons why people in power hesitate to vindicate the ideal of equality, we actually
miss out on opportunities to reduce inequities that might lie before us. Additionally, while there
may be short-term glory in fighting the good fight and going down swinging, it might be better in
the long-term to avoid a terrible, demoralizing defeat, as long as doing so can be said to improve
the conditions of the marginalized in some way.

So, what are the sorts of things we fear from the idea of equality? The most frequently
occurring impediments to vindicating an equality claim are concerns about altering a valuable
social good, the risk of political backlash, and even a distaste for branding someone a bigot.16 No
matter which conception we might prefer, equality is an inherently disruptive idea.17 Religious
accounts capture this essential truth.18 Our own troubled past has also underscored this lesson,
even if not everyone is willing to learn from it.

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16 See Tsai, supra note 12, at 13–25.

17 Anti-subordination accounts are perhaps more vigorous than formalistic ones, but even formal equality
has some bite: when a certain group has been excluded from a social good. The re-ordering that’s required
after formal exclusion will almost always be disruptive in some respects. For an overview of the anti-
subordination approach, see Ruth Colker, The Anti-Subordination Principle Applications, 3 WIS.

18 Early Christianity’s elevation of table fellowship as an ideal for equal status within the community, one
that included the women, the lame, and the poor, was so dangerous that it led to denunciations. Jesus of
For instance, it’s worth recalling that in 1953 the Supreme Court nearly reaffirmed
Plessy. Even as the justices bought time for themselves by scheduling the case for reargument
after a conference failed to produce five votes favoring the principle of racial equality, they
struggled with the very tangible fear that ruling in favor of the black school children would lead
to “subversion or even defiance of our mandates in many communities” (as Justice Tom Clark
explained) or portend “the end of Southern liberalism” (as Justice Hugo Black put it).19 With the
mythological status accorded Brown today, it’s also easy to ignore the fact that barely a majority
of Americans supported the ruling when it first came down in 1954.20 In other words, a fragile
institutional consensus among elites was forged first, and decisive cultural support emerged only
later.21

Faced with the potentially undesirable effects of equality, one answer is to sharply limit
the reach of the principle of equality; another is to bob and weave to avoid addressing tough
questions. Those are the choices that run through the heads of most decision makers.

But all is not lost. There is another option. Sometimes, it’s better to recharacterize an
equality dispute in a slightly different way to reframe the stakes, when doing so has a shot at
securing the support of crucial allies and lifting someone’s unequal burdens right away. I call this
practical egalitarianism, which is a fancy term for doing the work of equality by other means.

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Nazareth himself is remembered to have warned: “Do not suppose that I have come to bring peace to the
ever: it is not peace I have come to bring, but a sword.” Matthew 10:34, New Jerusalem Bible.

19 Tsai, supra note 12, at 24–25.


21 On the role of the Cold War in changing attitudes about civil rights, see generally MARY L. DUDZIAK,
We could instead see a controversy over equality as a due process matter or one that’s governed by the rule of reason, or in the right circumstances, as best resolved according to some other principles. If such an opportunity arises and the dispute is handled with an egalitarian mindset, it can be possible to both reduce the harms suffered by a marginalized community and create a precedent that can help build a culture of equality.

II. Rule of Reason in Action—The Census Case

Of all the Supreme Court’s decisions this past term, the most intriguing example of judges doing the work of equality by other means can be found in the census case. By a 5-4 vote, Justice John Roberts’ opinion in Department of Commerce v. New York\(^{22}\) dismantled the Trump administration’s argument that its motive for including a question about the citizenship of respondents was to enforce the Voting Rights Act. In a surprising turn of events, the majority affirmed the lower court’s preliminary injunction blocking the new query on the ground that “the sole stated reason [] seems to have been contrived.”\(^{23}\) Commerce Secretary Wilbur Ross had already long ago decided to add the question, and only then did the agency run around seeking another agency to support its call for citizenship information.\(^{24}\) Although the Department of Justice (“DOJ”) eventually backed the Department of Commerce (“DOC”), DOJ never behaved like this information was useful for its voting rights work.\(^{25}\) Roberts joined the four liberals on the Court by invoking the rule of reason, emphasizing that “[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that

\(^{22}\) Dep’t of Commerce v. New York, No. 18-966, slip op. (2019).

\(^{23}\) Id. at 28.

\(^{24}\) See id. at 26.

\(^{25}\) See id. at 27.
agencies offer genuine justifications for important decisions, reasons that can be scrutinized by
courts and the interested public.”26 In doing so, he confounded the administration and brought his
usual conservative comrades on the Court to denounce him for spearheading an “unprecedented
departure from our deferential review of discretionary agency decisions”27 and “usher[ing] in an
era of ‘disruptive practical consequences . . . ’”28 President Trump himself is said to have
seethed privately about Roberts’ role in thwarting his plans.29
Deploying the rule of reason is not the same thing as enforcing the equality principle in a
full-throated way because it lacks the precise condemnatory rhetoric associated with equality, but
that almost certainly wasn’t going to happen anyway in the case presented to the High Court. In
fact, the district judge had already rejected the equality claim and instead opted for the
alternative rationale that the agency hadn’t presented a reasonable justification for its decision as
required by the Administrative Procedure Act.31 Subsequently, in granting review, the Supreme

26 Id. at 28.

27 Dep’t of Commerce, slip op. at 2 (Thomas, J., dissenting).

28 Dep’t of Commerce, slip op. at 19 (Alito, J., dissenting)

29 See, e.g., Asawin Suebsaeng, Trump Declares from the Rose Garden He’s Not Owned on the Census,

Court had not opted to review the Equal Protection claim.\textsuperscript{32} Even so, the real mystery remained:

just how badly would the Roberts Court damage the cause of political and racial equality?

Here’s why this was a high-stakes dispute over equality even though the Court was never going to directly address the equality claim. The government’s own Census Bureau had warned the Secretary of Commerce that asking about citizenship would reduce the accuracy of the census.\textsuperscript{33} Their models showed that it would likely lead to the undercounting of Hispanic citizens and non-citizens by increasing non-responses by some 630,000 households.\textsuperscript{34}

According to the Constitution’s Enumeration Clause, information about a state’s “respective Numbers” from the census, to be taken every ten years, would be used to allocate representatives to the House of Representatives (the Fourteenth Amendment specifically directs

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\textsuperscript{32} See Question(s) Presented Report of Granted & Noted Cases, THE SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/opi/18-00966qp.pdf. The Supreme Court asked only the following questions to be briefed and argued:

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 701 et seq.

2. Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker-including by compelling the testimony of highranking Executive Branch officials-without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.


\textsuperscript{34} See Dep't of Commerce, slip op. at 9 (Breyer, J., concurring) (citing to the Memorandum of DOC in the Joint Appendix).
that representatives be allocated based on “the whole number of persons in each state, excluding Indians not taxed”).

For their part, the plaintiffs had originally accused the Trump administration of violating the principle of equality in two respects: (1) expressing animus against non-citizens and/or Hispanic people, who are to be counted by the clear terms of the Constitution’s but might not be; and (2) and damaging the political equality of states whose representation would be negatively impacted by undercounting non-citizens and racial minorities dissuaded from responding to census takers due to the question’s inclusion. At the time, plaintiffs built a circumstantial case of intent to harm on the basis of citizenship status and race. The case was based on evidence that Commerce Secretary Wilbur Ross had decided to add the question after conversations with anti-immigration figures like Steve Bannon and Kris Kobach, plus the unequal effects of the policy change.

On the other hand, there’s no specific language in the Constitution that prohibits the government from inquiring about citizenship during a census, and many nations already do just

35 U.S. CONST. art. I, § 2; id. amend. XIV, § 2.

36 See U.S. Dep’t of Commerce, 351 F. Supp. 3d at 665.

37 See id. at 670–71.

38 To be sure, it’s theoretically possible to come up with a coherent theory about what the Census Clause is designed to accomplish, along with the later Reconstruction Amendments, that would create an absolute bar to a citizenship question. But the only point I want to make is that in the absence of clear language in the Constitution itself, finding a prohibition on asking about citizenship is a tough ask of a centrist jurist and a nonstarter with the most conservative members of the Court. See also Dep’t of
that. If adding the question to the census violates the concept of equality, it’s only because the exercise of otherwise permissible authority has become tainted by an improper motivation, not because there is, or should be, an absolute bar against this course of action. The circumstantial structure of the plaintiffs’ equality claim helps us to understand why the four liberals on the Court, who suspected something nefarious was afoot, would be willing to swallow a less-than-ideal justification: they simply could not get enough votes for their more expansive position. But it doesn’t explain how they prevailed the Chief away from his usual allies.

Now, why on earth would Chief Justice Roberts provide the critical 5th vote to stop the administration dead in its tracks, for all practical purposes? We won’t know for sure until either Roberts speaks publicly on the matter or historians have had a chance to pore over the draft opinions and memos that were exchanged between chambers. But it’s possible to venture some hypotheses based on what we know about the jurists’ philosophical inclinations and their behavior in past high-profile disputes, such as when Roberts changed his mind at the last moment and found a way to uphold Obamacare.

The fractured outcome in the census case suggests that Roberts might have initially voted with his usual conservative colleagues, then at some point changed his mind. Experienced court watcher Linda Greenhouse points to the published texts themselves: “the opinions that provide the holding—the chief justice’s plus the partially concurring opinion of Justice Stephen Breyer for the court’s four liberals—have all the hallmarks of judicial tectonic plates that shifted late in

\[\text{\textit{Commerce}, slip op. at 12–13 (concluding that the Enumeration Clause implicitly permits Congress to ask questions about citizenship).}\]

\[39 \text{\textit{See id. at 5}.}\]
the day to produce an outcome that none of the players anticipated at the start.”

I agree with Greenhouse’s observation, though I’m going to push the point further and defend the Chief’s possible flip-flop on broader egalitarian grounds.

The beginning of Roberts’ opinion, which finds no objection from the Enumeration Clause itself from asking a citizenship question, feels like it initially appeared in a draft opinion upholding the agency’s action, while the key section containing the analysis that’s adverse to the government is buried like a last-minute insertion. Breyer’s lengthy concurring opinion—joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan—reads like it might have originally been written as a dissent. Most observers certainly felt after oral argument in August that there were five votes to uphold the government’s position.

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41 See generally Dep’t of Commerce, slip op. at 1–6.

42 See generally id. (Breyer, J., concurring).

What happened? One theory is that, after voting with the conservatives and assigning the opinion to himself, the opinion just wouldn’t write. That kind of thing has happened before.\textsuperscript{44} It’s a largely internal explanation that holds that certain doctrines can appear less convincing as the judge assigned to draft an opinion begins to actually work with them. But another, external, possibility is that Roberts was shaken by last-minute revelations that figures close to the administration added the citizenship question precisely to depress responses by non-citizens and artificially enhance the Republican Party’s political power. So-called “smoking gun” evidence that bolstered the plaintiffs’ theory of the case had appeared after the oral argument before the High Court, in the weeks before the decision was expected.\textsuperscript{45}

This extra-judicial evidence had been widely reported by the media but had not yet been tested in court. But it looked damning.\textsuperscript{46} According to those reports, newly discovered computer

\textsuperscript{44} See, e.g., Linda Greenhouse, \textit{The Mystery of John Roberts, Opinion}, N.Y. TIMES (July 11, 2012, 9:00 PM) (detailing how Justice Kennedy changed his mind in \textit{Lee v. Weisman} after being assigned to draft the opinion upholding school-sponsored prayer).


files and email correspondence showed that a Republican consultant Tom Hofeller had advised key figures to add the citizenship question to the 2020 census after his own research indicated that doing so would give a political advantage to “Republicans and non-Hispanic whites.”\(^47\) The Fourth Circuit took this evidence seriously, sending the appeal of a similar challenge to the census question back to the district court to assess the impact of this new evidence of bias.\(^48\) Two days later, Chief Justice Roberts’ own bombshell then dropped. The message was unmistakable: don’t treat us like patsies.\(^49\)

Had the Justices rushed to ratify the administration’s decision after this blockbuster revelation, history could very well have judged them harshly. And they would have deserved it. The Court had recently suffered a well-deserved blow to its reputation for rendering impartial judgements after whitewashing Trump’s ban on travel from several Muslim countries.\(^50\) The


\(^{49}\) See *Dep’t of Commerce*, slip op. at 28 (“Accepting contrived reasons would defeat the purpose of [the reasoned explanation requirement of administrative law.] If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered . . . in this case.).

possibility of damage to the Court’s stature from its handling of the Census Case could have been more lasting if it was perceived as part of a partisan and racist plot to entrench Republican power that lasted a decade or more. Already there was an impression in many quarters that the Roberts Court is a highly partisan institution, exacerbated by Kavanaugh’s seat “stolen” by Republicans through political hardball. The Supreme Court has always been a political institution, and it has sometimes been a nakedly partisan one. Even so, key to its legitimacy is avoiding unforced errors that wound its reputation in the second, and more corrosive, sense. And that’s precisely the kind of concern that has always appealed to Roberts.

Although the census decision stopped short of actually finding animus or some other improper motives, characteristics of an Equal Protection violation, the rationale did provide the next best thing. There are three ways government action can fail the rule of reason: (1) it’s motivated by an improper purpose—such as an unconstitutional motive; (2) there is insufficient support for the government’s stated reason; or (3) the reason given is a “pretext”—the mismatch between the evidence and the given reason is so great that what the lawyers are saying now in court are post-hoc rationalizations rather than the true motivations of the agency’s decision makers.

Roberts’ opinion declined to make a ruling about the government official’s true motives, said that there is sufficient evidence to support the Secretary’s decision to ask the citizenship question as one among several useful methods for gathering demographic information, but held

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that the claim about needing citizenship information to enforce the Voting Rights Act
nevertheless amounted to a pretext because there was “a significant mismatch between the
decision the Secretary made and the rationale he provided.” Critically, this last finding alone was
enough to block to the agency action.53

Obviously, the big unanswered question Roberts’ opinion refuses to answer is this: if the
VRA-based reason was a lie, then what was the agency’s true reason? One thing we need to
remember is that evidence of pretext can in some instances be treated as evidence of improper
motive (it’s evidence of a guilty mind, after all), especially when combined with other evidence
of misconduct.54 It’s possible that Roberts was sufficiently concerned about discrimination but
was unable or unwilling to make that finding. If that’s right, then, sending the case back to the
courts below then became the compromise that resolved those tensions, at least temporarily. But
there can be little doubt that finding pretext improves plaintiffs’ claim as to improper purpose in
any subsequent proceedings.

That brings us to the curious role of time. As political theorist Elizabeth Cohen observes,
time “is a valuable good that is frequently used to transact over power.”55 Cohen also notes that
“time can sometimes also be used as a means of rectifying injustices”—including by promoting
egalitarian ends. Usually, though, when time is of the essence in the justice system, that factor
strengthens the government’s hand because lawyers can claim some kind of exigency for its

53 Dep’t of Commerce, slip op. at 26.
55 Elizabeth F. Cohen, The Political Value of Time: Citizenship, Duration, and Democratic
56 Id. at 17.
actions. And most of the time, that added psychic stress renders judges incredibly compliant with
the government’s demands. All along, DOJ insisted that a final decision by the end of June was
necessary so the administration could meet its constitutional obligation to perform the census on
time.\textsuperscript{57}

This time, an impending deadline didn’t damage the pro-equality position. To the
contrary, time was very creatively manipulated to shorten the clock and thereby promote
egalitarian ends. That Roberts was willing to prolong the proceedings by invoking the rule of
reason was surprising, since it raised the very real possibility that the administration would lose
this fight on a \emph{de facto} basis: it might simply have to concede defeat and print the census forms
without the question because there wouldn’t be enough time to defend against the remaining
claims in the case. That Roberts was willing to swallow this possibility strongly suggests that he
wanted to avoid an outcome he felt was somehow worse (\textit{e.g.}, the perception of whitewashing
misconduct) or that he was persuaded there really was a colorable Equal Protection argument but
just couldn’t bring himself to say so on the record before him.

Either way, the rule of reason suddenly seemed like an attractive justification to avoid a
regrettable precedent or to give the plaintiffs a fair chance to probe the new evidence. And, if a
conservative like Roberts had concerns about any downstream consequences of actually holding
that the Equal Protection Clause operated as a viable constraint on the Enumeration Clause, that

\textsuperscript{57} Motion for Expedited Consideration of the Petition For a Writ of Certiorari Before Judgment and for
Expedited Merits Briefing and Oral Argument in the Event that the Court Grants the Petition, at 4–5,
Dep’t of Commerce v. New York (No. 18-966). [https://www.supremecourt.gov/DocketPDF/18/18-
966/81793/20190125174446870_00000001.pdf]
day was pushed into the distance for now, particularly if there was a chance the dispute could
evaporate on its own.

There was certainly some risk this time-based gambit would fail. In theory, the ruling
gave the administration another bite at the apple, so the rule of reason wasn’t formally an end-of-
the-line loss for proponents of the citizenship question. This allowed the government to claim
that the power it exercised was in fact a lawful one, as well as to spend some time looking for
ways to come up with a new reason for adding the question to the census.

Roberts’ behavior reminds me of another occasion where the stakes for equality were
apparent to all, and where he showed a willingness to cross the ideological divide and join the
more liberal members of the Court when he has been convinced that the scope of a precedent
could be carefully limited. In 2017, Justice Roberts wrote the opinion in Buck v. Davis
overturning Duane Edward Buck’s death sentence because of an unacceptable risk that racial
discrimination had infected the proceedings. The defendant’s own court-appointed lawyer had
put on an expert who testified that being black made someone more dangerous. That this
testimony was irrational—e.g., its introduction violated the rule of reason—ended up appealing
to Roberts.

Undoubtedly comforted that the precedent wouldn’t remake the entire justice system,
Justice Roberts gave one of his most eloquent vindications of equality, saying that the expert’s
testimony “appealed to a powerful racial stereotype—that of black men as ‘violence prone.’”

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59 See id. at 776.

60 Id.
That mistake, he insisted, improperly made “race directly pertinent on the question of life or
death.”61 But it wasn’t formally an equal protection case; it was a Sixth Amendment right to
counsel case.62 The apparent violation of rule of reason norms had apparently unlocked Roberts’
egalitarian sensibility.63

III. The Rule of Reason as a Substitute for Equality

More broadly, the rule of reason can occasionally serve as a second-best solution when
equality as a principle seems out of reach. As I’ve explained, there is a deep connection between
enforcing the demands of reason and safeguarding political minorities. Any doctrine that checks
blind deference to government officials, and along the way emphasizes empiricism, can only
enhance the project of building a more equal and just society—given that it’s already so hard to
convince those in power to see bias and, even when they see injustice, to do something about it.
The Census Case puts government officials on notice that their explanations will, in fact, be
scrutinized and that they have to make sense. This is something that egalitarians should cheer.

The rule of reason runs throughout our constitutional and common law tradition,
appearing in everything from the concept of self-defense to the Fourth Amendment to the Equal
Protection Clause. The Administrative Procedure Act codifies a version of this approach,
balancing agency expertise, accuracy, and accountability. Roberts’ opinion demonstrated the
critical features of the rule of reason as I’ve described them elsewhere.64 First, power must

61 Id. at 777.

63 See id. at 767.

63 This was a case that proceeded under the Sixth Amendment right to counsel rather than the Equal
Protection Clause, and the facts were sufficiently unusual that it wasn’t an everyday occurrence.

64 See generally Tsai, supra note 12, at 93–107.
always be justified, and it’s more than about who gets to decide a question. Second, a
governmental justification must be grounded in empirical reality. Third, a reason given “must be
truthful in the sense that they are address to real problems rather than fabricated crises, the
reasons can’t be ginned up after the fact, and the solutions should be fairly well suited to the
problem that has been identified.”

Ensuring that government reasons are based in evidence is another way of protecting
vulnerable minorities because those who would do harm to them will seek to cut corners by
appealing to emotions, exaggerated concerns of safety or public purpose—or in this case, wildly
implausible arguments that a move that objectively hurts minorities actually is benign and
intended to help them. Moreover, systematic tolerance of falsehoods doesn’t just license
incompetence; it also makes bias more difficult to uncover. As I’ve explained, “[e]xcluding
falsity from the range of reasonable solutions helps prevent domination of the less educated . . .
and those with inadequate access to reliable information.” Thus, enforcing the rule of reason
can help non-citizens and racial minorities, who aren’t always able to defend their own interests
through ordinary political processes.

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65 TSAI, supra note 12, at 107. It’s true that there is a difference of opinion over how much deference
someone should get. In Roberts’ view, an evidence-based reason by someone in authority like the
Secretary of Commerce is sufficient. It matches his view of the presidency where control by the president
or high officials is paramount. By contrast, the dissenters believe that this decision should not be
reviewed by the courts or that the record sufficiently supported Secretary Ross’s decision.

66 Id.; see generally id. at 106–08.

The two rationales aren’t identical, though. Beyond the expressive differences in the rationales, the rule of reason traditionally gives an agency more leeway than the principle of equality to come up with a different justification for its decision when there is an earlier, tainted one. On the other hand, we weren’t likely to see a holding that the government was forbidden from ever asking about citizenship on the census. A direct and broad exposition on equality was never really in the cards here. Nor was this Court ever going to impose a substantive limit barring certain kinds of demographic information from being collected through the Census.

Under those circumstances, Roberts’ ruling is a good outcome because it tangibly protects the rights of an embattled community and it’s useful in a forward-looking way to promote norms and practices upon which development of the idea of equality depends.

I think the dissenters are probably wrong that the “pretext” holding will somehow open the floodgates to judicial second-guessing of agency decisions. People unhappy with agency decisions will surely sprinkle the case in their briefs, but my guess is that, in most disputes, it will have no impact. As Roberts points out, this is the “rare” case with such an “extensive” record, even though the Supreme Court had earlier blocked efforts to depose Secretary Ross.

Most challenges to agency decisions will remain as easy cases based on a minimal record, where policy views are divided but no serious constitutional difficulties lurk. In other words, this precedent will be most potent only when it can serve as a brokered stand-in for some other constitutional violation when consensus is hard to reach for a stronger justification.

If I’m right about this, the Census Case slots in comfortably among an older line of cases in which a law or policy has been judicially stricken as irrational, in circumstances where a serious claim of unequal treatment has been made but practical considerations frustrated the

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68 Dep’t of Commerce, slip op. at 28.
resolution of the dispute as a more robust equality violation.\textsuperscript{69} These cases have always bothered the purists among us, who might be frustrated by their failure to observe certain doctrinal niceties (e.g., a thorough application of the tiers of scrutiny approach) or the absence of a more robust theory of equality. But for those who believe that justice is an inescapably collaborative exercise and that the grounds for compromise aren’t always straightforward or aesthetically pleasing, these precedents are nevertheless principled and have value in both promoting consensus and ameliorating harms.

Of these cases, \textit{United States Department of Agriculture v. Moreno}\textsuperscript{70} might be the closest analogue. There, the Justices invalidated an agency’s interpretation of the Food Stamp Act which barred benefits to anyone who lived a household where residents were not “all related to each other.”\textsuperscript{71} There was some concern about bias against hippies, but neither the agency’s guidelines nor the federal law made the mistake of overtly making that distinction.\textsuperscript{72} On top of that, hippies as a group probably would not have satisfied the test usually employed to identify a “discrete and insular minority” justifying elevated judicial scrutiny. Nevertheless, at a decisive moment in the decision, the Court found that the agency guideline “simply does not operate so as rationally to


\textsuperscript{70} 413 U.S. 528 (1973).

\textsuperscript{71} \textit{Id.} at 530.

\textsuperscript{72} \textit{Id.} at 534.
further the prevention of fraud.” 73 In other words, there was a mismatch between the reason
given and the evidence about how the policy actually operated—just like in the Census Case. 74
It’s important to note that the Justices there, too, felt that the rule of reason would be
helpful in reducing discrimination against the poor. As Justice William O. Douglas pointed out
separately, laws of this sort tended to fall heaviest on “desperately poor people with acute
problems.” 75 Similarly, in the census case, Justice Breyer underscored the impression among
four Justices that something more serious lay behind the pretext: the possibility of intentional
discrimination, or at least unequal impact on some members of society and certain
jurisdictions. 76 They preferred the stronger medicine that adding the citizenship question was
“arbitrary and capricious” because it would “likely cause a disproportionate number of
noncitizens and Hispanics to go uncounted . . . [and] create a risk that some States would
wrongfully lose a congressional representative and funding.” 77
In an age when public officials have become more brazen in their mendacity and
democratic backsliding has grown as a serious problem, 78 Roberts’ opinion is a welcome
reminder that facts still matter and government officials won’t get blind deference. Rule of

73 Id. at 537.
74 See my discussion of why the solution in Moreno was less robust, and possibly intrusive, than the
rights-based solutions presented by other justices. See Tsai, supra note 12, at 109–11.
75 Moreno, 413 U.S. at 541.
76 See Dep’t of Commerce, slip op. at 1 (Breyer, J., concurring).
77 Id.
78 See Robert L. Tsai, Manufactured Emergencies, YALE L.J. FORUM 350 (Feb. 15, 2019); see generally
Steven Levitsky & Daniel Ziblatt, HOW DEMOCRACIES DIE (2019).
reason norms are especially helpful for the project of equality because (1) technological
advances make it possible for enemies of equality to pursue nefarious goals in sophisticated
ways, (2) bureaucratic complexity and social networks make it easier to plot while covering
one’s tracks, and (3) the government’s incredibly smart lawyers can dazzle judges with all
manner of doctrinal excuses and distractions. A due regard for empiricism enhances the work of
equality; conversely, formalism catches only the most stupid, brazen, and inexcusable forms of
injustice.

There’s another case that comes to mind, where considerations of equality lurked in the
background, but the dispute was resolved according to the rule of reason. Once again, as in the
Census Case, “the evidence tells us a story that does not match the explanation.”\textsuperscript{79} The case is
\textit{Cleburne v. Cleburne Living Center}, where the Justices overturned a local ordinance that
prohibited group homes for the “feeble-minded.”\textsuperscript{80} There, government officials tried to argue that
the requirement existed to help minorities rather than hurt them, but the Court found that
incoherent.\textsuperscript{81} At that historical moment, the Justices could’ve tried to develop the law in a more
robust way to protect disabled people more generally. The administration vigorously opposed
such a move, however, and there was insufficient support once again for a more comprehensive
doctrine to protect the disabled.

The good news is that the failure to agree on a more general approach to ensuring the
equal treatment of all disabled people didn’t leave the deeply problematic ordinance in place.
Instead, the Justices found a way around the roadblock. They were able to say that the law rested

\textsuperscript{79} \textit{Id.} at 27 (majority opinion).

\textsuperscript{80} \textit{Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 436 (1985); see \textit{id.} at 450.

\textsuperscript{81} See \textit{id.} at 448–50.
upon “mere negative attitudes” against intellectually disabled people.\textsuperscript{82} Meanwhile, the debate over how best to deal with disability-based discrimination was left to percolate. Some commentators have read this merely as a case about animus, but a key moment in the analysis found the city’s explanations pretextual. Justice White’s opinion walked through the various reasons given by the city to justify the ban—to keep intellectually disabled people safe from flood waters, to ensure the tranquility of the neighborhood, to make sure the less fortunate aren’t teased by nearby schoolchildren—and found them all inadequately supported by the evidence.\textsuperscript{83} This feature of the decision—which is all about how a government justification can be irrational but not necessarily express hatred—can stand alone from the Court’s further inference that the real reason was fear of disabled people.

It’s worth noting that then-Chief Justice William Rehnquist signed off on this practical solution in \textit{Cleburne},\textsuperscript{84} just as Chief Justice Roberts found the rule of reason attractive in the census dispute. Both men enjoy a reputation as institutional conservatives who not only cared about the historical reputation of the Supreme Court, but also could be moved by procedural values even if they were skeptical of far-reaching theories of rights.\textsuperscript{85}

\textsuperscript{82} \textit{Id.} at 448.

\textsuperscript{83} \textit{See id.} at 448–50.


\textsuperscript{85} See TSAI, \textit{supra} note 12, at 97 (explaining how Rehnquist opened the door to consensus based on the rule of reason with more liberal jurists in \textit{Cleburne} by saying “it would not bother me greatly to resolve the controversy in this fashion”); \textit{supra} note 44.
In terms of the census fight, the ruling gave the plaintiffs the opportunity to move forward with discovery to try to connect the dots between the new evidence of bias and key administration figures. At the same time, it left room for policymakers to probe their options and pacify a disgruntled president. They could try to moot the earlier action by beginning a new process and developing a different justification for asking about respondents’ citizenship. A few of the president’s allies briefly floated a plan for him to sign an executive order or memorandum claiming some sort of emergency to justify adding the question at the last moment—though they would be hoping that judges would agree that the executive branch has a more active role in conducting the census than what the Constitution seemingly says. Of course, whether a new reason would really be “new” and sufficiently untainted by the previous “pretextual” reason would be an important question.

At all events, time wasn’t on the administration’s side. Even if President Trump bypassed the administrative process by signing an executive order, litigation would still follow. On this score, the additional costs imposed on the government by enforcing the rule of reason, plus the judicial admonishing about lying to judges, were already worth its weight in gold to those concerned about the anti-equality effects of the administration’s plan. Armed with additional, more thorough evidence, the record could look very different from the one originally before the

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87 See Rivkin, *supra* note 86.
Supreme Court—especially if the trial judge finds a violation of the Equal Protection Clause on remand after a full trial.

On July 11, 2019, the administration decided to throw in the towel. There would be no citizenship question on the 2022 census. Reality had finally settled in that the president would either have to resort to extra-legal means to get his way, or else risk disrupting the census and increase the possibility of an inaccurate count. Promising not to add the question to the 2022 census ensured that no more embarrassing details about Republican gerrymandering efforts would come from this lawsuit. Key figures involved in the decisions would no longer be under threat of being deposed under oath.

At a hastily assembled press conference at 5 p.m., President Trump tried to put a happy face on his decision by announcing that he was signing an executive order ordering all agencies to give citizenship information to the Census Bureau, but that’s something he could already have done. In the same press conference, Attorney General William Barr said “it was a logistical impediment, not a legal one.” But that’s not quite right. The legal standard—the rule of reason—in this instance created a formidable logistical impediment that proved exceedingly difficult to overcome.

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89 Id.

90 See id.

91 Id.
When full-throated equality wasn’t procedurally or strategically possible, the rule of reason had become the language of consensus and justice. The Court had all but closed the gap for executive response by releasing the decision on the last day of the term, June 27, just four days before the date the Solicitor General had indicated to begin printing forms. Barr acknowledged the potency of Roberts’ gambit:

There is simply no way to litigate these issues and obtain relief from the current injunctions in time to implement any new decision without jeopardizing our ability to carry out the census itself, which we are not going to do. So, as a practical matter, the Supreme Court’s decision closed all paths to adding the question to the 2020 decennial census.92 The President did suggest that the administration might later take the position that the allocation of political power could still take place based on citizens or the “voter-eligible population” rather than the entire population in a state,93 but that’s a constitutional fight for another day.94 The precise set of equality concerns and risks identified by this lawsuit—undercounting through deterrence—had been dealt with effectively.

92 Id.

93 See id.

94 Indeed, the president’s executive order invites states to do something that no state has yet tried to do: “design State and local legislative districts based on the population of voter-eligible citizens” rather than all people. Exec. Order No. 13880, 84 Fed. Reg. 33,823 (July 16, 2019). The constitutionality of such a plan has not been addressed by the U.S. Supreme Court. See id. However, Trump indicated that “if the officers or public bodies having initial responsibility for the legislative districting in each State indicate a need for tabulations of citizenship data, the Census Bureau will make a design change to make such information available.” Id.
A different administration could try again in 2032, but litigation would surely follow. Whatever happens next, it cannot be gainsaid that the rule of reason operated as an effective substitute for equality when a ruling on that ground was simply not possible. And the awful chain of events feared by at least four Justices, experts at the census bureau, and many friends of equality hasn’t transpired. That’s a win for equality, even if it took a work-around to get there.