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The Discrete Charm of Leveling Down

Aziz Z. Huq*

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Abstract

Starting from Justice Ginsburg’s 2017 opinion in Sessions v. Morales-Santana, this essay explores the choice between ‘leveling up’ and ‘leveling down’ as a response to an unlawful difference in the legal treatment of two distinct groups. That problem can arise in the Equal Protection, Free Speech, Free Exercise, and Dormant Commerce Clause contexts. My analysis starts by defining the idea of a ‘leveling down’ disposition in the context of a constitutional equality claim. After exploring analogies in other areas of constitutional law, I turn to two alternative ways of analyzing and solving the leveling-down disposition—one through the lens of Article III standing doctrine, and the other by reference to severability doctrine—to suggest that both are inadequate. I offer instead two ways in which a leveling down disposition can be derived from a constitutional theory of equality. The essay concludes by flagging an ‘exit’ from the seemingly dichotomous choice between leveling up and leveling down.

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Introduction

The final opinion on constitutional equality written by Justice Ruth Bader Ginsburg was handed down in 2017, some three years before her death. Her reasoning there at first blush delighted, but then dismayed, many of her erstwhile fans. The underlying case concerned a complicated federal law governing how U.S. citizenship can be acquired by a child born overseas to only one American parent. Under the provision at issue in the case,¹ an American father had to show ten years' physical presence in the United States in order to transmit his citizenship to his child. In contrast, an American mother needed to demonstrate only one such year.² The father of respondent Luis Ramón Morales–Santana fell short of a decade's presence by just twenty days.³ Upon being placed into immigration proceedings pending removal to the Dominican Republic, Morales-Santana objected on the ground that the gender gap in physical-presence prerequisites violated the Equal Protection component of the Fifth Amendment. As a result, he contended, his expulsion could not proceed simply because he had could not show that his father had complied with that lopsided statutory command. Instead, he was eligible for citizenship.⁴

The Supreme Court, with Justice Ginsburg wielding the pen for a six-Justice majority, began by embracing Morales–Santana's theory of constitutional equality.⁵ In a brilliant scherzo, Justice Ginsburg recapitulated in short order her key victories as an advocate and then as a jurist respecting gender equality, and then applied the rule that legislative gender classifications require an “exceedingly persuasive justification.”⁶ Such a justification was woefully wanting when it came to the challenged immigration provision, she explained, given its origins in “an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are.”⁷

But then, in a swift antiphonal swerve, she pulled back the prize that Morales–Santana sought when he first filed his legal challenge.⁸ Rather than ‘level up’ citizen fathers to the one-

¹ One of several. Other provisions had been at issue in *Nguyen v. INS*, 533 U.S. 53, 58 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998).

² See 8 U.S.C. §§ 1401(g) & 1409(a) (2012 ed.).

³ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

⁴ Morales-Santana sued to enforce the constitutional right of his deceased father to Equal Protection under familiar third-party standing rules. *Id.* at 1688-89. For the balance of this essay, I ignore that complication and talk of Morales-Santana's equality interests for the sake of simplicity.

⁵ In a concurrence in the judgment joined by Justice Alito, Justice Thomas opined that “[b]ecause respondent cannot obtain relief in any event, it is unnecessary for us to decide whether the 1952 version of the INA was constitutional.” *Id.* at 1701 (Thomas, J. concurring in the judgment).

⁶ *Id.* at 1690 (quoting, inter alia, *United States v. Virginia*, 518 U.S. 515, 524 (1996)). In 1996, Chief Justice Rehnquist caviled at the language of “exceedingly persuasive justification.” *Virginia*, 518 U.S. at 559 (Rehnquist, C. J., concurring) ([T]he phrase ‘exceedingly persuasive justification’... is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself.”). By 2017, it was unequivocally “a formulation of the test itself.”

⁷ *Morales-Santana*, 137 S. Ct. at 1689. The Court explored at length the reasons for the seemingly beneficial treatment of unwed mothers. It ranked that measure as one of many “[l]aws according or denying benefits in reliance on “[s]tereotypes about women's domestic roles,” the Court has observed, may “creat[e] a self-fulfilling cycle of discrimination that force[s] women to continue to assume the role of primary family caregiver.” *Id.* at 1693 (citation omitted).

⁸ The Solicitor General, on behalf of the United States, argued in favor of a levelling down remedy in the event the Court found a constitutional violation—albeit on different grounds from the Court's argument. Brief for Solicitor General in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017) [hereinafter “Solicitor General Brief in *Morales-Santana*”], at 48-49 (arguing that levelling down was necessary “to preserve the degree of flexibility necessary for Congress to address the problem, balancing competing interests while exercising its exclusive authority over naturalization.”).

year physical residency rule for citizen mothers, Justice Ginsburg’s opinion ‘levelled down’ by extending the ten-year physical presence requirement to children of both citizen fathers and citizen mothers alike. Framing the matter as controlled by inferred congressional intent, she posited that “[p]ut to the choice, Congress ... would have abrogated [the citizen-mother] exception, preferring preservation of the general rule” of ten-years’ physical presence.⁹ Not only would the claimant *Morales-Santana* continue to face deportation to the Dominican Republic, therefore, but the children of citizen mothers born overseas in the time period covered by the provision¹⁰—non-parties to the case—suddenly found themselves laboring under a new, more minatory regulatory regime. Equality in *Morales-Santana* made no one better off, and, startlingly, some non-parties worse off.

To many supporters of gender equality, the Court’s ‘levelling down’ disposal of the *Morales-Santana* case was cause for dismay.¹¹ Ardent welfarists of a Benthamite bent might have felt the same way. Indeed, whenever the ‘leveling down’ disposition has been applied in cases involving one of the Constitution’s equality commands (e.g., the Equal Protection Clause, the First Amendment, or the Dormant Commerce Clause), it has predictably prompted stern disapproval from most commentators.¹² Leveling down is seen as a disposition squarely at odds with the core normative project of equality.

Yet Justice Ginsburg’s decision not just to join in that result, but to write for a majority that included both liberals and conservatives, suggests that there is something more at work. To begin with, the disposition of *Morales-Santana* cannot plausibly be ascribed to its author’s indifference to the plight of the marginalized at the sharp end of state coercion. To the contrary, those who worked with Justice Ginsburg know that her approach to adjudication was always inflected not just by unstinting precision and precedential fidelity in the crafting of legal doctrine (even when she demurred to the relevant precedent), but also by a keenly felt sense of the specific burdens and pains shouldered by the particular litigants whose cases reached the Court.¹³ It strains credulity to suggest she was unaware or indifferent to the practical consequences of leveling down for *Morales-Santana* and others within the law’s scope. A *realpolitik* lens might focus on her need to keep a majority as a justification for her result, and cast the decision as an effort to advance the larger goal of gender equality even if the specific litigant could not be helped.

A more cogent account of *Morales-Santana* might instead train on her oft and early articulated respect for “[m]easured” doctrinal motions and “dialogue with other organs of governments and with the people.”¹⁴ Constitutional norms, on this view, are best achieved

⁹ *Morales-Santana*, 137 S. Ct. at 1700.

¹⁰ *Id.* at 1687 & n.3 (characterizing temporal scope of the regime challenged by *Morales-Santana*).

¹¹ For immediate responses, see, e.g., Deborah L. Brake, *Remedial Grief: Leveling Down in Morales-Santana*, Human Rights at Home Blog (June 14, 2017), http://law-professors.typepad.com/human_rights/2017/06/remedial-grief-leveling-down-in-sessions-v-morales-santana.html; Michael Dorf, *Equal Protection and Leveling Down as Schadenfreude*, Dorf on Law Blog (June 14, 2017), <http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html>; Ian Samuel, *Morales-Santana and the “Mean Remedy,”* PrawfsBlawg (June 12, 2017), <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/12/index.html>.

¹² See also *infra* text accompanying notes 68 to 83 (summarizing academic criticisms of *Morales-Santana* and leveling down more generally).

¹³ See Aziz Huq and Pamela Karlan, *Ginsburg helped those excluded by the legal system. The court needs that view*, Wash. Post (September 22, 2020), <https://www.washingtonpost.com/outlook/2020/09/22/ginsburg-advocate-court-sympathy-elitist/>.

¹⁴ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198 (1992) [hereinafter “Ginsburg, *Speaking in a Judicial Voice*”]; see also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe*

through carefully titrated interventions that do not stimulate backlash, and that afford maximal space for a democratic response (where one is legitimate). This is something to this explanation.¹⁵ But I think it is too general and abstract a story to count as a satisfactory explanation for the decision to level down in *Morales-Santana*. Put simply, a democratic “dialogue”¹⁶ could have been sustained either by levelling up or by levelling down in that case. And it is hardly clear that the Court in *Morales-Santana* indeed encouraged legislative consideration through its levelled down outcome: Congress was predictably unlikely to swoop in to aid a class of alien children without representation or monied interest groups at their side. Something more by way of explanation is required.

Indeed, it is not just that *Morales-Santana*’s resolution presents a puzzle. Its dissonant and unresolved final chords, set alongside it’s surprising composer, stir larger questions about the relationship between a commitment to constitutional equality on the one hand and the doctrinal apparatus used to translate that commitment into practice. The immediate negative reactions to *Morales-Santana* implicitly rest, I think, on the view that Justice Ginsburg’s heartfelt and unquestioned commitment to equality cannot be logically squared with a judicial disposition pursuant to which no one is better off. No account of equality, that is, can result in a positive justification for the judicial decision to ‘level down’ after an equality claim has been recognized. If levelling down is justified, on this view, it is at a very minimum a tragic compromise, one that flows perhaps from the sharp conflict between equality values on the one hand and some other independent value on the other hand (e.g., the risk of losing; respect for democratic decisions instantiated in a statute) that is compromised by leveling up. Leveling down is simply the least worst option given that conflict.

No doubt, there’s much to be said against leveling down. But I also think that there is more to be said on behalf of leveling down as a disposition—even if it is not a remedy for claimants such as *Morales-Santana*—including some points that can be squeezed out from certain theories of equality as a constitutional value. In my view, it is possible to deduce a leveling-down outcome as affirmatively desirable by applying certain theories of constitutional equality without any appeal to the existence of tragic conflicts or negative externalities from an equality judgment. The judicial decision to level down, in my view, also illuminates the specific theory of equality that a bench of Justices is enforcing. The decision to level down, that is, helps us grasp and articulate such a theory even when it’s not spelled out by a majority opinion. Contrary to the prevailing wisdom, I thus do not think that leveling down is the sole province of mean-spirited, remedially penurious jurists unwilling to destabilize a status quo cut across with race, gender, or other malign hierarchies. (Although it can be that too). Instead, I think that a racially progressive theory of the Equal Protection Clause committed to a more just and equitable world in relation to both race and gender relations could also lean upon levelling-down dispositions in appropriate cases.

v. Wade, 63 N.C. L. Rev. 375, 381 (1985) (expressing reservations about the manner in which the fundamental right to an abortion was articulated). Such deference to other actors and institutions has been frequently remarked. See, e.g., Richard J. Lazarus, *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003), 127 Harv. L. Rev. 451, 454 (2013) (commenting on Justice Ginsburg’s “sincere and genuine application of judicial restraint”); cf. Henry Paul Monaghan, *Doing Originalism*, 104 Colum. L. Rev. 32, 38 (2004) (commending Justice Ginsburg’s “historically constrained evolution” as “attractive” and “the only possible version of originalism as time goes on”).

¹⁵ Cf. Aziz Z. Huq, *A Liberal Justice’s Limits: Justice Ruth Bader Ginsburg and the American Criminal Justice System*, in *The Legacy of Ruth Bader Ginsburg* 108, 108 (Scott Dodson, ed. 2015) (noting the “the tension between [Justice Ginsburg’s] unflinching support for substantive justice and her tempered view of the “measured” judicial steps possible under that flag.”).

¹⁶ Ginsburg, *Speaking in a Judicial Voice*, *supra* note 14, at 1198.

I start by defining the leveling down disposition in the context of a constitutional equality claim, exploring analogous problems, and summarize the embarrassment of criticisms offered of that judicial resolution. I then turn to two alternative framings of the leveling-down phenomenon—through the lens of Article III standing doctrine, or as an application of severability doctrine and hence a form of statutory interpretation—to suggest that both are inadequate. Neither, that is, provide either an adequate justification or a comprehensive condemnation of leveling down. Finally, I offer two ways in which the leveling down remedy can be derived from a constitutional theory of equality, and an ‘exit’ from the seemingly dichotomous choice between leveling up and leveling down. In the end, this leads to me to wonder whether *Morales-Santana* was indeed rightly decided, or whether a more subtle, and also more just, resolution might not have been feasible.¹⁷

I. The Leveling Down Disposition in Constitutional Equality Law

A. Defining Leveling Down

The possibility of levelling down arises when there is a legal mandate for formal equality in the sense of a command that members of class A and class B be evaluated and treated alike, i.e., without respect to their membership in either class A or class B.¹⁸ *A leveling down disposition is a judicial ruling that create formal equality by eliminating one group’s advantage (or extending one group’s legal encumbrance) in a fashion that leaves no person advantaged (or less encumbered) by the law.* This definition assumes that (i) the relevant action is taken by a court; (ii) the relevant classification is binary, and the disposition ensures that a regulated person or entity’s position on either side of that binary is irrelevant to their legal status; and (iii) the facts of the matter lend themselves to an intuitive and prelegal sense of advantage or encumbrance.¹⁹ A law invalidated because it gave men apples and women pears—and hence denied them formal equality—could be addressed without either leveling up or down, then, for two reasons: It is not clear apples or pears are better or worse. And the constitutional flaw (if any) can be resolved without either leveling up or down—i.e., by simply apply everyone to choose their fruit.

I want to focus here on leveling down as a *judicial* remedy only. I do so because I think that judicial action presents different considerations from action by one or other elected branch of government. Some commentators have characterized non-judicial actions as leveling down,²⁰ citing the 1971 decision of *Palmer v. Thompson*.²¹ *Palmer* concerned a decision by the city of Jackson, Mississippi, to close or privatize its swimming pools after being ordered to desegregate them.²² The *Palmer* Court rejected a number of different theories of constitutional

¹⁷ Consistent with the ambition of this symposium, my aim is not to criticize but to celebrate the work of Justice Ginsburg. That said, I do not think that the Justice would have appreciated a reflexively uncritical approach. The critiques I offer, nevertheless, are meant to be in the spirit of her larger corpus of work.

¹⁸ Paul Stancil, *Substantive Equality and Procedural Justice*, 102 Iowa L. Rev. 1633, 1636 (2017) (“In simplest terms, formal equality norms all derive from the Aristotelian norm to ‘treat like cases as like.’”); see also Peter Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537, 542-48 (1982) (deriving formal equality to the work of Aristotle).

¹⁹ But consider *Orr v. Orr*, 440 U.S. 268 (1979), which concerned an Alabama law requiring husbands, but not wives, to pay alimony. Depending on whether one takes the plaintiff’s or defendant’s perspective, either kind of resolution can be characterized as leveling down.

²⁰ See, e.g., Tracy A. Thomas, *Leveling Down Gender Equality*, 42 Harv. J. L. & Gender 177, 200 (2019) (discussing *Palmer v. Thompson*, 403 U.S. 217 (1971)); Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 Wm. & Mary L. Rev. 513, 518 (2004) (“The current understanding of leveling down’s compatibility with equality norms may be traced to *Palmer v. Thompson*.”).

²¹ 403 U.S. 217 (1971).

²² *Id.* at 219.

violation, most notably the idea that “a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”²³ The municipal decision to close swimming pools ‘leveled down’ in the same fashion as a judicial decision because it eliminated public facilities for both races, rather than extending them to Blacks, following a conclusion that unequal access was unconstitutional. But if that decision was legally or morally problematic, it’s likely because the decision to close the pools (but not the gold courses) was the racially tinged fear of different colored bodies mixing.²⁴ Viewing the case now, it is impossible to view the City of Jackson’s action without perceiving the noxious tint of Jim Crow lurking in the background.

But extract the facts of *Palmer* from their specific time and place, and the wrongfulness of the municipal action becomes less clear: Local government, as a matter of routine, often changes the contours of the governmental services that it provides. It tacks between the funding of libraries, elementary schools, fire stations, and roads. Normally, those decisions are subject to rational-basis review (if they are even considered appropriate objects of litigated scrutiny at all). If the bare fact of leveling down was always *prime facie* constitutionally problematic, a city would be faced with a one-way fiscal ratchet. It would also be deprived of discretion to reallocate resources between under-resourced communities.²⁵ Because elected actors routinely engage in the allocation and recalibration of resources across many different groups and institutions, it seems implausible to characterize decisions with withdraw services provided to one but not another protected group as *eo ipso* invalid or even facially constitutionally suspect.

Of course, had Jackson maintained segregated pools, and had that arrangement subsequently been challenged, a federal court could have had to choose whether to level up or down. In making that decision, though, a court cannot appeal to the full range of quotidian, trivial, and partisan reasons that an elected body can legitimately consider. Its legitimate grounds for toggling between leveling up or down comprise a far smaller set. And of course, leveling down by a court—like Jackson’s decision in *Palmer*—can also be condemned as unconstitutional because of its motive. Moreover, the frequency of impermissibly motivated action by elected bodies is likely to be higher than the rate of impermissibly motivated action by judges. Indeed, it is striking how few instances there are in which judges at any level of the federal or state judicial system have been held to account for constitutionally impermissible

²³ *Id.* at 224.

²⁴ See Randall Kennedy, *Reconsidering Palmer v. Thompson*, 2018 Sup. Ct. Rev. 179, 190 (2018) (“Resistance to desegregation at pools was also attributable to sex. People disrobe at swimming pools and gaze at others who are similarly bare.”). In *Washington v. Davis*, the Court characterized *Palmer*’s holding as follows: “that the city was not overtly or covertly operating segregated pools” and that “the legitimate purposes of the ordinance to preserve peace and avoid deficits were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations.” *Washington v. Davis*, 426 U.S. 229, 243 (1976). Of course, the problem with *Palmer* was simply that its conclusion that there was no “racially discriminatory purpose,” *id.* at 240, was implausible on the facts.

²⁵ That’s not to say that the recession of social services cannot have racially regressive effects. See Jin Lee and Christopher Lubienski, *The impact of school closures on equity of access in Chicago*, 49 Educ. & Urb. Soc. 53 (2017) (analyzing 2013 school closures in Chicago and finding that minority children’s outcomes suffered).

motivations.²⁶ Perhaps this is because judges are less frequently biased; perhaps it's because there's a cultural norm against impugning the motives of 'independent' judges.²⁷

In the balance of this essay, therefore, I'll assume that judicial leveling down is typically not subject to the same legal regime as leveling down by the elected branches. The latter is both more frequent, and also more frequently amenable to an equality challenge than judicial action. This is so because the latter have much more leeway in making allocative policy decisions, and also because elected and bureaucratic actors are assumed to act more frequently than judges for bad (unconstitutional) reasons.

B. Illustrating Leveling Down

The Constitution contains several mandates for formal equality. The Equal Protection Clause, most obviously requires formal neutrality in respect to race,²⁸ prohibits certain gender distinctions,²⁹ and bars certain other formal classifications.³⁰ The free speech component of the First Amendment also imposes a rule of content neutrality. And both the dormant Commerce Clause and the Privileges and Immunities Clause of Article IV preclude certain distinctions between state citizens and non-citizens.³¹ The dormant Commerce Clause, for instance, has been described in terms of a "strict rule of equality."³² A claim advanced under any one of these theories can provide an opportunity for a court to engage in leveling down.

²⁶ For an important exception, however, see *infra* text accompanying notes 44 to 48. A plurality opinion by the Court suggests that "[i]f a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (Scalia, J., plurality op.). But does the same rule of institutional equivalence apply to the Equal Protection Clause? Consider that a court must treat litigants in statutory and constitutional cases differently based on their race or gender. The Court has never considered whether doing so passes muster under strict scrutiny. Of particular interest here is the question whether the redress of private discrimination is a compelling state interest. Certainly, it does not appear to be so when it is a legislature acting. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989) ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group"). So why should not the same rule apply to courts? For a discussion of this point, see Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195, 1253 (2002).

²⁷ If so, and if bias were widespread, that might be a strike against judicial independence. x

²⁸ *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310474 (2013) ("[S]trict scrutiny must be applied to any admissions program using racial categories or classifications.").

²⁹ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) ("The defender of legislation that differentiates on the basis of gender must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (citation omitted)).

³⁰ *Aziz Z. Huq, The Double Movement of National Origin Discrimination*, 87 U. Chi. L. Rev. 2397, 2404 (2020) (discussing origins and strength of the ban on national origin discrimination)

³¹ See *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2471 (2019) (finding "dormant Commerce Clause principles" violated when a state measure "deprive[d] citizens of their right to have access to the markets of other States on equal terms" (citation and quotation marked omitted)); *McBurney v. Young*, 569 U.S. 221, 231 (2013) (noting that Article IV "secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State" (citing *Missouri Pacific R. Co. v. Clarendon Boat Oar Co.*, 257 U.S. 533, 535 (1922))).

³² *Halliburton Oil Well Co. v. Reilly*, 373 U.S. 64, 73 (1963); *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981) (noting the requirement of "equality of treatment").

As a historical matter, instances of leveling down have been rare.³³ During the Roberts Court, nevertheless, there have been two high-profile instances in which the Court has embraced a leveling down remedy. In other instances, however, it has suggested that leveling up is constitutionally mandated. I document this pattern here, and then point to a longstanding pattern in the doctrine by which the Court is confronted with a persisting choice between leveling up and leveling down, albeit not denominated in those terms. At the same time, I flag instances in which judicial practice has diverged, without explanation, from stated norms.

1. *The Roberts Clause and Leveling Down*

The first of the recent cases, of course, is *Morales-Santana*. Justice Ginsburg there framed the dispositional choice between leveling down (i.e., applying the ten-year physical presence rule to both mothers and fathers) or leveling up (universally applying the one-year rule) as a matter of “the legislature’s intent, as revealed by the statute at hand” to which the Equal Protection Clause simply did not speak.³⁴ She began by observing that earlier gender-equality cases tended to concern a carve-out from a general rule that disadvantaged a protected class. In contrast, *Morales-Santana*’s case concerned a “discriminatory exception [that] consists of *favorable* treatment for a discrete group.”³⁵ To dispose of the case, Justice Ginsburg invoked “the same approach as in those benefits cases—striking the discriminatory exception—leads here to extending the general rule of longer physical-presence requirements to cover the previously favored group.”³⁶ Finding guidance in Title VII cases in which lower courts had declined to extend special benefits for women to all employees, Justice Ginsburg reasoned that “Congress... would have abrogated 1409(c)’s exception, preferring preservation of the general rule.”³⁷ Notably, she did not embrace the Solicitor General’s suggestion, drawing on an earlier opinion by Justice Scalia, that the federal courts simply had no power to grant a remedy that functioned in practice as a grant of citizenship.³⁸

The second instance of leveling down during the Roberts Court arose in a case applying First Amendment’s command that “equality of status in the field of ideas” prohibited content-based discrimination.³⁹ In *Barr v. American Association of Political Consultants*, the Court found a First Amendment defect in provisions of the Telephone Consumer Protection Act (“TCPA”) that restricted ‘robocalls’ to cellphones, but that made an exception for calls relating to the collection of debts that were owned or backed by the federal government.⁴⁰ Writing for a plurality of the Court, Justice Kavanaugh held that this content-based restriction failed strict scrutiny.⁴¹ This left the Court with a choice of leveling up (i.e., allowing robocalls) or leveling down (that is, barring all robocalls). To resolve this choice, Justice Kavanaugh did not appeal

³³ In some cases, the Supreme Court has found an equality violation in a state law, and then remanded to the state court to determination of a statutory scheme required after invalidation. *See, e.g.,* *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010); *Orr v. Orr*, 440 U.S. 268, 271 (1979); *Stanton v. Stanton*, 421 U.S. 7, 18 (1975). In *Stanton*, the state court leveled down upon remand. 564 P.2d 303 (Utah 1977). The possibility of leveling down, though, was recognized without being applied in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931), and then extensively discussed in a concurring opinion by Justice Harlan in *Welsh v. United States*, 398 U.S. 333, 344 (1970) (Harlan, J., concurring).

³⁴ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1700 & n.27.

³⁸ *Morales-Santana* Solicitor General Brief, *supra* note 8, at 48; *see* *Miller v. Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring).

³⁹ *Police Department of Chicago v. Mosely*, 408 U.S. 92, 96 (1972).

⁴⁰ 140 S. Ct. 2335, 2343 (2020) (Kavanaugh, J., plurality op.).

⁴¹ *Id.* at 2347.

to congressional intent, which was the touchstone in *Morales-Santana*. He instead invoked a “presumption of severability” that “reflects the limited role of the Judiciary.”⁴² Applying such a presumption, the Court held that the “constitutionally offending provision” excepting government debt-related calls, enacted twenty-five years after the TCPA’s general prohibition, was “an unconstitutional amendment to a prior law.”⁴³ The sequencing of statutory enactment and the constrained breadth of the rule for government debt-related calls, therefore, seemed to play pivotal roles in Justice Kavanaugh’s “severability” analysis.

Yet in other areas, the Roberts Court has suggested that leveling down is not just undesirable, but even constitutionally impermissible. Most salient here are cases applying the free exercise component of the First Amendment. The Court in *Espinoza v. Montana Department of Revenue* took up a Montana state scholarship program for private schools that excluded students attending religiously affiliated schools.⁴⁴ Writing for the dissent, Justice Ginsburg would have accepted the state supreme court’s decision to resolve the constitutional problem “by striking the scholarship program in its entirety” so as to create a permissible “neutrality” between religious and secular entities.⁴⁵ The majority opinion by Chief Justice Roberts, however, rejected the Montana Court’s leveling down remedy. According to the majority, the state constitutional provision upon which the state court relied “expressly discriminate[d] on the basis of religious status,” and as such could not be the basis for a resolution of case.⁴⁶ The majority did not explain why the formally discriminatory character of the state constitutional provision mattered once the state court had determined that religious and secular entities would be treated alike. (It seemed to presume that the state court leveled down because of the initial federal constitutional ‘mistake’—but this is far from clear given the facts). Since it’s unlikely that the Court would have reached the same outcome had the Montana court leveled up, *Espinoza* seems to be a case in which leveling down functioned as a necessary part of the constitutional wrong.

Espinoza is noteworthy because it is one of the rare instances in which a downward-directed *judicial* action has found to be rest upon impermissible grounds.⁴⁷ Its outcome is all the more striking given that its predicate factual premise of judicial impropriety was not premised on any information about the attitudes or beliefs of the Montana judges involved, or a factual finding that the state court treated religious and secular entities differently. *Espinoza* also contrasts sharply with instances in which the Court has refused to attribute constitutional significance to the historical predicates of a legislative action.⁴⁸ Nor is *Espinoza* the only decision where a state actor’s leveling down was deemed constitutionally impermissible. A year later, the Court resolved a Free Exercise challenge to the exclusion of religious groups from Philadelphia’s scheme for foster-care placements by mandating a ‘leveling up’ in the provision of discretionary state funding.⁴⁹ There was simply no discussion of whether leveling up or

⁴² *Id.* at 2351. Justice Kavanaugh is probably best read here as insisting that as much of the statute be saved as feasible, i.e., a presumption that the minimal amount of statutory text will be severed.

⁴³ *Id.* at 2353 (describing the exception as “the constitutionally offending provision”).

⁴⁴ 140 S. Ct. 2246 (2020).

⁴⁵ *Id.* at 2279 (Ginsburg, J., dissenting).

⁴⁶ *Id.* at 2262.

⁴⁷ See *supra* text accompanying notes 45 to 46. One might say, though, that the problem was not the state court’s action, but the putative bias of the state constitutional drafters. On this view, *Espinoza* is not a case about improper judicial motive.

⁴⁸ *Abbott v. Perez*, 138 S. Ct. 2305, 2313, 2316–18, 2325–26 (2018).

⁴⁹ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1875 (2021); see Aziz Huq, *The Court’s religious liberty ‘compromise’ is actually a victory for the right*, Wash. Post (June 21, 2021), <https://www.washingtonpost.com/outlook/2021/06/21/fulton-religious-liberty-compromise-conservative-victory/>.

leveling down was the appropriate remedy.⁵⁰ Leveling up was simply assumed to be the correct approach.

It is, in short, hard to discern a trend in the Roberts Court's approach to the leveling up/leveling down choice of dispositions in cases concerning formal constitutional equality. *Barr* and *Morales-Santana* might indicate a measure of judicial restraint akin to the approach long counseled by Justice Ginsburg, at least where the Court does not see a de facto preferred constitutional liberty in play. These cases might also be viewed as of a piece with other constitutional cases, principally sounding in the separation of powers, in which the Court has opted for narrower remedial dispositions even after finding a constitutional error.⁵¹ Putting together *Morales-Santana*, *Barr*, and these recent separation-of-powers decisions, it is possible to perhaps discern a default position of modesty on the Roberts' Court's part when it comes to addressing constitutional harms. But the religious liberty cases suggest that this reading should not be taken too far.

2. *Retroactivity as Leveling Down*

A choice that is somewhat akin to the election between leveling up and leveling down arises in one other line of cases. So far as I can tell, other commentators have not perceived these cases as raising questions like those as *Morales-Santana* and *Barr*. This seemingly extraneous line of cases not only presents a similar (albeit not identical) problem, it will also turn out to offer another potential disposition for formal equality cases. So I briefly discuss them here.

When the Court recognizes a new criminal procedure right, or a new application or extension of such a right, it often does so in a case involving a specific criminal defendant (call her D) whose offense and whose trial are necessarily in the past. Recognition of the new right raises an immediate question of who *else* other than D benefits from the new right. Should the newly-minted right, for instance, be available to all those who were tried and convicted at the same time as D? Should it apply only to those whose convictions have not, when the Supreme Court acts in D's case, become final? What of those who were charged at the same time as D, whose convictions have become final, but whose convictions are being challenged in ongoing state or federal collateral (habeas) review? And can the Court deny D, and all others whose trial has already occurred, any relief and instead opt for a wholly prophylactic remedy? This suite of questions is often analyzed under the rubric of retroactivity.⁵² But it is worth noting here that these are also questions about formal equality. In granting a remedy to D, that is, the Court must ask about what kinds of equality count, and whether to 'level up' or 'level down' with

⁵⁰ The same is true of cases involving religious objections to pandemic restrictions. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *but see* *Does 1-3 v. Mills*, No. 21A90 (U.S. Oct. 29, 2021) (denying to enjoin the vaccination mandate for those who objected on religious grounds pending a decision on the petition for certiorari). The remedial disposition of these cases is very hard to square with the analytic framework offered the same Term by Justice Kavanaugh in *Barr*.

⁵¹ The most interesting cases concern the separation of powers. See *Collins v. Yellen*, 141 S. Ct. 1761, 1784-87 (2021) (finding that the Director of the Federal Housing Finance Authority could not be protected by a "for cause" restrictions, but not invalidating the statute); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (opting for "a tailored approach" to an Appointment Clause violation); *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (finding that the Consumer Finance Protection Bureau's "leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers," but declining to invalidate the statute or vacate the proceeding first brought against the plaintiff).

⁵² For this terminology, see Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1738 (1991).

respect to the different groups of other defendants who have been or will be convicted under the same shadow of constitutional error.

In thinking through these questions, the Court has explicitly appealed to the value of formal equality. In one pivotal decision, it observed that the “selective application of new rules violates the principle of treating similarly situated defendants the same.”⁵³ This is the norm at issue in the constitutional cases canvassed above. The Court has settled on three rules to ensure compliance with that principle. First, the Court has never used the possibility of pure prospectivity—i.e., leveling down for all criminal defendants, including D, who have experienced constitutionally defective processes. It has nevertheless left that possibility open.⁵⁴ Second, it has said that new rights should be fully retroactive in criminal cases on direct review at the time the right is announced.⁵⁵ For these litigants, the Court has decided to level up. Third, with exceptions of little practical importance here, the same treatment is not accorded in cases where a criminal conviction has become final, but where collateral review in either state or federal court is ongoing.⁵⁶ Hence, with some relatively insignificant exceptions, a conviction cannot generally be disturbed on the basis of new law arising after that conviction has become final.⁵⁷

One way to summarize this constellation of doctrine is to see that new rules of constitutional criminal procedure are applied to all case pending on direct review at the time a that rule is announced, but not to cases pending on collateral review. But another, not at all inaccurate, way to think about the doctrine is as a mix of leveling up (for direct review) and leveling down (for collateral review). The first characterization rests implicitly on the assumption that direct and collateral review are fundamentally different.⁵⁸ This second way of looking at the cases snaps into focus if one starts instead with the assumption that collateral and direct review are not, in fact, as different as all that. To be clear, the Court has not accepted that assumption. But this is surely a debatable posture. For in some state systems, a criminal defendant has a first chance to raise some constitutional claims on direct review, and a first chance in respect to other claims in collateral review. Indeed, in many states, assistance of counsel claims cannot be raised on direct review, but can be raised on collateral review.⁵⁹ In these states, that is, both direct and collateral review operate as ‘first bites’ at the apple for certain constitutional claims. And, moreover, whether a particular defendant will be in the direct or the collateral review process at the time that the Supreme Court announces a new rule will depend on how long their trial and appeal takes—i.e., it will vary arbitrarily based on congestion in state-court dockets and other extraneous factors. From that vantage point, it appears that the Court has drawn something of an arbitrary line around the domain of formal

⁵³ *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987); *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) (“[W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently.”); *Shea v. Louisiana*, 470 U.S. 130, 135 (1985).

⁵⁴ But “no decision of this Court forecloses the possibility of pure prospectivity—refusal to apply a new rule in the very case in which it is announced and every case thereafter.” *Harper v. Virginia Dep’t of Tax’n*, 509 U.S. 86, 115 (1993) (O’Connor, J., dissenting).

⁵⁵ *Griffith*, 479 U.S. at 322.

⁵⁶ *Teague v. Lane*, 489 U.S. 288, 305-07 (1989) (plurality opinion). The Court has recently rejected *Teague’s* exception for “watershed” rules. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1557-58 (2021).

⁵⁷ *See Aziz Z. Huq, Judicial Independence and the Rationing of Constitutional Remedies*, 65 *Duke L.J.* 1, 35–36 (2015) (“By holding that habeas petitioners could not obtain relief based on violations of constitutional rules announced after their convictions became final, it held state officials responsible for extant constitutional law, but not potential expansions.”).

⁵⁸ Fallon and Meltzer, *supra* note 52, at 1815 (discussing reasons for distinguishing direct from collateral review).

⁵⁹ *Aziz Z. Huq, Habeas and the Roberts Court*, 81 *U. Chi. L. Rev.* 519, 546 (2014).

equality—leveling up on one side (direct appeals) while leveling down in the other, collateral context—as a way to avoid more difficult questions about disposition.

The retroactivity jurisprudence also brings into focus a third disposition that is different from both leveling up and also leveling down: Vacate the conviction of the defendant wise (or lucky) enough to bring the winning case, but disturb no other past conviction whether it is on direct or collateral review at the time of the Court’s new ruling. In effect, this is a refusal to level up for all but the case at bar. The Court, indeed, used this technique for the famous *Miranda v. Arizona* decision,⁶⁰ perhaps because application of *Miranda*, even to cases then pending on direct appeal, would have had a destabilizing effect on state criminal justice systems.⁶¹ The Court subsequently rejected this ‘selective’ prospectivity approach in criminal cases.⁶² It subsequently rejected that remedial tool in civil cases too.⁶³ It is worth noting that the Court’s decision to set aside selective prospectivity in the civil context did not purport to rest upon constitutional foundations. Instead, the Court invoked, rather generically, generic equality values. It may then be possible to argue that where there are countervailing concerns counseling in favor of selective prospectivity, that method should be used. This is a possibility to which I will return later in this essay.⁶⁴

C. Criticizing Leveling Down

Leveling down has a bad rap. With one notable exception, it is hard to find anything more than grudging acceptance in the literature. I briefly catalog the main objections that dominate the existing literature herein the following Part, I will suggest that these objections—while not without merit—are in some instances overstated. But my aim right here is to state these objections in their best, and most forceful light. This allows me to suggest that a positive case can be made for leveling down *despite* objections pushing in the other direction.

To begin with, it is important to recognize that commentators generally acknowledge that both leveling up and leveling down can be impermissible when they impose new and unexpected costs on third-parties. This sort of argument from negative externalities can run in either direction. It is less an argument for or against either leveling up or leveling down, and simply a recognition that judicial remedies can have complex, ramifying effects. For instance, a ruling that women had impermissibly been excluded from jury venires could not be remedied by excluding both men and women from future juries.⁶⁵ The only available remedy here is leveling up. Similarly, a criminal statute that has been found to be impermissibly limited to a suspect class cannot be remedied by retroactively expanding liability to a comparator class without violating due process.⁶⁶ In addition, where extending a benefit to both classes would

⁶⁰ 384 U.S. 436 (1966).

⁶¹ *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966) (holding that *Miranda v. Arizona*, 384 U.S. 436 (1966), would not apply retroactively to other cases in which the trial had already occurred).

⁶² *Griffith*, 479 U.S. at 328.

⁶³ *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540 (1991) (Souter, J., plurality op.) (“*Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context.”).

⁶⁴ See *infra* text accompanying notes 164 to 166.

⁶⁵ Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 Yale L.J. 1185, 1187 n.8 (1986) (discussing *Taylor v. Louisiana*, 419 U.S. 522 (1975)).

⁶⁶ Brake suggests that “a legislative attempt to thwart a court’s ability to remedy a constitutional violation would itself violate the Constitution.” Brake, *supra* note 20, at 548 n.127. But this assumes that the legislature has an opportunity to act before a court has imposed a remedy, and does so for impermissible reasons. This may describe the facts in *Palmer*.

create too great a fiscal burden on the state, leveling down may be the sole option.⁶⁷ Or where a court expands a right to alimony from women only to both men and women, the reliance interests of female spouses who would suddenly be faced with retroactive financial obligations.

Let us say, though, that there is no objection from negative externalities either to leveling up or down. Under those conditions, commentators have lodged a series of objections to leveling down. I organize these argument into three main clusters.

First, commentators express a concern that the adoption of leveling down remedies will have the effect of reducing or eliminating the incentive of litigants to bring cases in the first instance.⁶⁸ Tracey Thomas hence argues that a leveling down remedy undermines “the ability of citizens to act as private attorney generals to help enforce the public laws of gender equality are compromised, and fewer actions will be brought to challenge discriminatory conduct.”⁶⁹ In a complementary vein, Rebecca Aviel has argued that “the leveling-down decisions have the potential to erode public support for the very idea of equality itself.”⁷⁰ Sounding a somewhat similar tone, Justice Gorsuch in *Barr* worried about the dynamic effect on litigants of awarding “no relief at all.”⁷¹ This critique usefully draws attention to the way in which the final disposition of a constitutional equality claim will, over time, alter the conditions under which such suits can or will be filed in the first place. That is, it is a dynamic rather than a static argument.

A variation on this argument might be that the prospect of leveling down creates a problem for Article III standing purposes, insofar as it denies the possibility that the plaintiff will obtain redress for her constitutional wrong.⁷² Standing doctrine, at a minimum, implies that the availability of “individually focused” remediation is “a constitutionally mandated threshold matter.”⁷³ The Court in *Heckler v. Matthews* rejected the idea that a plaintiff had to show he or she would secure pecuniary gain from a win, on the ground that even if he or she would not receive a financial benefit, he or she could still secure a remedy for the fact of “unequal treatment . . .” solely because of gender.⁷⁴ *Matthews* suggests that the possibility of not gaining anything material need not defeat a plaintiff’s standing. But it is worth noting that the nature of the remedy sought might matter. The *Heckler* plaintiffs sought only declarative relief. The Court has long cautioned that “standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek.”⁷⁵ If a plaintiff seeks money damages for the past material consequences of a benefit denial, as well as an injunction, a question would arise whether he or she would have standing in respect

⁶⁷ See, e.g., *Heckler v. Matthews*, 465 U.S. 728, 737-38 (1984).

⁶⁸ Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 98 Mich. L. Rev. 2001, 2028 (1998).

⁶⁹ Thomas, *supra* note 20, at 201.

⁷⁰ Rebecca Aviel, *Rights As A Zero-Sum Game*, 61 Ariz. L. Rev. 351, 385 (2019).

⁷¹ *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring in part and dissenting in part) (“What is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?”).

⁷² See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (“The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”).

⁷³ Thomas, *supra* note 20, at 207.

⁷⁴ 465 U.S. 728, 737-38 (1984). In *Matthews*, the statute in question contained a “severability” clause stating that if the gender differential were invalidated on constitutional grounds, benefits would be withdrawn from men and women alike. *Id.* at 734. *Matthews* does not illuminate what the Court would do if confronted by “nonseverability [used] for truly coercive reasons.” Michael C. Dorf, *Fallback Law*, 107 Colum. L. Rev. 303, 340 (2007). Nor does it completely solve the standing question.

⁷⁵ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

to the injunctive claim as well as the damages claim. The counterargument would be that the plaintiff had not been harmed, since he or she was not eligible for the benefit in any case. Hence, the prospect of leveling down might indeed compromise Article III standing to secure money damages, if not forward-looking relief. To the extent that the motive for plaintiffs to lodge equality cases in the first instance, the potential frailty of Article III standing for damages claims may have a dynamic impact on the rate of equality claims. But it is wrong to say that standing problems would compromise any and all suits.

Second, some commentators have suggested that the Constitution is “not indifferent” between leveling-up and leveling-down dispositions,⁷⁶ and that at least in Equal Protection cases “the Constitution requires leveling up [as] the presumptively correct remedy.”⁷⁷ In the gender equality context, for example, it is argued that there is a “constitutional concern about the disempowerment of women ... that favors extension” of measures aiding women.⁷⁸ A related worry is that the disadvantaged (protected) group will not be able to use the political process to level up universally.⁷⁹ For example, if the reason that the group’s interests were ignored in the first instance was prejudice, or even a malign sort of negligence, then there is no particular reason to think that the legislature will reach a better outcome next time around. Again, Justice Gorsuch made a roughly analogous point about constitutional purposes in respect to the First Amendment’s ambitions in *Barr*.⁸⁰ The core idea pressed here by commentators and judges alike is that there is a tight relationship between the threshold constitutional demand of formal equality on the one hand, and the disposition of leveling up because the relevant constitutional norm also has a substantive component.

A third and related objection is an argument that the philosopher Derek Parfit has famously labeled the “levelling down objection” (note the British spelling!). This objects to leveling down on the ground that an action that “would be worse for some people, and better for no one” cannot be desirable.⁸¹ As legal scholar Pam Karlan succinctly puts the same point, “[m]isery loves company, but not that much.”⁸² Or, in Peter Westen’s words, leveling down makes equality “so preposterous a moral proposition that, if it were what equality really meant, no one would give it a moment’s thought.”⁸³ Call this the argument from perversity.

⁷⁶ Caminker, *supra* note 65, at 1198.

⁷⁷ Thomas, *supra* note 20, at 198.

⁷⁸ Caminker, *supra* note 65, at 1198; *id.* at 1202 (appealing to the concept of “underenforced” constitutional norms); *see also* Karlan, *supra* note 68, at 2027 (noting the theory that “the Equal Protection Clause is meant to address racially selective sympathy or indifference”); Thomas, *supra* note 20, at 200 (arguing that leveling down “fails to honor or effectuate the ultimate meaning of the operative constitutional right”); Brake, *supra* note 20, at 516 (arguing that “leveling down proceeds from an abstracted and objectified analysis of equality that ignores the lived experience of inequality and implicitly privileges the perspective of those doing the abstracting”); *see also* Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. Rev. 322, 351 (2016) (arguing that “in suits challenging laws that provided social security and similar welfare benefits ... invalidating these laws would have harmed some vulnerable groups”).

⁷⁹ Brake, *supra* note 20, at 606.

⁸⁰ *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring in part and dissenting in part) (“[S]omewhat, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned.”).

⁸¹ Derek Parfit, *Equality or Priority?*, reprinted in *The Ideal of Equality* 17 (Matthew Clayton & Andrew Williams eds., 2002). For an adoption of this view, *see* Jean Marie Doherty, *Law in an Elevator: When Leveling Down Remedies Let Equality Off in the Basement*, 81 S. Cal. L. Rev. 1017, 1020 (2008).

⁸² Karlan, *supra* note 68, at 2028.

⁸³ Westen, *supra* note 18, at 546.

None of this is to say that leveling down lacks any defenders. Perhaps the most articulate of those defenders has been one Professor Ruth Bader Ginsburg.⁸⁴ Writing in 1979, well after she had undertaken her work for the ACLU Women’s Rights Project, still-Professor Ginsburg concurred with analytic frame adopted by the dissenters Justices in a recent gender equality case, *Califano v. Westcott*, in their votes for leveling down.⁸⁵ A “candid recognition of the role of court,” she argued, required the recognition that it was engaged in “essentially legislative behavior” because it would serve as a “short-term surrogate for the legislature.”⁸⁶ To decide whether to level up or down, she counseled attention to “the strength of the legislature’s commitment to the residual policy” as well as the “disruption a solution one way or the other would entail.”⁸⁷ These twin factors, almost forty years later, could have been used as lodestars for her analysis in *Morales-Santana*, even if they do not appear in so many words in that opinion.

II. Clarifying the Problems Implicated in a Leveling Down Disposition

Given the battery of arguments that have been offered against leveling down, it is perhaps surprising that the Court still uses that disposition at all. In this Part, I reconsider some of the arguments offered about leveling down, and try and clear away what seem to me a number of imprecise formulations and even confusions that may hinder clear-sighted consideration of leveling down.

To begin with, I return to the way in which Justices Ginsburg and Justice Kavanaugh formulate the choice between leveling up and down as a problem of statutory interpretation, akin to the analysis of severability. I suggest that this misses an important distinction and elides the most peculiar feature of equality cases. Then, to get a better grip on the affirmative case for leveling down, I return to the various critiques of that disposition enumerated in Part I, and suggest that, at least in some instances, there is less than meets the eye. I offer a reformulation of the litigation incentives critique and respond to Parfit’s “levelling down” critique (drawing, indeed, on arguments that Parfit and others have made).

I defer until the following part a proper response to the arguments from the constitutional purpose, since my main defense of leveling down starts with the postulation of a different function of equality within the constitutional design. The aim of this Part is to clear the ground so that different function can more clearly and easily be perceived.

A. Leveling Down and Severability Analysis Reconsidered

In *Morales Santana* and *Barr*, Justices Ginsburg and Kavanaugh offered two slightly different formulations of how judges should comprehend and analyze the choice between leveling up and down. Despite their differences, both framed that choice in fundamentally the same way: as a permutation of the statutory-interpretation question raised in severability analysis. One way of reading their varying rules in a single unifying frame is by understanding them both as efforts to subsume the question of leveling up or down under the rubric of statutory interpretation (bracketing significant differences in the toolkit applied to that task!)

⁸⁴ Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 Clev. St. L. Rev. 301 (1979) [hereinafter “Ginsburg, *Some Thoughts*”].

⁸⁵ *Id.* at 314-16 (discussing *Califano v. Westcott*, 443 U.S. 76, 96-98 (1978) (Powell, J., dissenting)). To be sure, she would have leveled up on the specific facts of *Westcott*, but agreed with Justice Powell’s framing.

⁸⁶ *Id.* at 317.

⁸⁷ *Id.* at 318.

Hence, recall that Justice Ginsburg spoke in *Morales-Santana* of “the legislature's intent, as revealed by the statute at hand.”⁸⁸ She asked whether “Congress... would have abrogated 1409(c)'s exception, preferring preservation of the general rule.”⁸⁹ In contrast, Justice Kavanaugh in *Barr* invoked a “presumption of severability,”⁹⁰ as an explicit alternative to an inquiry into legislative intent. In effect, he offered a “default rule against a certain reading.”⁹¹ Despite their methodological differences, there may be less than first appears to the gap between their positions. Justice Kavanaugh’s brand of textualism, after all, is a means to “enhance the rule of law and the appearance of neutral, evenhanded justice” by more faithfully tracking what Congress did (where the gap between action and intent is not significant, at least).⁹² Indeed, his rule might well be reformulated as a useful rule of thumb under conditions of uncertainty, as much as a prophylaxis against excessively legislative action by the court.⁹³ This rule of thumb operationalizes the assumption that a court’s task, after a finding of unconstitutionality, is to excise as little of the statute as possible,⁹⁴ and hence evince as much fidelity to the plan of the enacting legislature as feasible.⁹⁵

But is this the best way of framing the issue at stake? I think there is reason to think not. To begin with, I think that the statutory interpretation lens elides an important distinction between severability and the leveling up/down problem. Further, I agree with Richard Fallon that when a violation of a formal constitutional equality norm has been identified, the ensuing dispositional “question is not whether the statute should be severed, but whether applicable remedial principles permit or require a court to extend more favorable treatment to a group Congress [or a state] attempted to treat less favorably.”⁹⁶ Even if, as then-Professor Ginsburg put it, the court is acting as a “short-term surrogate for the legislature,”⁹⁷ that does not mean that it should use rule-like presumptions or open-ended inquiry as a means to create a facsimile of legislative intent.

As a threshold matter, it is certainly right that, as Fallon implies, the core case of severability presents a different sort of problem to the leveling up/down question. In the core case of severability, the Court is confronted with a discrete provision or provisions that contains

⁸⁸ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017).

⁸⁹ *Id.* at 1700 & n.27.

⁹⁰ *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2353 (2020) (Kavanaugh, J., plurality op.).

⁹¹ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2155 (2016). That said, it is not clear what evidence (if any) would be sufficient to overcome the presumption applied in *Barr*. But if that presumption is in effect irrebuttable, shouldn't we call it what it really is—a rule and not a presumption?

⁹² *Id.* at 2163.

⁹³ Cf. Robert L. Nightingale, Note, *How to Trim A Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 Yale L.J. 1672, 1743 (2016) (reasoning from legislative intent to the presumption of severability).

⁹⁴ *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (directing that “[a] court should refrain from invalidating more of the statute than is necessary”).

⁹⁵ The Court, to be sure, on occasionally recognizes that this task entails some normative judgment. See *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (“The cancellation of one section of a statute may be the functional equivalent of a partial repeal”). But it is at pains otherwise to minimize, or perhaps suppress recognition, of that normative aspect of the task. See, e.g., *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (“[M]indful that our constitutional mandate and our institutional competence are limited, we restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’ even as we strive to salvage it.” (quotation omitted)); *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) (“This Court ‘will not rewrite a... law to conform it to constitutional requirements.’” (alteration in original) (quotation omitted)).

⁹⁶ Richard H. Fallon, Jr., *Facial Challenges, Saving Constructions, and Statutory Severability*, 99 Tex. L. Rev. 215, 257 (2020). Fallon cites *Morales-Santana* for this proposition, *id.* at 257, n. 257, but Justice Ginsburg relied less on “applicable remedial principles” and more on hypothesized congressional intent. Hence, I would not invoke her opinion in the way that Fallon does, even though I agree with his ultimate normative conclusion.

⁹⁷ Ginsburg, *Some Thoughts*, *supra* note 84, at 317.

a constitutional flaw. Given a judicial finding of unconstitutionality running against that specific provision(s), the question of severability is whether other elements of the same statutory scheme should be treated as invalid or unenforceable.⁹⁸ Where the Court has identified a formal constitutional equality concern, there are two provisions imposing different rules on distinct classes: the ten- and one-year physical presence requirements in *Morales-Santana*, and the prohibition and permission for robocalls by non-governmental and state-backed debt collectors in *Barr*. In these cases, the constitutional problem does not arise because one or other provision contains a constitutional flaw. It arises because there is a differential between the legal treatment accorded under each of the two provisions—a combinatory effect rather than the effect of one provision in isolation. Unlike the severability cases, therefore, there is not a single provision that can be targeted for excision, followed by an inquiry into whether other parts of the statute are so intricately intertwined with it that they must fall too. The constitutional problem by its nature adheres not to a single provision, but to the difference between the two provisions.⁹⁹

Judges occasionally lose sight of this, and make analytically confused statements. The plurality opinion in *Barr v. American Association of Political Consultants*, for example, glimpsed the problem at certain moments but otherwise talked of the “constitutionally offending provision” (in the singular) excepting government debt-related calls.¹⁰⁰ The problem with this statement is that it treats a legal conclusion as a threshold fact from which analysis can proceed. State is, the problem is not whether provisions B, C, and D would have been enacted in the absence of provision A—it is the analytically distinct question of which of two provisions, A and B, must fall if both cannot constitutionally coexist.

Because the question of leveling up/down is analytically distinct from the severability question, it cannot be assumed that the way doctrinal forms for resolving severability can be mechanically extended to that new context. More particularly, I am not certain that either the Ginsburg formulation in *Morales-Santana* or the Kavanaugh formulation in *Barr* gets us very far. In both cases, they offer familiar and hence comforting verbal formulations that don’t really get us far in thinking about the distinctive problem of opting for either leveling up or down. I think this is because that problem is not well stated as a problem of statutory meaning, as Fallon said, but rather a question of distinctive judicial judgment.

To see this, consider again Justice Ginsburg’s “legislature’s intent” framing.¹⁰¹ In the severability context, courts appear to assume that the relevant intent is that of the enacting legislature, and not the intent of the contemporaneous body with power to enact a new

⁹⁸ See, e.g., *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1482 (2018) (“In order for other ... provisions to fall, it must be evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.” (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–661 (1987)); see also *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (“After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?”).

⁹⁹ Consider the following view of severability: “When some part of the sub-constitutional law is found invalid, [courts] sometimes must determine whether any other legal rule is conditional on, and hence inseparable, from it. In cases of inseparability, legal rules that are not themselves unconstitutional may thus be found to be inoperative, and courts must decide accordingly.” John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 *Geo. Wash. L. Rev.* 56, 82 (2014); accord *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring) (citing Harrison). This procedure breaks apart at the first step because there is no one invalid provision; it is the relationship of two provisions that generates the invalidity. Again, the point is that the leveling up/down problem is not usefully analyzed by assuming it presents the same problem as severability.

¹⁰⁰ 140 S. Ct. 2335, 2353 (2020) (Kavanaugh, J., plurality op.).

¹⁰¹ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017).

measure.¹⁰² This is a plausible heuristic: Constitutional problems are frequent and unexpected enough that it seems reasonable to presume that legislators, as a very general matter, have formed a view (perhaps embodied in the text or structure of a statute) of how the statute should operate once a constitutional excision has occurred. Further, it seems at a minimum eminently reasonable to say, along with Justice Kavanaugh, that the search for retail evidence of this intent is best superseded by a rule-like presumption that at little as possible of the statutory text should be excised as feasible.

Yet the assumptions underwriting this approach have less force when the question is whether to level up or down. The latter is a small subset of potential constitutional problems.¹⁰³ It is therefore far less likely that the legislature will have formulated either a general approach or a specific opinion to the distinct and different puzzle of choosing between different provisions.¹⁰⁴ The search for specific legislative intent posited by Justice Ginsburg is hence far less likely to yield results. Nor is it clear that there exists a default rule tracking the preferences of an enacting Congress of the sort that Justice Kavanaugh offered in *Barr*.¹⁰⁵ That is, whereas it makes reasonable sense to assume, as a quite general matter, that Congress would wish courts to adopt a severability default rule of minimal excision, it is quite unclear how Congress would wish courts to resolve the choice between two provisions, A and B, one of which must fall for the statute as a whole to be constitutional.

Indeed, a close reading of *Barr* suggests that Justice Kavanaugh's presumption of severability is not doing the analytic work that he imputes to it. On his accounting, this presumption directs courts to "invalidate[] and sever[] unconstitutional provisions of the law rather than razing whole statutes."¹⁰⁶ But (as I noted above) this formulation assumes the existing of an offending provision or provisions. Where the constitutional problem arises not from the text of specific provisions, but from the coexistence of two separate provisions, this understanding of severability gives no guidance as to which provision to cast away. Justice Kavanaugh avoided this difficulty by stipulating, almost ipse dixit, that the robocall provision of the TCPA was "the constitutionally offending provision."¹⁰⁷ The only reason offered for this decisive stipulation was that the robocall exception was a later addition to a "prior law" that had already been proved to operate "independently ... for 20-plus years."¹⁰⁸ It is not at all clear, however, why the relative novelty of the robocall exception should have counted against it: After all, in other cases of unavoidable statutory conflicts, the more recent provision will control.¹⁰⁹ Indeed, from at least one vantage point, the decision to characterize the robocall

¹⁰² See, e.g., *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 687 (1987) (finding "abundant indication of a clear congressional intent of severability both in the language and structure of the Act and in its legislative history").

¹⁰³ See supra text accompanying note 100 for an explanation of this difference.

¹⁰⁴ There are some instances in which the enacting Congress can be plausibly, for instance, in *Heckler v. Matthews*, Congress has explicitly included instructions of how to resolve the leveling up/down choice. 465 U.S. 728, 737-38 (1984). But Congress did so because it was responding to an earlier equality-related ruling; the downstream problems of formal equality were hence squarely presented to it.

¹⁰⁵ Note that "the statutory default rules that minimize political dissatisfaction often do not track the most likely meaning or even preferences of the enacting legislature." Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 Colum. L. Rev. 2027, 2030 (2002). Instead, they may "maximize the extent to which statutory results accurately reflect enactable political preference." *Id.* at 20-36. The problem is that this formulation does not get us much further with the problem of leveling up or down.

¹⁰⁶ *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335, 2351 (2020) (Kavanaugh, J., plurality op.).

¹⁰⁷ *Id.* at 2353.

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). The presumption against implied repeals, which seems to counsel in favor of older over newer statutes, is not helpful here. That canon applies when a court is "[p]resented with two statutes" and endeavors to "regard each as effective" unless their provisions are "irreconcilable." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citation and quotation

provision an exception turned practicality on its head: Justice Gorsuch pointed out that the “exception” might be understood as sweeping in “a seemingly infinite number of robocalls of the type consumers appear to find most invasive.”¹¹⁰

To be clear, I am not arguing that Justice Gorsuch had the better of the argument on this last point. I am rather pointing out that the analytic framework offered by Justice Kavanaugh, like that offered by Justice Ginsburg, cannot carry the weight it purports to hold. The leveling up/down choice should not be examined through the lens of severability doctrine, and, more generally, should not be assimilated into the mine run of statutory interpretation problems.

B. Reconsidering the Litigation Incentive and “Levelling Down” Objections

As we have seen, critics have suggested that leveling down is incentive-compatible with the expected operation of constitutional litigation, or, worse, “impossible to believe” and “implausible.”¹¹¹ I think these objections are at best overstated, and will try and explain why here.

First, I think it is unlikely that the effect of leveling down on litigation incentives would be as dramatic as the critics suppose. The litigation-incentives argument assumes that constitutional litigation is filed because individual plaintiffs are materially harmed, and want to gain some material recompense via judicial action. The connection between material harms and the incentive to engage in constitutional litigation, however, is far more tenuous in practice than this assumes.

The relationship between material incentives and litigation filing rates is uncertain. On the one hand, relatively few people who experience material harms at the hands of state agents (commonly, the police) end up seeking redress in court; whether they do or not depends on a host of highly local factors, from the availability of civil-rights attorneys to the attitudes of the local state and federal benches.¹¹² On the other hand, the absence of material harm in other domains does not seem to hinder litigation from being filed. Most notoriously, challenges to affirmative action in university admissions are brought by individuals who would not have been admitted even without the university’s use of race, and who have, in any event, gone to attend another degree program.¹¹³ It seems likely that equality cases will, for the foreseeable future, be often brought by ideological organizations and attorneys who have independent resources to pursue litigation. To be sure, an ideological organization might hesitate before filing suit because of a concern that a victory on the merits may be accompanied by a ‘loss’ through a leveling-down disposition; the ACLU, for example, might be unwilling to bring speech rights cases if it believes victory will lead to *more* and not less speech regulation. But even here, the mere possibility of such an outcome might have effects at the margin, but is unlikely to lead *all*

marked omitted). The problem is that once a formal equality violation has been demonstrated, “irreconcilable” differences necessarily exist, and so the path of reconciliation is no longer available.

¹¹⁰ *Barr*, 140 S. Ct. at 2365 (Gorsuch, J., concurring in part and dissenting in part) (emphases in original omitted).

¹¹¹ Parfit, *supra* note 81, at 17.

¹¹² Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 Mich. L. Rev. 1539, 1601 (2020) (explaining that “whether people seek redress for violations of their rights and whether they succeed also depends in significant part on the civil rights ecosystem in which the claims arose”).

¹¹³ See Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 Vand. L. Rev. 297, 299 (2015) (discussing Abigail Fisher’s standing in a challenge to the University of Texas’s admissions policy); accord Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 Yale L.J. Online 85 (2012)

suits to dry up. There is no particular reason to think, therefore, that the flow of constitutional equality cases will dry up entirely any time soon if leveling down were used more often.

I think this observation, though, reveals a more subtle version of the litigation-incentives critique, albeit one that is not particular to equality cases in which leveling down is an option. Notwithstanding the formal demands of Article III standing doctrine, the federal courts no longer orient toward, or serve well, the individuals have experienced the most serious harms as a consequence of constitutional violations. They are instead generally open to ideologically motivated litigants who seek to use the courts to further a policy agenda. The possibility of leveling down is certainly a component of this phenomenon, but hardly the only or the most important one. Because the substance of constitutional law overlaps greatly with the domain of democratic policy, and because judges cannot (and do not) screen for cases in which judicial review is a substitute for success in the elected branches, the courts operate as forums for pitched ideological conflict while failing to serve the corrective justice and deterrence functions that ordinarily would justify money damages for past harms.¹¹⁴ Put otherwise, the larger problem to which critics glancingly refer is the capture of the federal courts for ideological conflict as opposed to mere constitutional dispute resolution.¹¹⁵

Second, I am not persuaded that the “levelling down objection” associated with Parfit provides a reason against leveling down as a judicial disposition.¹¹⁶ As a correlative, the critiques from constitutional purpose that in effect repackage Parfit’s argument are no more convincing. As a starting point, the objection (at least insofar as it is adopted by American legal scholars seems to rest on normative premises that are either implausible or at least unpalatable. Their arguments seems to rests on an individualistic, additive, and welfarist perspective: That is, the relevant metric of welfare is individual; individual welfare can be calculated discretely and then aggregative through a simple additive function; and the relation between or distribution of those individual welfare evaluations is irrelevant.¹¹⁷ That is, the assumption is that if a court levels down, no good has resulted. But this seems to assume that the existence of inequality cannot generate harms—which seems improbable. Inequality, after all, is likely to be a predicate fact that allows (even if it does not necessarily entail) stratification and domination. Certain forms of equality might be deemed necessary, moreover, for the operation of democracy.¹¹⁸

I also think it is implausible to say that the mere fact of inequality *simpliciter* is never morally or legally inconsequential. To give one example of great salience at the time of this writing, there are now a considerable number of studies that the “most powerful” predictor of the rate of deaths from the Covid-19 virus “is inequality—usually measured as the Gini

¹¹⁴ Barr v. Am. Ass’n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020) (Kavanaugh, J., plurality op.) noting that leveling up would “end up harming the different and far larger set of strangers to this suit—the tens of millions of consumers who would be bombarded every day with robocalls nonstop”.

¹¹⁵ Constitutional law scholars bare some blame for this since they focus so relentlessly on the Supreme Court’s law-declaration function, rather than on the blue-collar work of actually providing warranted redress. Federal courts, by all accounts, do not perform their remedial task well. See Aziz Z. Huq, *The Collapse of Constitutional Remedies* (forthcoming 2021).

¹¹⁶ To be clear, Parfit doesn’t embrace the argument.

¹¹⁷ Larry Temkin, *Equality, Priority and the Levelling Down Objection* (1998), reprinted in *The Ideal of Equality* 131, 136 (Matthew Clayton & Andrew Williams eds., 2002) (noting that the objection assumes that “equality has no intrinsic value, and non-instrumental egalitarianism must be rejected”). More generally, the levelling down objection rejects the possibility that “something is valuable according to someone, but not intrinsically valuable for him.” Nils Holtung, *Egalitarianism and the levelling down objection*, 58 *Analysis* 166, 168 (1998).

¹¹⁸ For a useful analysis of how this might be so, see Robert C. Post, *Democracy and Equality*, 603 *Annals American Academy Pol. & Legal Theory* 24 (2006).

coefficient of income.”¹¹⁹ That is, in a quite immediate and direct way, “higher inequality leads to more suffering.”¹²⁰ This sort of dynamic effect is not well captured in the criticisms offered against decisions such as *Morales-Santana*, which focus quite narrowly on the specific point in time after the decision is made. Through a more general lens, T.M. Scanlon has identified a range of ways in which inequality standing alone can be objectionable, including the way it can engender “humiliating differences in power” or give “the rich unacceptable forms of power over those who have less.”¹²¹ Discussing differences in status (which may often be at issue in Equal Protection jurisprudence), Scanlon notes that “depriving some people of a feeling of superiority that they may value” is not morally objectionable leveling down because “this is not something they could complain of losing.”¹²² Advancing a related point, Parfit observes that if one embraces the levelling down objection, this has the effect of shutting off certain, arguably desirable, forms of critique. For instance, “[i]f inequality is not in itself bad, we may find it harder to explain ... why we should redistribute resources.”¹²³ Although I recognize the possibility of reasonable disagreement here, I don’t see a good reason for ruling out such concerns (nor, I suspect, would many of leveling down’s critics if they were pressed on the point).

A similar point can be made by terms of purely legal norms without recourse to moral reasoning of any form. In the American constitutional context, it is implausible to say that equality is *not* an independent constitutional value quite apart from its welfarist effect. The Constitution contains a large number of rights, obviously. As Peter Westen famously argued, it is possible to rewrite any right as a claim to an equal entitlement to some good.¹²⁴ The Constitution guarantees to individual both the sum of these entitlements and also ‘equal protection.’ The use of the “levelling down objection” in the constitutional context in effect eliminates the latter term.

More modestly, the argument might be empirically contingent: Given the harms wrought by leveling down, the critics might say, it is simply implausible to think that the good that comes from affirming an abstract hypothesis of formal equality. On this view, equality may be a separate and distinct good, but it can never outweigh the material losses from leveling down. And if the judicial choice is between affirming the abstract value of formal equality plus leveling up, and affirming that equality value and leveling down—there is no good reason for a court to do the latter when it can always do the former.

Yet even on this view, there may well be reasons to level down. For example, a ‘leveling up’ disposition in *Barr* would likely have dramatically increased the volume of robocalls received by American households. As Justice Kavanaugh rightly noted, this counts as a cost that—even if not dispositive on its own—may well have tipped the balance toward leveling down in an all-things-considered analysis. Another concern is that leveling up might have dynamic effects of its own: Rather than mitigating the flow of litigants, leveling up might lead to prompt Congress to avoid carve-outs even when constitutionally feasible, and instead impose unvariegated rules

¹¹⁹ *Establishing the Cause of Death*, *The Economist* (July 31, 2021), at 62. It should go without saying that my argument here is not that we should ‘level down’ with respect to Covid-19, only that the latter demonstrates an intrinsic harm of inequality.

¹²⁰ *Id.*

¹²¹ T.M. Scanlon, *Why Does Inequality Matter?* 8 (2018).

¹²² *Id.* at 28; *id.* at 31 (noting that the “harms” of “discrimination and caste systems” are “good reasons for eliminating positions of privilege”).

¹²³ Parfit, *supra* note 81, at 18.

¹²⁴ Westen, *supra* note 18, at 548-50.

that uniformly allocate harsh burdens.¹²⁵ If this concern were substantial enough, the “constitutional concern about the disempowerment of women” that commentators evoke would, in practice, offer no basis for distinguishing between leveling up and down.¹²⁶

* * *

In summary, the choice between leveling up and down cannot be reduced to an exercise in statutory interpretation. It is also not isomorphic with severability doctrine. Instead, it presents a distinct kind of judicial choice. In thinking about that choice, I have suggested here the litigation-incentives and the Parfit-derived ‘levelling down objection’ do not supply reasons against leveling down. This leaves the question whether the constitutional value of equality can be deployed to resist that disposition. The best way of answering that question is by offering a reading of constitutional equality that can sustain leveling down as a dispensation on the theory that you can’t beat something with nothing.

III. The (Modest) Case for Leveling Down

In this Part, I offer a concededly constrained justification for leveling down by developing the connection between two plausible views of constitutional equality’s function. That is, rather than trying to defeat the arguments from constitutional purpose (canvassed in Part I) on their own terms, I suggest new terrain upon which leveling down can find firmer ethical footing. Here, I follow here Louis Seidman’s argument that leveling down might be justified by “map[ping] various solutions onto the functions served by equality claims in the first instance.”¹²⁷ Seidman suggests that the Equal Protection Clause can be understood as “a protection against a caste system” and a shield against “the social message of inferiority conveyed by separation.”¹²⁸ He further cites the “special standing rules for equal treatment cases,” such as the affirmative action cases discussed above, as evidence that the Court treats “equality as an independent, noninstrumental good.”¹²⁹

Building on Seidman’s basic methodological and substantive insights, I draw here on two very different views of constitutional equality—one conservative and canonical, and the other almost heretical but progressive in valence—in order to show not only that leveling down can be deduced directly from equality norms, but also to demonstrate that the decision to level down does not have an obvious ideological coloration. It can be put to use to quite diverse normative ends. Importantly, the arguments that I develop here are not based on the specter of negative externalities: That is, it is not the case under either of these arguments that leveling down is simply the ‘least bad’ option, picked because of the unintended costs of leveling up. Instead, there is something positive to be said on its behalf.

¹²⁵ That some carve-outs might withstand constitutional scrutiny is demonstrated by *Heckler v. Matthews*, 465 U.S. 728 (1984). The worry here is likely to be most acute in respect to gender equality claims. Unlike race-based constitutional equality doctrine, the law of constitutional gender equality does not foreclose all forms of ‘affirmative action’ for women. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” [and] to advance full development of the talent and capacities of our Nation’s people.” (citations omitted). Congress may well be less likely to exercise this discretion if an error in judgment leads to an undesirable burdensome end-state.

¹²⁶ Caminker, *supra* note 65, at 1198.

¹²⁷ Louis Michael Seidman, *The Ratchet Wreck: Equality’s Leveling Down Problem 3* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740127.

¹²⁸ *Id.* at 47.

¹²⁹ *Id.* at 45.

To be clear up front, my argument is not that leveling up is always required or inevitably desirable. Clearly, it isn't. Rather, my avowedly modest ambition is to demonstrate that it is possible to generate a range of appealing normative foundations for leveling down.

A. Leveling Down as Antibalkanization

In recent decisions concerning racial discrimination and the Equal Protection Clause, the Court has identified two interrelated goals. The first is that “the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class”¹³⁰ and respect their “personal right[]’ to be treated with equal dignity and respect.”¹³¹ In consequence, strict scrutiny is applied to any “admissions program using racial categories or classifications.”¹³² The second is getting the state out entirely of the “sordid business [of] divvying us up by race.”¹³³ This second goal is focused on informal and formal structures of political organization, rather than the treatment of specific individuals. Reva Siegel has characterized it as an “antibalkanization” norm.¹³⁴ An advocate of the latter “thinks about equal protection purposively and structurally: [he or she] assesses the constitutionality of government action by asking about the kind of polity it creates,” and in particular attends to “the forms of estrangement that both racial stratification and practices of racial remediation may engender.”¹³⁵ These twinned goals of individualization and antibalkanization provide nominal goalposts for the doctrine. Some have argued (persuasively, in my view) that if the Court indeed had these goals, it would adopt a different set of doctrinal rules.¹³⁶ For present purposes, I set aside those objections, and instead ask whether leveling down could be justified as a way of executing those values.

Assume arguing that the (sincerely pursued) ambition of Equal Protection doctrine is a social order in which individuals are evaluated and assigned benefits or burdens on some account of their merit without regard to their protected status.¹³⁷ The risk to that social order might vary over time. At one point in time, it may be imperiled by a dominant caste that creates carve-outs for disfavored groups in ways that deprive them of the benefits and protections of the law. Under these circumstances, providing equality plaintiffs by default with a leveling-up remedy would make a good deal of sense.

But at a different point in time, the threat might come from a different direction. The concern might instead be that the law will be used not to selectively subordinate, but instead to

¹³⁰ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (plurality op.)

¹³¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

¹³² *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 310 (2013).

¹³³ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).

¹³⁴ Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *Yale L.J.* 1278, 1287 (2011).

¹³⁵ *Id.* at 1300-01.

¹³⁶ On individualization, see Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 *Yale L.J.* 1600, 1641-42 (2020) (casting “serious doubt on the notion that race-based generalizations and inferences are by their nature disrespectful of anyone’s individuality,” as the doctrine presently suggests). On antibalkanization, see Seidman, *supra* note 127, at 51 (noting that “sometimes facially neutral policies *do* reinforce caste and subordination”).

¹³⁷ This assumes that it is possible to define ‘merit’ without respect to race or gender, i.e., that understandings of social and economic distinction are not themselves inflected by pernicious forms of stratification. I am skeptical of this assumption, but stipulate it here for the sake of developing this argument. Accord Ayyan Zubair, *Brown’s Lost Promise: New York City Specialized High Schools As A Case Study in the Illusory Support for Class-Based Affirmative Action*, 11 *Cal. L. Rev. Online* 557, 570 (2021).

target small groups for special and unwarranted benefits. The risk to a morally acceptable social ordering would then arise from efforts to legislate insulate small groups from the forms of social evaluation and judgment to which everyone else in the society was subject. In a pungent op-ed penned before he became a judge or a Justice, Brett Kavanaugh captured the basic gist of this argument with a sweeping brief against various forms of affirmative action on the ground that they operated as a “naked racial -spoils system.”¹³⁸

This intuition might play out in doctrine as follows: Prohibited characteristics might be a proxy for measures that are intended to bypass the general norm of individualized consideration and evaluation, in ways that insulate, and hence extend in time, the material or status entitlements of a small group. The fact that the sheltered group is one that has been historically disadvantaged or an object of discrimination would not guarantee that the effect of such measures would merely be a ‘leveling up.’ For it may be the case that “special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion.”¹³⁹

If all this were to be the case in fact,¹⁴⁰ then the leveling down disposition in equality law would make a good deal more sense. That solution might be preferred in race-related cases, for example, if it was understood as a way to “avoid[] both a whites-only racial spoils system reflecting the status quo and a minority-favoring racial spoils system based on the politics of remediation.”¹⁴¹ A leveling-up disposition, moreover, would be inappropriate for a number of reasons. It would, at a very minimum, extend the supernumerary demands placed on the public fisc by privileged minorities in ways that strained public finances. And more seriously, such a disposition would displace the possibility of individuated judgments about merit, or the lack thereof. By creating a level playing field upon which individual merit can be evaluated, the leveling down disposition advances the larger normative goal of ensuring discrete person-focused rather than group-dependent forms of advancement.

To be clear again, while this is an account of leveling down that fits with current constitutional doctrine in respect to race, it rests on a constitutional theory of equality that I find empirically implausible and normative unappealing with respect to racial dynamics observable in the larger context of American society.¹⁴² I do not offer it, therefore, in a spirit of endorsement. Rather, I aim here simply to demonstrate how the leveling down disposition can be deduced from a theory of constitutional equality with resonance in present, quote conservative doctrine.

Even if, like me, you find this account unappealing or implausible with respect to race, it is worth considering whether this account finds greater resonance in respect to other constitutional equality rules, and in particular for the dormant Commerce Clause. The latter

¹³⁸ Brett Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall. St. J. (September 27, 1999). For an extended and early version of this argument, see William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. Chi. L. Rev. 775, 778 (1979) (arguing that the “use of racial classification results in “racism, racial spoils systems, racial competition, and racial odium.”).

¹³⁹ *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting); see also *Fullilove v. Klutznick*, 448 U.S. 448, 538 (1980) (Stevens, J., dissenting) (“[T]he most disadvantaged within each class are the least likely to receive any benefit from the special privilege even though they are the persons most likely still to be suffering the consequences of the past wrong.”).

¹⁴⁰ To be clear, I sketch this argument without vouching for its empirical or moral credentials. See *infra* text accompanying note 142.

¹⁴¹ William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 Yale L.J. 1279, 1307 (2005).

¹⁴² In particular, the fear that white ethnics are the principle victims of discrimination

is commonly understood as animated by a concern about “economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁴³ Measures that violate the dormant Commerce Clause commonly seek to advantage or subsidize a comparatively small group of in-state actors rather than imposing a burden on a larger group of out-of-state actors.¹⁴⁴ A default leveling down response to measures that impermissibly “favor local businesses over out-of-state businesses”¹⁴⁵ may well be more sensible often than a leveling up response. State governments, after all, are in the general business of responding to the legitimate demands of their constituents by supplying them with benefits. There are well-known difficulties, of course, in distinguishing between legitimate subsidies and those that raise constitutional concern because of their effects on out-of-state actors.¹⁴⁶ But assuming these can be overcome, the case for leveling down in the dormant Commerce Clause context does not appear to implicate the serious normative and empirical objections imaginable (and that are in my view persuasive) in the race context.

B. Leveling Down as Antisubordination

An important, but now thoroughly marginalized, vein of theorizing constitutional equality aims at preventing persisting “subordination” of a group that has historically experienced disadvantage, discrimination, or other like forms of social marginalization.¹⁴⁷ Indeed, perhaps “the most elementary antidiscrimination principle singles out one kind of economically rational stereotyping and condemns it, on the theory that such stereotyping has the harmful long-term consequence of perpetuating group-based inequalities.”¹⁴⁸

At first blush, antisubordination accounts of equality may seem squarely at odds with the use of leveling down. But this is not always so. The manner in which subordination is implemented will depend on the nature of impediments thrown up to hinder marginalized groups. Just as a logic of racial balkanization can be advanced through two different mechanisms, so too systems of subordination and hierarchy can be pursued through diametrically opposed strategies. On the one hand, a system of social, economic, and political hierarchy might be maintained through laws that formally disqualify the disfavored group from certain positions, privileges, or benefits. Obviously, this was how race and gender stratification were maintained for centuries. On the other hand, the same system of stratification can be propped up by measures that channel particularly key resources to one group in ways that ensure its persisting

¹⁴³ Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274 (1988)).

¹⁴⁴ See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 576 (1997) (“The Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, singling out camps that serve mostly in-staters for beneficial tax treatment, and penalizing those camps that do a principally interstate business.”).

¹⁴⁵ *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984).

¹⁴⁶ Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 Yale L.J. 965, 967 (1998) (framing this problem).

¹⁴⁷ For influential early versions of this argument in the race context, see Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 Calif. L. Rev. 935, 960 (1994) (“[T]he antisubordination principle contends that certain groups should not occupy socially, culturally, or materially subordinate positions in society.”); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil & Pub. Aff. 107, 157 (1976) (arguing the Equal Protection Clause prohibits laws or official practices that “aggravate[]...the subordinate position of a specially disadvantaged group”). For a parallel argument in the gender context, see Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 32–45 (1987); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002).

¹⁴⁸ Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410, 2418 (1994).

economic, social, or political advantage. That is, law can be used to lock in resources essential to the intertemporal preservation of hierarchy.

Where the first condition holds, leveling up provides an appealing remedy. In this vein, Section 1 of the Civil Rights Act of 1866—which was among the very first civil-rights measures passed in the Civil War’s wake—did not command formal inequality. Instead, it directed that all citizens, regardless of their race, were entitled to “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”¹⁴⁹ That is, the Congress of 1866 aimed to level up African-Americans (and former slaves in particular) to the station of “white citizens.” It did not merely equalize; it also fixed the direction of that equality project.

On the other hand, where social norms of equality and legal rules demanding formally even-handed treatment have emerged, a previously dominant social group is commonly not without the means to promote and sustain its own advantages. It can do so effectively without violating formal equality through the transmission of privilege via mechanisms that are formally and legally open but functionally closed to entry for most members of a minority group. The sociologist Charles Tilly has hence used the term “opportunity hoarding” whereby elites “maintain themselves as elites by controlling valuable resources and engaging the effort of less favored others in generating returns from those resources.”¹⁵⁰ Tilly argues that preserving opportunities in this ways happen when elites are able to solve their “organizational problems by means of categorical distinctions” that are used to organize, implicitly or explicitly, “systems of social closure, exclusion, and control.”¹⁵¹

Perhaps the most important form of “opportunity hoarding” relevant to race-related dynamics in the United States operates with respect to secondary education. I focus here on race to flesh this argument out; I leave for another occasion consideration of how a parallel argument could be made in respect to gender or ethnicity.

High quality education, at least in contemporary America, is a scarce resource. Funding for primary and secondary education also is highly localized in the United States. Against a historical context of racial segregation and hyper-segregation,¹⁵² and large racial wealth gaps,¹⁵³ middle-class, typically white communities can use their “exclusionary” zoning power as an instrument for minimizing affordable housing, and hence control access to good schooling.¹⁵⁴

¹⁴⁹ Act of April 9, 1866, c. 31, s 1, 14 Stat. 27, re-enacted by s 18 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, s 18, 16 Stat. 140, 144, and codified in §§ 1977 and 1978 of the Revised statutes of 1874, now 42 U.S.C. §§ 1981 and 1982. For a discussion of the enactment history of the measure, see *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422 (1968)

¹⁵⁰ Charles Tilly, *Durable Inequality* 94, 147-69 (1998). For an application of Tilly’s ideas in the policing context, see Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev. 650, 765 (2020).

¹⁵¹ Tilly, *supra* note 150, at 8; Charles Tilly, *Changing forms of inequality*, 21 Soc. Theory 31, 33 (2003) (“Categories ... transfer shared understandings, practices, and interpersonal relations from setting to setting, making old routines easy to reproduce in new settings.”).

¹⁵² Douglas S. Massey, *Still the Linchpin: Segregation and Stratification in the USA*, 12 Race & Soc. Prob. 12, 12 (2020) (“Although average levels of black–white segregation have moderated over the ensuing decades, the declines have been uneven and black segregation has by no means disappeared. Indeed, in some metropolitan areas, it remains extreme”).

¹⁵³ Dionissi Aliprantis, and Daniel R. Carroll, *What Is Behind the Persistence of the Racial Wealth Gap?* Econ. Comm. (2019), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-commentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racial-wealth-gap>.

¹⁵⁴ See Olatunde C. A. Johnson, *‘Social Engineering’: Notes on the Law and Political Economy of Integration*, 40 Cardozo L. Rev. 1149, 1165 (2019) (“Relatively wealthy communities can use land use mechanisms (such as exclusionary zoning) and taxing to bar entry”).

They can hereby arbitrage “a market distortion restricting access to a scarce good (in this case, land),” into a social policy that “restricts opportunities (such as good schools) to other children.”¹⁵⁵ This arbitrage between economic status and educational opportunity leads to large funding gaps between majority-white and majority-nonwhite school districts.¹⁵⁶ The ensuing patchwork of educational opportunities are thus properly characterized as white “opportunity hoarding” achieved through the medium of “social structures ... that limit the access of outgroup members to resources controlled by the ingroup.”¹⁵⁷ Most blatantly, “criminal or civil penalties against parents for enrolling their children in a school district in which neither the child nor parent resides” shore up the systemized preservation of education opportunities, and their intergenerational transmission.¹⁵⁸ The net effect is that economic mobility is indexed by geography because where one grows up, and hence where one is educated, has a powerful effect on whether one thrives economically as an adult.¹⁵⁹

Of course, current Equal Protection law is insensitive to these mechanisms for preserving racialized economic and social advantage across generations despite their entangling of racialized public and private action.¹⁶⁰ But imagine a Court that understood the Equal Protection Clause to have an anti-subordinating ambition, one with special reference to the historically marginalization of Blacks. The doctrine might pick out measures that had not just a disparate impact on Blacks, but that had the predictable effect of extending racial disadvantages and disparities in time. Obviously, the ensuing equality-related doctrine would not be focused on formal classifications, and would take very different account of sociological and econometric evidence of the mechanisms that link race to disadvantage in durable ways. It seems to me plausible to say that the ensuing doctrine would be more faithful to the original meaning of the Equal Protection Clause, and certainly closer to the original understanding of the Radical Republicans who drafted it, and pushed it through to ratification.¹⁶¹

One piece of that doctrine would be the expanded use of the leveling down disposition. A court concerned with actually existing forms of racial and gender subordination, that is, would find constitutional violations where a legal mechanism was found to be channeling valuable social resources to ‘insiders’ in such a way as to preserve the marginalized standing of

¹⁵⁵ Richard V. Reeves, Opinion, *‘Exclusionary Zoning’ is Opportunity Hoarding by Upper Middle Class*, Brookings Inst. (May 24, 2017), <https://www.brookings.edu/opinions/exclusionary-zoning-is-opportunity-hoarding-by-upper-middle-class>.

¹⁵⁶ Massey, *supra* note 152, at 12; *see also* Sarah Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. Times (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html> (“School districts that predominantly serve students of color received \$23 billion less in funding than mostly white school districts in the United States in 2016, despite serving the same number of students ...”).

¹⁵⁷ Massey, *supra* note --, at 12 (citation omitted); Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2386 (2021) (arguing that residential segregation by race and wealth hence interlaces with localized funding to allow “students in predominantly white school districts ... [to] hoard the best educational opportunities”).

¹⁵⁸ LaToya Baldwin Clark, *Education As Property*, 105 Va. L. Rev. 397, 398 (2019).

¹⁵⁹ Raj Chetty and Nathaniel Hendren, *The Impacts of Neighborhoods on Inter-generational Mobility I: Childhood Exposure Effects*, 133 Q. J. Econ. 1107, 1107-08 (2018). Even processes that change residential patterns, such as gentrification, have the effect of reproducing racial stratification. *See* Jackelyn Hwang and Lei Ding, *Unequal displacement: gentrification, racial stratification, and residential destinations in Philadelphia*, 126 Am. J. Soc. 354 (2020).

¹⁶⁰ Indeed, at times the Court positively puts its weight behind these dynamics. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

¹⁶¹ *See, e.g.*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985) (documenting how “race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection”).

‘outsiders.’ Because the preservation of social hierarchies depends on mechanisms that fence out others from goods such as education that provide a foundation for economic and social advancement, the appropriate disposition in these cases would be to eliminate the distinctive access regime that has been maintained by the dominant group. In the educational context, for instance, this would mean severing the connection between residence and schooling disallowing localized monopolies on high-quality education, mandating both resource and pupil sharing between districts, and having recourse again to the integrative measures deployed in the twentieth century desegregation campaign. Leveling down, in short, would entail dismantling the mechanisms that had been used to concentrate resources or goods such as education, deconcentrating them even at the cost of diluting their quality.¹⁶² It would mean equalizing educational resources across geographic units in the teeth of economic and racial segregation.

My aim here is not to set out in precise details the doctrinal tools that courts could use to dismantle opportunity hoarding that disadvantages women, racial, or ethnic minorities.¹⁶³ Rather, my narrower and more modest point is conceptual: Leveling down is a plausible doctrinal response to a particular kind of equality problem.

Contrary to what at first blush might appear to be the case, this suggests that there is not a necessary connection between status-quo oriented normative goals and leveling down. To the contrary, eliminating privileges can be an effective tool in progressive visions of inequality in a world already characterized by social closure and opportunity hoarding.

Conclusion

My aim in this essay has been to explore the possible justifications for ‘leveling down’ in the wake of a formal equality violation under the Equal Protection Clause, the First Amendment’s free speech and religious freedom components, and the dormant Commerce Clause. My inquiry was catalyzed by Justice Ginsburg’s resolution of *Morales-Santana*’s Equal Protection claim.¹⁶⁴ But my analysis has led me to reject the analytic framing offered by Justice Ginsburg in that decision, as well as in her 1978 article on the same topic. Without endorsing the specific result in *Morales-Santana*, I have suggested different accounts of constitutional equality can work as a foundation for leveling down remedies.

But was *Morales-Santana* rightly decided? Given the celebratory purpose for which this essay is written, I don’t want to make a judgment on that point. More modestly, I will conclude by suggesting a ‘path not taken’ in an earlier decision that may well have made for a more attractive resolution in that case. Recall that I earlier observed that the Court had ruled out on prudential grounds the remedy of “selective prospectivity,” in which a specific litigant obtains

¹⁶² Some of the same mission might be advanced through leveling up remedies of the kind that Joseph Fishkin has explored in this work on bottlenecks. He has drawn attention to the existence of “bottlenecks,” or narrow passages that an individual must traverse to have access to an array of opportunities. Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* 13, 156-60 (2014). Fishkin argues in favor of measures such as eliminating college-degree requirements for jobs for which they are unnecessary and promoting community colleges for those who do not score well on standardized tests. *Id.* at 146-49. These are leveling up solutions to the problems similar those to discussed in the main text.

¹⁶³ For one empirical accounting, see Matthew G. Springer, Keke Liu, and James W. Guthrie, *The impact of school finance litigation on resource distribution: a comparison of court-mandated equity and adequacy reforms*, 17 *Educ. Econ.* 421 (2009).

¹⁶⁴ *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017).

a remedy for a historical wrong, even though others harmed at the same time do not obtain relief.¹⁶⁵ I suggest there that selective prospectivity had perhaps more to be said in its favor.

A revised argument for selective prospectivity in cases such as *Morales-Santana* and *Barr* would start with the observation, made by Justice Gorsuch in the latter case, that “the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future” is that “plaintiffs are entitled to an injunction preventing [a law’s] enforcement against them.”¹⁶⁶ The conditions for application of the “traditional rule” certainly held in *Morales-Santana* as well as *Barr*: Deportation to the Dominican Republic, and loss of the right of residence in the United States, likely both count as irreparable injuries. The issuance of an injunction would also be consistent with (and perhaps demanded by) the “valid rule” doctrine which “directs that federal court litigants are always allowed to insist that their conduct be judged in accordance with a rule that is constitutionally valid.”¹⁶⁷ The equality-related concerns adduced in other instances against selective prospectivity have little force in the leveling down context. The litigant who enjoys the benefit is being singled out for a good reason: They were subject to an unconstitutional rule, and then challenged that rule successfully. Subsequent litigants, however, who are subject to the new, leveled-down rule that results from the litigation have no equality-related cause to complain. By the time that a court reaches these cases, the law no longer contains a violation of formal equality. Unlike the initial litigant, they are not being subject to an invalid rule, and hence have no entitlement to a constitutional remedy. In an era of apparent remedial restraint, this form of selective prospectivity has the potential both to allay the policy-related equality concerns leveled against its criminal procedure adjunct, and also to supply a variant on leveling-down that meets many (if not all) of the objections we saw in Part II, including most obviously the litigation incentive problem.

Justice Ginsburg’s option in *Morales-Santana*, even if it did not explore that route, nevertheless exemplifies her typical blend of concern for the disenfranchised and deep commitment to the technical forms of the law; it is her at her best, in other words, and so worthy of tribute. This rich intersection informs and motivates the analysis of this paper, as well (I hope) as much else that I and others in her wake strive to do as scholars, lawyers, and jurists.

¹⁶⁵ See *supra* text accompanying note 63 (discussing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (Souter, J., plurality op.))

¹⁶⁶ *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2365 (2020) (Gorsuch, J. concurring in part and dissenting in part).

¹⁶⁷ Aziz Z. Huq, *Standing for the Structural Constitution*, 99 Va. L. Rev. 1435, 1452 (2013) (citation and grammatical changes omitted).